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Governments' Authority

Unconstitutional Constitutional Amendments
Puzzles of State Identity, Privatization, and
Constitutional Authority
Privatization and Regulation
Innovation in Public Law Remedies
The Enforcement of International Law

Editor
Judith Resnik





Gruber Program for Global Justice and Women's Rights

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Dieter Grimm and Kim Lane Scheppele

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Constitutional Authority**

Manuel José Cepeda-Espinosa and Judith Resnik

Privatization and Regulation

Jon Michaels and Susan Rose-Ackerman

Innovation in Public Law Remedies

Owen Fiss and Nicholas Parrillo

The Enforcement of International Law

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PREFACE

First, a word on the origins of these books in order. A great debt is owed to the founding leadership of Paul Gewirtz and Anthony Kronman, and to Robert Post, Bruce Ackerman, and Jed Rubenfeld, chairing the Seminar thereafter.

This year's volume, *Government's Authority*, takes up several interrelated questions of courts' roles in constitutional orders. We begin in Chapter I with the topic of *Unconstitutional Constitutional Amendments*. Dieter Grimm and Kim Lane Scheppele launch the inquiries by exploring whether, how, and why constitutional amendments can be "unconstitutional." The questions include what, if any, are the limits on amending constitutions and what role, if any, judges play in setting those limits. As the Chapter recounts, dozens of constitutions contain "eternity clauses," specifying that certain provisions cannot be altered. Further, many courts have ruled on the legality of the processes for amendment, as well as on the substance of amendments. The wealth of case law and commentary prompts reflection on whether constitutional amendments pose special or unique questions for judges, on the standards to test amendments' legality, and on whether judicial responses are jurisdiction-specific or transnational.

We then turn to puzzles of state identity, privatization, and constitutional authority. Chapter II, *Courting Sovereignty: Public and Private Prisons and Police*, edited by Manuel Cepeda-Espinosa and Judith Resnik, turns from the issue of governments' capacity to reconstitute themselves to government decisions to outsource some of their activities—either to private entities or to other governments. Privatization is not new; public and private sectors have long been entangled. What is new is constitutionalism, imposing legal constraints on the exercise of power. The result has been court-based challenges to executive and legislative decisions shifting state-based activities—such as incarcerating, policing, and caring for the elderly—either to the private sector or to another government. The puzzles are about whether state sovereignty has an "essence" that cannot be outsourced; what consequences attach to a public/private distinction; whether that frame has coherence; whether individual rights are to be protected regardless of the service providers' identity; and what roles courts should play in defining sovereignty and in shaping the contours and reach of rights.

In Chapter III, *Privatization and Regulation*, Jon Michaels and Susan Rose-Ackerman take up other aspects of the public/private *mélange*. Their examples include the outsourcing of executive, legislative, and judicial functions. Policy-making is devolved to charter cities, company towns, and water districts. Future generations can be bound—and disenfranchised—by contracts entered into

by earlier administrations. Executive decision-making likewise devolves services, such as utilities, from the public sector to private parties. Standard-setting by private entities turns those bodies into private legislatures and administrative agencies. Judicial decision-making is outsourced by deputizing private entities, such as professional bodies, to render binding judgments. As the cases and commentary detail, questions range from the consequences of such decisions for free speech, voting, accountability, transparency, regulation, distributional obligations, to whether procedural due process requirements attach.

Chapter IV, *Innovations in Public Law Remedies*, crafted by Owen Fiss and Nicholas Parrillo, explores the development of innovative remedies that courts have shaped in response to constitutional failures of other branches of government. A first inquiry is the authority of judges to revise (by reading up, down, in, or out) statutes so as to make them constitutional. A second set of questions revolves around injunctions that require government bureaucracies, such as those administering prisons, to revise their practices to comply with constitutional mandates. Both kinds of remedies put judiciaries in complex relationships with other parts of governments and raise questions about the function of courts.

Remedial authority is also at the heart of Chapter V, *The Enforcement of International Law*, in which Oona Hathaway and Scott Shapiro shift the focus from domestic to international law. They explore the mechanisms for the enforcement of international law and the role of courts in interpreting and implementing international obligations. The question of international law's remedial force prompts inquiries into the conception of treaties and conventions as "law" and how those transnational agreements operate in both national and international courts.

The readings for each of this year's sessions were selected and edited by the colleagues mentioned above, who gave generously of their time and were patient with questions and editorial suggestions. As in the past, other Seminar participants provided suggestions of cases and materials, and some drafted commentary specifically for this volume. Yale Law Librarians Michael VanderHeijden and Sarah Kraus identified and gathered sources that would otherwise have been unavailable. As is the custom, the materials in this volume have been relentlessly pruned (including essays by participants), and most footnotes and citations have been omitted.

We are the beneficiaries of wonderful student editors. But for their work, the volume would not exist. The unusually able students are the Executive and Managing Editor, Travis Pantin; the Senior Editors, Julia Brower, Blake Emerson, and Andrea Scoseria Katz; and those joining the group—Jenne Ayers, Leslie Esbrook, Carlton Forbes, and Julie Veroff. These student-colleagues have been tireless in shepherding the volume to completion. Special thanks is also due to Renee DeMatteo, Yale Law School's Senior Conference and Events Services Manager, who is one of the pillars of the Seminar; her advice, attention, and kindness guided each stage of the process. Other Yale staff, including Osikhena Awudu, Kathi Lawton, and Kelly Mangs-Hernandez, repeatedly lent their hands to this project.

The Yale Global Constitutional Seminar is now a part of the Gruber Program for Global Justice and Women's Rights at the Yale Law School. Peter and Patricia Gruber have made a set of remarkable commitments to the development of a more humane, egalitarian, and just environment for all the world's inhabitants. Their generous support makes possible this sharing of ideas, actions, and aspirations.

Judith Resnik
Arthur Liman Professor of Law, Yale Law School
July, 2013

UNCONSTITUTIONAL CONSTITUTIONAL
AMENDMENTS

DISCUSSION LEADERS

DIETER GRIMM AND KIM LANE SCHEPPELE

I. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

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THE PROBLEM

Constitutional amendments, by definition, change a constitution and raise the possibility of conflicts with constitutional provisions that predated those amendments. In fact, precisely such a contradiction may be the point: an amendment may well be designed to substitute new ideas that are inconsistent with what went before. Constitutional amendments are sometimes the result of deep constitutional battles over basic values, and the aim of amendments is often to bring about major change in the political order. Ready examples come from several jurisdictions: the Reconstruction Amendments of the U.S. Constitution aimed in the 1860s to eradicate slavery, which the original U.S. Constitution of 1789 had recognized; various amendments to the German Basic Law include controversial changes in the 1960s to increase police powers; the 1962 amendment to the French Constitution modified the original structural design by authorizing direct election of the President; and the 1970s amendments to the Indian Constitution elevated the social goal of land redistribution above private property rights.

The questions in this Chapter are about the limits, if any, on constitutional amendments and the sources, if any, of judicial authority to impose or enforce limits on permissible amendments to constitutional texts. As this Chapter's materials illustrate, these questions are neither new nor unusual, and they have been met with diverse responses from constitutional texts, decisions, and commentary. By one estimate, forty-two percent of all recent constitutions contain explicit "eternity clauses," prohibiting amendment of certain parts of the constitution.¹ Even more constitutions contain hierarchies of norms that identify some provisions as "more important" than others—producing an internal structure in which courts can find lower provisions to be inconsistent with higher ones.

Below, an overview of the issues comes from by Dieter Grimm, followed by an excerpt from Carl Schmitt's influential theoretical framework for understanding the issue and a review by Yaniv Roznai of some of the many constitutions that contain limitations on amendments. Thereafter the Chapter examines how courts in different jurisdictions have handled limits to constitutional amendments. The focus is on judicial attention to the sources of constitutional amendment, the creation of internal hierarchies of norms, judicial dialogue with the political branches over amendments, and the role of the judiciary when an escalating political struggle moves to the constitutional level.

¹ See Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 63 AM. J. OF COMP. LAW (forthcoming 2013), excerpted below.

The questions raised by these materials include: Does judicial review of amendments to constitutions present qualitatively different issues than the judicial review of ordinary laws? Who should have the legal capacity to raise challenges to amendments? Should courts' roles be limited to review of formal compliance with the procedural rules for amendment or should courts also have the power to review constitutional amendments on substantive grounds? What are the sources of standards to judge constitutional amendments? Need judges rely only on explicit constitutional texts or can they use interpretative and evaluative techniques beyond this explicit authorization? Should courts be limited to assessing constitutional amendments only in exceptional situations, or could review be routine? Should the role of courts with regard to constitutional amendments depend on the political context—for example, whether an amendment is the result of a widespread political consensus or whether it reflects an attempt to escalate a divisive political conflict to the constitutional level? Are these questions jurisdiction-specific or should judges see review of constitutional amendments in comparative perspective? Yet more generally, does constitutional change have limits? What is the role of courts in defining what those limits are?

Dieter Grimm

Amending Constitutions: An Overview^{*}

I. Constitutions usually contain rules about constitutional amendments. John Locke's idea that a constitution should be "the sacred and unalterable form and rule of government . . . forever" did not find many followers. Today, the exclusion of amendments is regarded as a threat to a constitution rather than a safeguard. The dividing line does not run between amendable and non-amendable constitutions, but between constitutions whose amendment process is easy and constitutions whose amendment process is difficult.

Moreover, the variety among amendment regimes is immense. The majority of constitutional provisions concerning amendments are formal, determining who has the power to decide upon amendments and which procedure the holder of this power must observe. However, a number of constitutions contain substantive rules as well, to declare that certain parts or certain provisions within the constitution are unamendable (so-called "eternity clauses").

Germany's post-WWII constitution, the Basic Law, is often quoted as an example of an eternity clause. Article 79, section 3 prohibits the amendment of the leading principles of the constitution contained in Arts. 1 and 20—principles

^{*} All rights reserved, Dieter Grimm, 2013.

that include human dignity, democracy, the rule of law, the social state, and federalism. Yet, the idea of non-amendability is much older. For example, Article V of the U.S. Constitution prohibited amendments concerning slavery before the year 1808, and it continues to prohibit amendments that would abolish the equal representation of the states in the Senate.

Other constitutions have excluded a broader set of constitutional amendments, such as altering the integrity of a territory of a state or the republican form of government. As early as 1814, for example, the Norwegian Constitution declared that an amendment “must never contradict the principles embodied in this Constitution, but must solely relate to modifications of particular provisions which do not alter the spirit of the Constitution.” Further, some constitutions provide different amendment rules for different parts of their constitutions.

The experience of totalitarian political systems in the 20th century increased the number of eternity clauses in constitutions worldwide, just as this experience prompted the increased frequency of judicial review. In reaction to the total neglect of all constitutional boundaries by the previous regime, efforts in many countries aimed to immunize the essential elements of new order from amendments. Here, the German Constitution often served as a model.

Where substantive limits to the amendment power were lacking, courts have sometimes derived equivalent protections from other provisions, including the notion of amendment, from the difference between the constituent, or original, power and the amending or delegated power. India offers a well-known example; its Supreme Court declared, in a decision excerpted below, that the basic structure of its Constitution was not subject to amendment.

An influential theoretical foundation for the distinction between original and delegated power was developed by Carl Schmitt who, in his 1928 *Constitutional Theory (Verfassungslehre)*, had criticized the prevailing understanding of the amendment clause of the Weimar Constitution of 1919, which permitted constitutional amendment by legislation, if enacted by a supermajority. This provision was commonly understood to have given Parliament complete freedom in determining the content of an amendment.

Schmitt posited a difference between the constitution and constitutional law. For Schmitt, a constitution is the decision of a political entity on the form and substance of its political system. That decision, often taken at a turning point in a country's history, a revolution or a defeat, antedates the drafting of the

constitutional law and is not taken in a formalized procedure and not fixed in writing. It is ontological in nature.

Constitutional law, by contrast, is set down in a text and adopted in a formal procedure. It gives legal expression to the original decision and may add a number of concretizations and technical provisions whose source is not the original decision but the will of the specific framers of those texts. From this distinction, Schmitt drew the conclusion that the constitution could only be altered by the political entity that was its source, and that amendments were limited to constitutional law.

II. The existence of provisions regulating the amendment of constitutions, formal or substantive, establishes a hierarchy of norms within the constitution. The consequence of this internal hierarchy is the possibility of unconstitutional constitutional amendments, i.e. amendments that violate the amendment rules either because of a failure to follow the prescribed procedure or because of an incompatibility with substantive limits to amendments.

But what are the consequences? Is an amendment that violates the rules for amendments null and void? Who has the power to ascertain whether a violation happened? Some constitutions provide textual answers to these questions, for example by exempting amendments from judicial review or by limiting judicial review to the formal rules for amendments. But many constitutions are silent as to the remedy, and the gap is closed by interpretation.

Here the courts come in. There are some early judgments on this matter in the United States, while the question was of little practical impact in countries without judicial review. Today, with judicial review widely accepted, the role of courts in connection with constitutional amendments is of great importance. The main issue is whether courts need an explicit mandate to review constitutional amendments or whether this power can be inferred from the existence of explicit or implicit limits to amendments.

Another question is whether the power of courts to review constitutional amendments depends on the author of the amendment. The French *Conseil constitutionnel* has declared that amendments adopted by way of referendum are not subject to judicial scrutiny because their author is the Sovereign itself, the People. But do the People, when exercising the amendment power conferred upon them by the constitution, truly act as sovereign, i.e. as a *pouvoir constituant*, or as a *pouvoir constitué*?

Constitutional amendments are not the only way of altering constitutions. They form but a sub-category of constitutional change. Amendments change constitutions by way of altering the text. Another way of changing constitutions consists in changing the meaning of a constant text by way of interpretation. Sometimes changes of this kind have a far greater impact than amendments.

An important question in this context is whether there are limits to constitutional change by way of interpretation. Are there changes in the meaning of a constitution that amount to an amendment and therefore ought to be reserved to the amendment procedure? This problem will, however, not be treated in the materials, which are focused on the issue of unconstitutional constitutional amendments.

Hierarchies of Constitutional Norms

When does a legal enactment so fundamentally change a constitutional order that it is no longer an amendment but is instead a new constitution? To imagine that an amendment must be subordinate to “the constitution” requires a hierarchy of constitutional norms, and a classic statement of this position comes from Carl Schmitt.

Carl Schmitt *Constitutional Theory**

. . . §3. *The Positive Concept of the Constitution (The Constitution as the Complete Decision over the Type and Form of the Political Unity)*

A concept of the constitution is only possible when one distinguishes constitution and constitutional law. . . .

I. The constitution in the positive sense originates from an *act of the constitution-making power*. The act of establishing a constitution as such involves not separate sets of norms. Instead, it determines the entirety of the political unity in regard to its peculiar form of existence through a single instance of decision. This act *constitutes* the form and type of the political unity, the existence of which

* Excerpted from CARL SCHMITT, *CONSTITUTIONAL THEORY* 75-80, 150-151 (Jeffrey Seitzer trans., Duke University Press 2008) (1928).

is presupposed. It is not the case that the political unity first arises during the “establishment of a constitution.” The constitution in the positive sense entails only the conscious determination of the particular complete form, for which the political unity decides. This external form can alter itself. Fundamentally new forms can be introduced without the state ceasing to exist, more specifically, without the political unity of the people ending. However, a subject capable of acting, one with the will to establish a constitution, is always a component of constitution making. Such a constitution is a conscious decision, which the political unity reaches *for itself* and provides *itself* through the bearer of the constitution-making power.

During the founding of new states (as in the year 1775 in the *United States of America* or in the year 1919 during the founding of *Czechoslovakia*) or during fundamental social transformations (France 1789, Russia 1918), this aspect of the constitution as a conscious decision determining the political existence in its concrete form of being emerges especially clearly. Here can most easily arise the impression that a constitution must always found a new state, an error, moreover, which derives from the confusion of a “social contract” (founding the political unity) with the constitution. . . . But the unity of the constitution lies not in the constitution itself, but rather in the political unity, the peculiar form of existence of which is determined through the act of constitution making.

The constitution, therefore, is nothing absolute insofar as it did not originate on its own. It is also not valid by virtue of its normative correctness or on the basis of its systematic completeness. The constitution does not establish itself. It is, rather, given to a concrete political unity. . . . The constitution is valid by virtue of the existing political will of that which establishes it. Every type of legal norm, even constitutional law, presupposes that such a *will* already exists.

On the contrary, *constitutional laws* are valid first on the basis of the constitution and presuppose a *constitution*. For its validity as a normative regulation, every statute, even constitutional law, ultimately needs a political *decision* that is prior to it, a decision that is reached by a power or authority that exists politically. Every existing political unity has its value and its “right to existence” not in the rightness or usefulness of norms, but rather in its existence. Considered juristically, what exists as *political* power has value because it exists. Consequently, its “right to self-preservation” is the prerequisite of all further discussions; it attempts, above all, to maintain itself in its existence, “in suo esse perseverare” (Spinoza); it protects “its *existence*, its *integrity*, its *security*, and its *constitution*,” which are all existential values. . . .

Because every being is a concrete and determined existence, some kind of constitution is part of every concrete political existence. But not every entity that exists politically decides in a conscious action the form of this political existence and reaches, through its own conscious determination, the decision regarding its concrete type, as did the American states in their Declaration of Independence and as did the French nation in the year 1789. Compared to this existential decision, all normative regulations are secondary. Even all concepts applied in legal norms, which presuppose political existence, concepts such as high treason, treason against a Land, etc., preserve their content and their sense not from a norm but rather from the concrete reality of something existing that is independent politically.

II. The Constitution as Political Decision. It is necessary to speak of the constitution as a unity and, in this regard, to adhere to an absolute sense of the constitution. At the same time, the relativity of the individual constitutional *laws* may not be misconstrued. The distinction between constitution and constitutional law, however, is only possible because the essence of the constitution is not contained in a statute or in a norm. Prior to the establishment of any norm, there is a fundamental *political decision by the bearer of the constitution-making power*. In a democracy, more specifically, this is a decision by the people; in a genuine monarchy, it is a decision by the monarch. . . .

[I]n this way, the German Reich of the Weimar Constitution characterizes itself as a constitutional democracy. In particular, it designates itself a bourgeois Rechtsstaat [state under the rule of law] cast in the political form of a democratic republic with a federal-state structure. The Art. 17 provision prescribing a parliamentary democracy for all Land constitutions contains the strengthening of this fundamental, total decision for the parliamentary democracy.

1. These provisions are not constitutional laws. Clauses like “the German people provided itself this constitution,” “state authority derives from the people,” or “the German Reich is a republic,” are not statutes at all and, consequently, are also not constitutional laws. They are not even framework laws or fundamental principles. As such, however, they are not something minor or not worthy of notice. They are *more* than statutes and sets of norms. They are, specifically, the concrete political decisions providing the German people’s form of political existence and thus constitute the fundamental prerequisite for all subsequent norms, even those involving constitutional laws. Everything regarding legality and the normative order inside the German Reich is valid only on the basis and only in the context of these decisions. They constitute the substance of the constitution. The fact that the Weimar Constitution is actually a constitution and not a sum of disconnected individual provisions subject to change according to

Art.76, which the parties of the Weimar governmental coalition agreed to insert into the text on the basis of some “compromise,” lies solely in the existential, comprehensive decision of the German people. . . .

2. The practical meaning of the difference between constitution and constitutional law makes itself evident in the following examples of its use.

(a) Constitutional *laws* can be changed by way of Art. 76. However, the constitution as a whole cannot be changed in this way. Art. 76 stipulates that “the constitution” can be changed by legislation. Indeed, the wording of this article, which reflects the unclear linguistic usage that was typical until now, does not distinguish between constitution and constitutional law. . . . That “the constitution” can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decision. The German Reich cannot be transformed into an absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag. The “legislature amending the constitution” according to Art. 76 is not omnipotent at all. The manner of speaking associated with the “all-powerful” English Parliament, which since de Lolme and Blackstone has been thoughtlessly repeated and applied to all other conceivable parliaments, has produced a great confusion. A majority decision of the English Parliament would not suffice to make England into a Soviet state. . . . Only the direct, conscious will of the entire English people, not some parliamentary majority, would be able to institute such fundamental changes.

Consequently, constitution “*making*” and constitutional “*change*” (more accurately, revision of individual constitutional provisions) are *qualitatively* different, because in the first instance the word “constitution” denotes the constitution as complete, total decision, while in the other instance it denotes only the individual constitutional *law*. A “constitution-making” assembly is thus also qualitatively different from a conventional legislative body. In other words, it differs from a constitutionally sanctioned legislative body, such as a parliament. . . . If such a constitution-making assembly were not qualitatively different from a properly constituted parliament, one would be led to the nonsensical and unjust result that a parliament could bind all subsequent parliaments (selected by the same people according to democratic electoral methods) through simple majority decisions and could make a qualified majority necessary for the elimination of certain (not qualitatively different) laws, which came about through simple majority. . . .

§ 11. Concepts Derived from the Concept of the Constitution

[III.]2. Boundaries of the authority for constitutional amendments.

If the procedure for a constitutional amendment is regulated constitutionally, this establishes a jurisdiction (competence) that is not self-evident. . . . The jurisdiction for constitutional amendment is not a normal jurisdiction in the sense of a competence, in other words, of a regulated and bounded set of tasks. For changing constitutional laws is not a normal state function like establishing statutes, conducting trials, undertaking administrative acts, etc. It is an extraordinary authority. As such, however, it is not thoroughly unlimited, for it remains an authority that is constitutionally shared. Like every constitutional authority, it is limited, and, in this sense, it is a genuine competence. In the context of a constitutional regulation, there can be no unlimited authority, and every jurisdiction is bounded. Even a “competence-competence” can be nothing without limits, if the expression is not to become meaningless and the concept of competence is not to dissolve altogether. When understood properly, competence-competence is something other than sovereignty

The boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change. The authority to “amend the constitution,” granted by constitutional legislation, means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved. This means the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to establish a new constitution, nor is it the authority to change the particular basis of this jurisdiction for constitutional revisions. . . .

(a) Constitutional amendment, therefore, is not constitutional annihilation.

The offices with jurisdiction over a decision on a constitution-amending statute do not thereby become the bearer or subject of the constitution-making power. They are also not commissioned with the ongoing exercise of this constitution-making power. They are not, for example, a latent, always present constitution-making national assembly with the powers of sovereign dictatorship. A constitutional amendment that transforms a state resting on the monarchical principle into one ruled by the constitution-making power of the people is not at all constitutional. . . . A constitution resting on the constitution-making power of

the people cannot be transformed into a constitution of the monarchical principle by way of a constitutional “amendment” or “revision.” That would not be constitutional change. It would be instead constitutional annihilation. . . .

Yaniv Roznai

Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea^{*}

. . . Between the years 1776 and 1783, . . . the idea of explicitly limiting the amendment power appeared. According to the constitution of New Jersey (1776), members of the Legislative Council, or House of Assembly, had to take an oath not to “annul or repeal” the provisions for annual elections, the articles opposing church establishment and conferring equal civil rights on all Protestants, and [the article guaranteeing] trial by jury (Article 23). The Delaware Constitution (1776) prohibited amendments to the Declaration of Rights, the articles establishing the state’s name, the bicameral legislature, the legislature’s power over its own officers and members, the ban on slave importation, and the establishment of any one religious sect (Article 30). . . .

In France, the 1791 Constitution’s Preamble stated that the National Assembly “abolishes irrevocably the institutions which were injurious to liberty and equality of rights.” . . . [In 1884] the French Parliament met as a National Assembly in order to revise the Constitutional Law of 1875 . . . [and added] “The republican form of government cannot be made the subject of a proposition for revision.” . . . This formulation is repeated in Article 95 of the Constitution of 1946, and it appears in Article 89 of the Constitution of 1958 [the current Constitution] with slightly different wording: “The republican form of government shall not be the object of any amendment.”

[T]he Mexican Constitution of 1824 stated that “the Religion of the Mexican Nation is, and shall be perpetually, the Apostolic Roman Catholic,” and that “the Articles of this Constitution, and of the Constituent Act, which establish the Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be reformed.”

^{*} Excerpted from Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. (forthcoming 2013).

[L]ater, the Venezuelan Constitution of 1830 . . . stipulated that “the authority possessed by Congress to modify the Constitution does not extend to the Form of Government, which shall always continue to be republican, popular, representative, responsible, and alternating.” The Peruvian Constitution of 1839 stated that “The form of a popular Representative Government consolidated in unity, responsible, and alternating; and the division and independence of the Legislative, Executive, and Judicial Powers is unalterable.” Ecuador’s Constitution of 1843 protected the form of government from amendments, a protection that was extended in the 1851 Constitution to the State’s religion [and its] . . . present 2008 Constitution prohibit[s] amendments from altering the “fundamental structure or the nature and constituent elements of the State” and from setting “constraints on rights and guarantees.”

A review I conducted of 192 written constitutions reveals that, as of 2011, eighty-two constitutions include unamendable provisions (forty-two percent). . . . [O]f 537 past and present national constitutions, 172 constitutions (thirty-two percent) include unamendable provisions . . . [making unamendable provisions] . . . a symbol of modernism

Perhaps the most famous example is the German Basic Law (1949). . . .

Following the Second World War and the development of human rights law, prohibitions on amendments infringing upon fundamental rights and freedom became a popular entrenchment, and the primary underlying idea is that “unlike ordinary legislation which is governed by the majoritarian principle, human rights alone are not subject to the will of the majority.”⁷⁷

Other protected principles are the state’s religion, such as Islam; the official language; secularism or separation of state and church; the rule of law, multi-party system, political pluralism or other democratic characteristics; territorial integrity or independence; judicial review or independence of courts; separation of powers; rule of the constitution; sovereignty of the people; and the state’s existence. In addition, some constitutions contain unique entrenchment provisions. For example, Qatar’s Constitution of 2004 protects the state’s inheritance and the functions of the Emir. Niger’s various constitutions protect amnesties granted to perpetrators of human rights violations. Finally, some states have general provisions protecting the spirit of the preamble or the principles of the constitution and its spirit. . . .

⁷⁷ Gunnar Beck, *The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness*, 25 PENN ST. INT’L L. REV. 615 (2007).

ADJUDICATING THE CONSTITUTIONALITY OF AMENDMENTS

The constitutionality of constitutional amendments has arisen as an issue before many courts. Perhaps the most basic decision is whether a particular enactment is an exercise of the amendment power or the constituent power. We will therefore start with the French Referendum Case, in which the Constitutional Council was asked whether a popular referendum that changed the constitution in violation of the rules for amending the text was constitutional. Does every act by actors who constitute the constituent power—in this case, the people themselves—constitute a constituent act?

On the Constituent Power and the Amending Power: France

The following brief summary¹ describes the circumstances prompting the litigation in the *Referendum Case* (Constitutional Council of France 1962).

After the assassination attempt at Petit-Clamart on 22 August 1962, General de Gaulle announced at the Council of Ministers on 12 September that he was going to seek to change the Constitution's method of appointing a President of the Republic and to introduce popular, rather than indirect, election. The procedure he adopted was that for amending the Constitution provided for in article 89, which involves a bill being passed by both chambers. The Pompidou Government was already facing problems in Parliament, so that such a bill was unlikely to pass. Drawing on his success in the referendum of April 1962 that put an end to the Algerian crisis, the President relied on article 11, which enables the President to put a bill "concerning the organization of public authorities" to a referendum, "on the recommendation of the Government." The President of the Senate and the opposition criticized the Government for this "outrageous breach of the Constitution," and it was defeated in a confidence motion on 5 October 1962. Parliamentary elections were called [T]he President decided by a decree . . . to submit the proposed law in relation to the election of the President to a referendum on 28 October.

¹ Excerpted from JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 133-34 (1992).

De Gaulle was successful in the referendum, but the President of the Senate . . . referred the [matter] to the Conseil constitutionnel as unconstitutional.

The decision of the Constitutional Council is excerpted below.

Referendum Case
Constitutional Council (France)
62-20 DC (1962)*

1. Considering that the competence of the Conseil contitutionnel is strictly limited by the Constitution, as well as by the provisions of the organic law of 7 November 1958 on the Conseil constitutionnel . . . that the Conseil constitutionnel cannot be called upon to rule on matters other than the limited number for which those texts provide;

2. Considering that, even if article 61 of the Constitution gives the Conseil constitutionnel the task of assessing the compatibility with the Constitution of organic laws and ordinary laws, which, respectively, must be submitted to it for scrutiny, without stating whether this competence extends to all texts of legislative character, be they adopted by the people after a referendum or passed by Parliament, or whether, on the contrary, it is limited only to the latter category, it follows from the spirit of the Constitution, which made the Conseil constitutionnel a body regulating the activity of public authorities, that the laws to which the Constitution intended to refer in article 61 are only those *loi* passed by Parliament, and not those which, adopted by the people after a referendum, constitute a direct expression of national sovereignty; . . .

5. Considering that it follows from what has been said that none of the provisions of the Constitution, nor of the above-mentioned organic law applying it, gives the Conseil constitutionnel the competence to rule on the request submitted by the President of the Senate, that it consider whether the bill adopted by the French people by way of referendum on 28 October 1962 is compatible with the Constitution . . . [the referral is rejected].

* Translation excerpted from COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 137, 137-38 (Norman Dorsen, Michel Rosenfeld, András Sajó, Susanne Baer eds., 2d ed. 2010).

Judicial Interpretation of the Core Constitution: Germany

Like the French Constitutional Council, the German Federal Constitutional Court has considered the difference between an enactment of a constituent power and an enactment of a constituted power—thereby tracing the border between a constitution and a constitutional amendment.

In the Gender Equality Case, excerpted below, a provision of the original constitution was at issue, and the Court refused to find that any part of the original constitution could be unconstitutional. The Court, however, left the door open for a future finding that an amendment added later might be unconstitutional and firmly defended the idea that it had the jurisdiction to make such a determination. By the time that the Federal Constitutional Court heard its first case on a constitutional amendment 15 years later, the Court divided on the question of whether the particular amendment in question was constitutional.

According to Art. 3 sect. 2 of the German Constitution (Basic Law - BL), “Men and women shall have equal rights.” Art. 117 sect. 1 BL adds: “Law which is inconsistent with sect. 2 of Article 3 BL shall remain in force until adapted to that provision, but not beyond March 31, 1953.”

The German Civil Code (BGB) of January 1, 1900 contained many provisions that were incompatible with Art. 3 sect. 2 BL. By March 1953, the legislature had not adapted them to the constitution. Many civil courts that had to deal with family and inheritance law feared that, were all these provisions no longer applicable, the result would be a legal chaos that could not have been intended by the framers of the Basic Law. A number of courts, therefore, were of the opinion that Art. 117 sect. 1 BL was unconstitutional because it violated the principles of legal certainty and of separation of powers.

The Court of Appeals of Frankfurt referred the question to the Federal Constitutional Court (FCC) under Art. 100 BL, through which a court shall stay proceedings before it in order to refer a question on the compatibility of the law of the case with the Basic Law to the Federal Constitutional Court for resolution. The FCC discussed the question of unconstitutional constitutional law and did not exclude such a possibility theoretically, but found it highly unlikely in the case of the Basic Law itself. The Court found Art. 117 sect. 1 BL to be valid law—with the consequence that from April 1, 1953 on, all ordinary law incompatible with Art. 3 sect. 2 BL lost its validity. The civil courts were asked to fill the gaps in the spirit of Art. 3 sect. 2 BL until the legislature acted.

Gender Equality Case
Federal Constitutional Court of Germany
BVerfGE 3, 225 (1953)*

. . . In deciding upon the admissibility of the referral, it has to be discussed whether it is theoretically possible to examine the compatibility of constitutional provisions with higher-ranking legal norms (of any source). . . . Regarding this question, the following considerations must be taken into account:

The Basic Law has to be perceived as a unity. Therefore, it is unthinkable as a matter of principle that there are higher and lower norms within the constitution itself and that the compatibility of one constitutional provision with another constitutional provision can be examined This is true irrespective[] of the importance and internal weight of a single provision. This determination is also not affected by the fact that some constitutional provisions can be partially disposed of by the legislature and that other provisions are inviolable and cannot be changed even by a constitutional amendment. It is the nature of the “pouvoir constituant” that it can establish exceptions to its own fundamental norms. These exceptions have to be adhered to according to the “lex specialis derogat legi generali” rule.

This reasoning expresses the idea that the “pouvoir constituant” can arrange everything according to its will. However, the strict application of this idea would be a fallback into the mindset of a statutory positivism which does not recognize any value judgments and which was overcome long ago by jurisprudence and legal practice. The history of the Nazi regime in Germany shows that the legislator can produce injustice and that legal practice has to be armed against such historically possible developments. Therefore, in exceptional cases, it must be possible to value material justice higher than the principle of certainty, which is reflected in the validity of positive law in normal cases. Even the original framers of the constitution are not—by necessity— free from the risk of crossing these outer-limits of justice. The Federal Constitutional Court does not deem it necessary to decide here when such extreme cases are given. Their exceptional character cannot be called into question. In their basic decisions and thus in the positive constitutional text, the framers of the Basic Law included provisions that are often called “supra-statutory” (e.g. Article 1 or Article 20 Basic Law). Through this inclusion in the positive constitutional text, these provisions did not lose their special character. Thus, they are at the disposition of

* Translated by Matthias Rossbach, Yale LLM, 2012.

the “pouvoir constituant” (by allowing exceptions) only as far as these outer-limits of justice are not crossed.

The probability that the liberal democratic framers of the constitution crossed these limits is so low that the theoretical possibility of the unconstitutionality of original provisions of the constitution amounts to a practical impossibility.

When the “Parlamentarischer Rat” (Parliamentary Council) began to draft the Basic Law, its work was dominated by the fresh experiences of the historic catastrophe which had been caused by the lawless state of the National Socialists. The Parliamentary Council decisively renounced an attitude which did not see any value in law and justice. It wanted to realize the idea of justice in the Basic Law. Its success can only be determined by looking at the objective results of legislation—and not by looking at the intention of the framers. . . . No court has deemed an attack against a constitutional provision to be serious enough to refer it to the Federal Constitutional Court. . . .

In fact, in a modern constitutional state, the courts are also products of the constitution; their functions are derived from the constitution either directly or indirectly. Thus, they can generally fulfil only those tasks which they are given by the constitution. Consequently, some commentators and some judgments deny the authority of the judiciary to review the validity of constitutional provisions. They argue that in such a case a judge would claim the “pouvoir constituant” for himself and that he would move too far away from the principle of separation of powers. It is said that this could not be justified by modern constitutions which adhere to the rule of law—and particularly not by the Basic Law. In contrast to that, others say that the Basic Law itself chose a court—the Federal Constitutional Court—for guaranteeing the inviolability of the fundamental decisions of the Basic Law. They argue that correspondingly the constitutional court must also have the authority to examine the compatibility of constitutional provisions with supra-statutory law, which is incorporated in the constitution and presupposed by it. They claim further that the Federal Constitutional Court would defy the will of the constitution and endanger legal certainty by declining judicial review in that regard, and not by exercising it. If the Federal Constitutional Court denied the admissibility of referrals regarding allegedly unconstitutional constitutional provisions because of an exclusion of judicial review of constitutional provisions, it would still be possible that a different court would not follow this reasoning and exercise judicial review. It is argued that this would be a result that the Basic Law wanted to avoid by giving the Federal Constitutional Court the exclusive authority for judicial review regarding statutory norms.

In fact, if one accepts the—even remote—possibility of “unconstitutional constitutional provisions,” it is logical to give the judiciary the power to make this determination. The judiciary bases its authority on the constitution, but also to some extent—according to the nature of its function—on the idea of law itself. The finding that unconstitutional provisions can exist within the constitution would largely lose its value if such provisions could only be removed by constitutional amendment. It cannot be claimed that the Federal Constitutional Court unjustifiably assumes the “*pouvoir constituant*” by exercising judicial review in that regard: Judicial review of norms (in its protective function) is of a different nature than the law-creating function of the legislature. Above that, as mentioned before, this competence naturally only has a very narrow space as far as original provisions of the constitution are concerned. Thus, the judicial determination that an original provision of the constitution is invalid will hardly occur. . . .

The Gender Equality Case concerned the question of whether the original text of the Constitution may contain unconstitutional provisions. The next case was the first to deal with the question of unconstitutional constitutional amendments. In 1968, after West Germany had regained its sovereignty, a number of new, highly contested provisions regarding the state of emergency were introduced into the Basic Law. Many citizens, in particular those involved in the 1968 student movement, feared that the amendments might eventually be used to turn the Federal Republic into a dictatorship. (To this day, they have never been used.)

As part of the package of amendments, the fundamental right protecting the privacy of correspondence, posts, and telecommunications in Art. 10 BL was also amended. The original limitation clause in Art. 10, section 2 BL read: “Restrictions may be ordered only pursuant to a law.” The amendment added: “If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.” In the Eavesdropping Case, the Federal Constitutional Court found the amendment compatible with the “eternity clause”

of Art. 79 section 3 BL,¹ while the dissenting justices were of the opinion that it was not.

Eavesdropping Case
Federal Constitutional Court of Germany
BVerfGE 30, 1 (1970)*

... The interpretation of Article 79 (3) Basic Law leads to the following findings:

a) Article 79 (3) Basic Law specifies a limit to constitutional amendments. Its purpose is to prevent the [abolition] of the substance and the basics of the current constitutional order in the formalistic and legalistic way of a constitutional amendment and to avoid the misuse of this constitutional order for the subsequent legitimization of a totalitarian regime. Article 79 (3) Basic Law thus prohibits the abandonment of the principles mentioned therein. Principles will not be “affected” as such if they are generally adhered to and if they are only modified in special circumstances due to their nature and on evidently reasonable grounds. The formula that these principles may not be “affected” is therefore not stricter than the similar formula in Article 19 (2) Basic Law according to which “the essence” of a basic right may not be “affected.”**

¹ Article 79, section 3, of the Basic Law provides:

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 1 reads:

(1) Human dignity shall be inviolable.

Article 20 [Constitutional principles—Right of resistance] reads:

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

* Translated by Matthias Roszbach, Yale LLM, 2012.

** Article 19 [Restriction of basic rights—Legal remedies] provides:

b) It is important to note that Article 79 (3) Basic Law does not only regard the division of the federal territory into Länder and their participation on principle in the legislative process as inviolable. It also regards “the principles laid down in Articles 1 and 20” as inviolable. That is different—partially more, partially less—from the formulation that Article 79 (3) Basic Law prohibits every constitutional amendment regarding the constitutional principles of human dignity and the rule of law. In Article 1 Basic Law, more principles than just the principle of human dignity are “laid down.” Similarly, Article 20 Basic Law contains more principles than the rule of law. However, the rule of law is not “laid down” in Article 20. Rather, only certain principles of the rule of law are “laid down” there—such as the principle of separation of powers (section 2), the principle that the legislature is bound by the constitutional order, and that the executive and the judiciary are bound by law and justice (section 3). But the rule of law contains more principles than those referred to in Article 79 (3) Basic Law and Article 20 Basic Law. In previous cases, the Federal Constitutional Court has already derived more principles from the rule of law than those mentioned in Article 20—such as the prohibition of retroactive burdensome legislation, the proportionality principle, the solution of the tension between legal certainty and justice in the individual case, and the principle of guaranteeing as complete a legal protection as possible. The text of Article 79 (3) Basic Law restricts the boundaries of constitutional amendments. This restriction has to be taken the more seriously since Article 79 (3) is a rule that specifies an exception. Therefore, this provision may not prevent the legislature from the modification of fundamental constitutional principles as long as this modification is within the limits of the constitutional system. . . .

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

(4) Should any person’s rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.

As part of the 1968 package of amendments to the Basic Law, the following sentence was added after the final sentence of Article 19 (4):

The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

c) Regarding the principle of the inviolability of human dignity (Article 1 Basic Law), which—according to Article 79 (3) Basic Law—may not be affected by a constitutional amendment, everything depends on the determination under which circumstances human dignity can be violated. Obviously, this cannot be determined in a general way, but only with regard to the concrete case. General formulas like the formula that no human being may be turned into a mere object of state authority can only indicate a tendency where to find cases of a violation of human dignity. Human beings often are mere objects of the present conditions, of the societal developments, and of the law—as far as one has to obey regardless of one’s own interests. This alone does not constitute a violation of human dignity. Such a violation additionally requires that a human being is treated in a way that principally questions his or her quality as a subject or that the treatment constitutes an arbitrary disregard of human dignity in the instant case. Therefore, a treatment of a human being by the executive branch will affect human dignity if this treatment expresses a disregard of the value which every human being possesses by virtue of being a person. In this sense, the treatment must constitute a “contemptuous treatment.”

Dissenting opinion of Justices Geller, Dr. v. Schlabrendorff and Dr. Rupp:

... The constitutional amendment, as interpreted above is impermissible according to Article 79 (3) Basic Law.

a) Article 79 (3) Basic Law declares the inviolability of certain principles of the constitution. In contrast to the Weimar Constitution and to the constitution of the German Empire, the Basic Law contains limits to constitutional amendments. Certainly, such an important and far-reaching exceptional provision may not be interpreted in a broad way. But it would be a complete misconception of its meaning if its sense was primarily seen in the prevention of the misuse of the formalistic and legalistic way of a constitutional amendment for the subsequent legitimation of a totalitarian regime. It need not be mentioned that an “Ermächtigungsgesetz” [Enabling Law; statute enabling the executive branch to make laws without the participation of the legislature] like the Enabling Law of 1933 would be unconstitutional. Article 79 (3) Basic Law means more: Certain fundamental decisions of the Basic Law are declared inviolable as long as the Basic Law is in effect. . . . However broad or narrow one might draw the principles laid down in Articles 1 and 20 Basic Law: In any case, they encompass those principles that give the Basic Law its characteristic imprint. These two norms are the cornerstones of the constitutional order of the Basic Law. . . .

Due to the aforementioned considerations, we come to the following conclusions: The principle laid down in Article 1 Basic Law that a human being

may not be turned into the mere object of state action and that public authority may not arbitrarily dispose of individual rights *ex officio* without further ado, as well as the principle (laid down in Article 20 Basic Law) that demands as complete a legal protection as possible of individual rights by courts belong to the principles “laid down in Article 1 and 20 Basic Law.” These two principles contain the fundamental decision of the framers of the Basic Law. This decision significantly determines the nature of a state that is governed by the rule of law as understood by the Basic Law. It gives the constitutional order its characteristic imprint. Exactly these constitutive elements shall be inviolable according to Article 79 (3) Basic Law.

c) The instant constitutional amendment “affects” the principles laid down in Articles 1 and Article 20 Basic Law.

The text and purpose of Article 79 (3) Basic Law do not require that one of the mentioned principles is completely abolished or “principally abandoned.” The word “affected” requires less. It is enough that the principles derived from Article 1 and 20 Basic Law are disregarded fully or partially with respect to one part of an individual’s liberty. Only this interpretation complies with the importance of Article 79 (3) Basic Law within the system of the Basic Law. Its constitutive elements shall remain “unaffected.” They should also be protected against a gradual process of disintegration that could start if these principles were to be adhered to only “generally.” It must be taken into account that the text of Article 79 (3) Basic Law is substantially narrower than the wording of Article 19 (2) Basic Law.

Article 10 (2) cl. 2 [which was added to the] Basic Law permits an encroachment upon the private sphere of a citizen without any access to courts. It hits not only enemies of the constitution, but also [unsuspecting] people as well as people who are personally not involved with the matter. Also their phone[s] can be tapped, their letters can be opened, they will never learn that this happened, they will never be able to justify themselves or to get rid of an undesired entanglement although this can be very important to the affected people. This treatment disposes of the individual right of respecting the private sphere “*ex officio* without further ado”; it turns the citizen into an object of public authority. Against that, one cannot argue that human beings are often mere objects of the present conditions, of the societal developments, and of the law—as far as one has to obey regardless of one’s own interests. It need not be stressed that citizens are bound by the law; but this does not turn them into mere objects of public authority; they remain active members of the legal community. The practical examples that are mentioned by the majority opinion are not meaningful because the enumerated measures are either done with the knowledge of the affected

person (e.g. when a doctor has to report a patient who suffers from an infectious disease) or do not affect the protected private sphere (e.g. the wiretapping of private radio communication, which happens in the public sphere of the atmosphere). Above all, it has to be kept in mind that—in all these cases—citizens can defend themselves as soon as there is an encroachment into their private sphere; they have access to the courts. On the other hand, the special character of the [statute] that Article 10 (2) cl. 2 Basic Law authorizes . . . cannot be expressed better than by the fact that an amendment to the Basic Law was deemed to be necessary.

Article 10 (2) cl. 2 Basic Law also affects the requirement of legal protection through courts, which is derived from the rule of law principles contained in Article 20 Basic Law. It has already been explained above that the principle of legality of executive action alone does not fulfill this requirement. The bodies that are mentioned in Article 10 (2) cl. 2 Basic Law do not meet the standard of legal protection through courts because Article 10 (2) cl. 2 Basic Law does not demand that these bodies are independent and free from any directions. But the requirements would not be met either if these bodies were “appointed or formed by Parliament” and if they were “independent within the executive sphere.” Bodies of such a kind have a self-controlling function within the executive branch (like local government decision-making committees, which consist of elected members). They do not give individual judicial protection and are generally regarded as administrative bodies. In a system that is dominated by the separation of powers, it is the sole function of the judiciary to provide individual legal protection because legal protection is directed against encroachments by the two other branches of government. Therefore, bodies that provide legal protection traditionally belong to the sphere of the judiciary. It need not be decided whether they have to adhere to the traditional model of courts. However, it is essential that these bodies fulfill certain guarantees of neutrality. This requires a separation from the legislature and the executive, and a well-regulated decision-making process. In particular, the affected person must be able to participate in this process. It need not be stressed that a secret procedure—like the procedure that Article 10 (2) cl. 2 Basic Law allows—in which the affected person is neither heard nor able to defend himself or herself, does not provide legal protection.

b) The opinion of the Court stresses the decision for a “militant democracy” that does not accept any misuse of basic rights for fighting against the free democratic order or against the existence of state authority. Nobody calls into question that the existence of the Federal Republic of Germany and the free democratic order constitute paramount legal values which have to be protected

and defended, and which—in case of emergency—can prevail over individual rights.

In case of a hostile attack and a subsequent state of emergency, which might last for a longer, but limited amount of time, individual rights must and may be temporarily limited to a significant extent. This case has to be distinguished from measures that seem to be necessary for the protection of the legal order (e.g. for the fight against crime or against foreign intelligence) in the normal situation of “everyday legal life.” In such cases, there are limits to the restriction of individual rights. The “militant democracy” defends the current constitutional order that complies with the rule of law, of which individual rights are an integral part. Whenever the legislature passes statutes or constitutional amendments for purposes of internal security (e.g. for fighting against crime or against activities of foreign intelligence), it therefore has to balance legal values against each other according to the value judgments made by the constitution itself. The “Staatsraison” is not necessarily a prevailing value. If the legislature misjudges these limits, the “militant democracy” will fight against itself.

The limits that may not be crossed are identical to the restrictions on constitutional amendments set out in Article 79 (3) Basic Law. The unchangeable part of the constitutional order may not be affected—except in the exceptional case of a state of emergency. The “militant democracy” is manifested in Articles 9 (2), 18, 21 Basic Law as well as in Article 79 (3) Basic Law. . . . It would be a self-contradiction to abandon inalienable principles of the constitution for the sake of protecting the constitution.

The margin of appreciation of the legislature is thus limited as far as the legislature is not allowed to eliminate the legal protection of individuals. As far as intelligence services work under special conditions, special measures have to be taken to accommodate these conditions—such as the creation of special courts, which are separate from the executive branch and which can guarantee secrecy within their procedure without giving up the indispensable participation of the affected individuals. It need not be decided whether a constitutional amendment would be necessary for such measures. . . .

Judicial Review of the Amendment Power as Part of Normal Constitutional Practices: Colombia and Brazil

When constitutional amendment is a rare occurrence, the question of the constitutionality of a particular amendment arises infrequently. But if a constitution is amended regularly and a constitutional court is accustomed to guarding the constitution, then one might expect that court to develop a more routine jurisprudence of constitutional amendments. Both Colombia and Brazil exemplify this approach, and the review of constitutional amendments on a regular basis is a part of an on-going dialogue between the high court and the political branches.

The Colombian Constitution gives the Constitutional Court power to review amendments for procedural correctness and excess of competence; the Court has understood these powers broadly. The Brazilian Federal Supreme Court has claimed the power to review constitutional amendments not only for procedural flaws but also for substantive inconsistencies with the basic principles of the Brazilian Constitution. The practices in these two jurisdictions raise the question of whether a court's role in reviewing amendments should depend on the court's place in the overall constitutional order, including the ease with which amending authorities can change the text of constitutional provisions.

Manuel José Cepeda-Espinosa

Notes on Unconstitutional Constitutional Amendments in Colombian Constitutional Law^{*}

The Colombian Constitution has been flexible. Since 1957, Congress [has adopted] constitutional amendments following the normal legislative process. There are two basic differences between an amendment and a statute: the amendment requires eight readings (not four as ordinary statutes) and in the last four readings it must be approved by [an] absolute majority of the members of the House of Representatives and the Senate.

The Supreme Court first struck down a constitutional amendment in 1978. The Court held that since amendments followed the same legislative process [as] ordinary statutes, they could also be subject to judicial review for serious procedural flaws. On that occasion, Congress sought to convene a Constituent Assembly and approved a constitutional amendment for this purpose. This

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amendment was necessary because in 1957 a constitutional referendum established that only Congress had the power to reform the Constitution. The Supreme Court ruled that the Constitution prevented Congress from delegating its amending power to an assembly. Thus the amendment convening the Constituent Assembly was struck down. . . . [I]n 1981, . . . the Supreme Court struck down a constitutional amendment approved by Congress which reformed several articles of the Constitution. The Court stated that the legislative process followed by Congress had violated the rights of political minorities. [In addition], the Court found that amendments initiated by different Congresspersons or the Executive could not be cumulated in one single bill. Each amendment had to be handled separately in Congress.

These two decisions prompted deep and lasting political unrest against the Supreme Court. There was a widespread sense that the Constitution had become too rigid. After several complex political and juridical processes, a Constituent Assembly was finally convened directly by the people, without the intervention of Congress, in 1990 . . . [with] delegates [who] were . . . elected directly by the people. The Supreme Court upheld this exceptional amending procedure on the grounds that the original constituent power resided in the people. The Assembly adopted a whole new Constitution in 1991. It created a Constitutional Court and [gave] it the power of constitutional judicial review which had been exercised by the Supreme Court since 1887. The 1991 Constitution . . . allows amendment in three different ways: by Congress, by a Constituent Assembly or by the people through referendum.¹ By the end of 2012, 37 reforms had been approved by Congress and one by referendum.

Amendments adopted by Congress may be challenged by any citizen through an *actio popularis*, as ordinary statutes have been challenged in Colombia since 1910. The so-called *action of unconstitutionality* may only be filed within the year following the enactment of the constitutional amendment.² This action can only be instituted for two kinds of constitutional flaws: procedural errors and excess of competence. The first type of challenge is expressly authorized by the Constitution. The second was allowed by the Constitutional Court in 2003, under the doctrine of the prohibition of substitution of the Constitution. The Court held that Congress may change the Constitution, but its power to amend does not extend to abolishing, subverting, or substituting the 1991 Constitution with a

¹ Colombian Constitution. art. 374. Referenda must be first approved by Congress and reviewed by the Constitutional Court. They can be proposed to Congress either by the Government or by a set number of citizens.

² Referenda are reviewed *ex officio* by the Court before they are put to the people. In this case, the Court does not review adopted amendments, but rather proposed amendments.

completely different one. . . . Any article of the Constitution may be amended, and the Court cannot declare unconstitutional a constitutional amendment for material or substantive vices. By definition, the content of any amendment contradicts in whole or in part the article it purports to amend.

The Constitutional Court has struck down constitutional amendments for procedural errors several times. A notorious decision was rendered in the case of an amendment that sought to restrict certain fundamental rights and enlarge the powers of the Executive Branch to confront illegal armed groups (the . . . anti-terrorism amendment of 2003). In 2004, the Constitutional Court held that this reform had a procedural error: the congressional report necessary to initiate the sixth reading in Congress had not been approved by [an] absolute majority. . . .

Another very important decision based on procedural errors was rendered in 2010. The Court struck down an act of Congress that sought to call a constitutional referendum to allow for more than one presidential reelection, the so-called “Second Reelection Case.” The act was approved following a citizens’ initiative supported by the signatures of over one million citizens, that is, 5% of the citizens registered to vote according to the electoral census, which is the threshold for national popular initiatives in Colombia. The Court found that several irregularities had occurred during the approval of this call for a referendum. Among them, the Court found a violation of spending limits in the collection of signatures and other infractions of the legal requirements of a call for a referendum. More importantly, the Court also found . . . that, by changing the wording of the proposed amendment, Congress failed to respect the will of the citizens who had called for it. The Court also found that the favorable vote on this initiative had been achieved by a last minute switch in political affiliation by some members of Congress, who changed parties in order to circumvent party sanctions. Finally, the call for referendum was approved during extraordinary sessions which had not been duly [publicized] by the Government.

The second [way through which] the Constitutional Court can declare . . . a constitutional amendment [unconstitutional] is on the grounds of excess of competence, that is, in cases in which the amendment is not really a modification of the Constitution, but amounts to a replacement of the Constitution by a wholly different one. The Court has made a distinction between the original constituent power and the derivative power of amendment. It has held that the power to reform the Constitution is a limited power derived from the people and thus an amendment may not destroy the basic identity of the Constitution adopted by the people in 1991. Only the original constituent power can modify the basic identity of the Constitution or replace it by a wholly different one. In these cases, judicial review of the amendment involves a confrontation between the amendment and

the basic elements of the Constitution, not to determine if there are contradictions between the contents of the current and the previous constitutional articles, but to establish if the defining element of the identity of the Constitution has been replaced by an opposite element.

This doctrine, entailing a review of competence of the amending organ, was introduced in 2003 when the Court examined the constitutionality of a call for referendum to amend several articles of the Constitution. It concerned a variety of issues: from electoral regulation to public salaries, as well as proposed amendments aimed at overruling previous decisions of the Constitutional Court. Although the Court struck down some aspects of the referendum,³ it held that none of the proposed amendments amounted to a substitution of the Constitution: the electoral system could be changed, the rules for the approval of the annual budget could be amended, and the Court's judgments could be overruled by constitutional amendment. In passing, the Court gave extreme examples of substitution of a basic element of the identity of the Constitution (e.g. abolishing the republican form of government to enact a monarchy).

During the last 10 years, almost all constitutional amendments have been challenged on grounds of substitution of the Constitution. . . . The most controversial decision was rendered in the so-called "First Reelection Case." In 2005, the Court held that an amendment which allowed for presidential reelection was not a substitution of an essential element of the basic identity of the Constitution. Since 1991, presidential reelection had been forbidden. The Court concluded that allowing a President to be reelected for one additional four-year term increased presidential power, but did not destroy the principle of separation of powers or the system of checks and balances. It did not replace them [with] opposite principles.

The Court has struck down four amendments for excess of competence. Firstly, in this same case, the Court found unconstitutional a norm which gave to the Council of State (the highest court for administrative law cases) the power to adopt the rules concerning the rights and duties of candidates if the President decided to run for reelection, in the event that Congress failed to approve the corresponding statute. In the absence of such a statute, the president could not run

³ The referendum required citizens to answer a single yes or no to a whole package of questions. The Court ruled that because the referendum addressed so [many] different issues, and the freedom of voters had to be preserved, it could not be voted with a general approval or disapproval. Each issue had to be voted separately. Also, the Court ruled that the drafting of some questions was misleading and induced voters to vote "yes," thus manipulating their will. The Court also held that the minimum voter turnout necessary for the referendum to be binding had to include invalid and blank votes, since these votes were legitimate forms of political participation.

for reelection. Thus, the first reelection amendment gave the Council of State the extraordinary power to legislate. The Council, being a judicial organ, could act without the parties' participation or that of civil society organizations. In fact, the "statute" could not be reviewed by the Constitutional Court before the presidential election was held. The Court concluded that this temporarily gave the Council of State, a judicial organ, the unlimited power to legislate about political rights related to the most important election, without any possibilities for constitutional judicial review. This amounted to a substitution of the principle of constitutional supremacy for the *ad hoc* arbitrary power of the Council of State.

Then, in 2009 it declared unconstitutional a legislative act that sought to enroll civil servants in administrative careers who [had] previously not competed for [them]. The Constitutional Court considered that this was a substantial replacement of Article 125 of the Constitution, which states that public jobs should be provided for as a result of merit-based competition. The Court found that this amendment entailed a substitution of the Constitution since access to administrative power ceased to be based on merit and instead depended on subjective criteria, like clientelism, patronage or friendship.

Third, in 2010, in the "Second Reelection Case" . . . the Court held that, aside from procedural irregularities [explained earlier], the call for [a] referendum entailed a substitution of a defining element of the Constitution . . . [even though] one reelection only did not substitute the Constitution. The Court found that a third consecutive presidential term could result in extreme presidentialism, causing imbalances that would significantly undermine the principle of separation of powers. Also, it held that a second reelection would affect the principle of alternation in the access to political power, and allow for the [entrenchment] of the already reelected president, which is completely opposed to the principle of competitive democracy. The Court also underlined that the third reelection would inevitably affect the right of equal treatment and opportunities for other presidential candidates.

Fourth, in 2012, the Constitutional Court declared unconstitutional an amendment which provided that rules on conflict of interest would not apply to members of Congress participating in the deliberation and voting [on] constitutional amendments. According to the Constitutional Court, the amendment amounted to a replacement of the principle of prevalence of general interest by the unchecked predominance of the private interests of Congresspersons who would be able to introduce any norm in the Constitution for their own benefit. In fact, after this amendment had been approved, Congress passed another amendment changing the rules concerning the criminal prosecution of Congresspersons, . . . arousing public outrage.

To conclude, in Colombia, it is usual to have judicial review of constitutional reforms for errors of procedure and [excess] of competence. This has been done since before the 1991 Constitution was adopted. The Constitutional Court has continued this trend. However, statistically speaking, an overruling of constitutional amendments for excess of competence has remained the exception and important amendments have been upheld.



Joaquim Barbosa

*Unconstitutional Constitutional Amendments and the Brazilian Supreme Court of Jurisprudence**

When it was promulgated, the Brazilian Constitution had 246 articles in its main body and 72 additional provisions of a temporary nature. From 1988 to this date the Constitution has been amended 71 times. Some [temporary] provisions . . . are still effective. Changes in [both main and temporary provisions] of the constitution involve such [diverse] matters as the creation of new financial funds, the establishment of a national council with powers for administrative and punishment control over the members of the judiciary, [the] overhaul of [the] tax system, the establishment of a minimum wage for teachers, among others.

The constant modification of the constitutional text [has] allowed the Judiciary, especially the Supreme Court, to play an eminent role in the national life and to gain a vast experience in the field of judicial review of state acts.

From the moment of the Constitution's promulgation, the Derived Constituent Power comes into existence. By its reformative aspect, the Derived Constituent Power can take the form of a constitutional revision or a constitutional amendment. . . .

[D]espite . . . the unlimited powers given to the Original Constituent Power, the Derived Constituent Power, in the Brazilian realm, finds itself restricted by the limits already set forth by the Constitution.

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The . . . limits [on] the derived Constituent Power are divided into political or jurisdictional processes, and further qualified, according to the time of [their] application, as preventive or repressive. . . .

[T]he restrictions on the derived Constituent Power may still be classified in[to] material and formal limits, [with the latter] subdivided into explicit and implicit restrictions. . . .

[F]ormal limitations to constitutional amendments [are] subdivided by the legal doctrine [into] procedural restrictions, temporal limits, and circumstantial boundaries.

Under this concept, the Brazilian Supreme Court has recognized the full validity of judicial review of constitutional amendments, principally when it concerns constitutional amendments that violate the dispositions of . . . article 60 of the Brazilian Constitution [laying out the amendment procedure. As an example,] the Court held in 1926 that all constitutional amendments are subject to judicial review by the Supreme Court of Brazil. . . .

Moreover, the Brazilian Supreme Court . . . already recognized the unconstitutionality of constitutional amendment provisions in light of formal defects

[With regard to] *the explicit material limitation [of] the Derived Constituent Power*, the Brazilian Supreme Court has rendered decisions that clearly revealed the possibility of judicial review of constitutional amendments, both in the abstract and in . . . “*incidenter tantum*” . . . despite the precedent whereby the Supreme Court established that there is no hierarchy among constitutional provisions. . . .

The Brazilian Supreme Federal Court has already declared the unconstitutionality of certain norms embodied in constitutional amendments. . . .

Finally, the Brazilian Supreme Court has been increasingly confronted with judicial review actions, both in abstract and concrete review, filed against constitutional amendments. . . .

[In particular, there were] four direct actions of unconstitutionality filed against the Constitutional Amendment n. 62/2009 [which required the Court to assess the constitutionality of moratoria on debt repayment].

Constitutionalizing Political Division Through the Use of Constitutional Amendments

Ideally, constitutional amendments should reflect a political consensus. But sometimes amendments are made at times of intense political polarization, when there is no consensus to be had and one side of the political battle decides to constitutionalize the issues that divide the country by amending the constitution to put its victory into the text. Such a use of the amendment procedure often gives rise to questions about the substantive legitimacy of the amendment or the procedures used to guide an amendment through a polarized political landscape.

Constitutional amendment in a time of trouble raises many questions: Is it constitutional for the governing parties in a time of political polarization to amend the constitution without bringing the dissenters on board? Do political victories alone answer the legal questions about the legitimacy of amendment? And who is to say whether an amendment under such circumstances is legitimate or not, particularly in cases where the high court may be a party to the conflict?

The Civil War Amendments in the United States

The American Constitution is so difficult to amend that the question rarely arises whether a federal constitutional amendment is constitutional. Nonetheless, the question is not as obscure as one might imagine. Federal courts have almost routinely struck state constitutional amendments for inconsistency with the federal constitution and have in fact treated them little differently from ordinary state laws (see most recently, *Perry v. Brown* (9th Cir. 2012)). But could a *federal* constitutional amendment ever be unconstitutional? The effort to amend the Constitution before and after the Civil War provides an opportunity to consider the question.

A last-ditch effort to prevent the American Civil War involved a constitutional amendment: the original 13th Amendment, known as the Corwin Amendment after its key sponsor, Ohio Representative Thomas Corwin. The text read:

No amendment shall be made to the Constitution which will authorize or give to Congress power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.

In keeping with the rest of the US Constitution, slavery and slaves are not mentioned by name, with “domestic institutions” and “persons held to labor or service” as the preferred euphemisms.

In March of 1861, on the eve of war, the amendment barely passed both Houses of Congress with the requisite supermajorities. Representatives of the Southern states, having already left the Congress, did not vote. Though presidential support is not necessary for a constitutional amendment, President Lincoln indicated in his first inaugural address that “I have no objection to [the Amendment’s] being made express and irrevocable.” The amendment was ratified by Ohio, Maryland and Illinois before the war erupted and stopped the process of state ratification.

The Corwin Amendment would have preserved slavery in the states where it already existed and proposed to make that pact binding by declaring it unamendable. Because the amendment failed, questions raised by it remain hypothetical but intriguing: Could an amendment *add* an eternity clause to a constitution? Could a political bargain designed to stop a war bind a country to its terms in perpetuity? Could an amendment at such cross-purposes with an evolving sense of justice be reconciled with a constitution that later developed along those lines?

Yet other issues arose at the war’s end. Amendments designed to end slavery and codify the constitutional aspirations of the war’s victors were proposed and ultimately ratified. But was this post-war ratification process itself constitutionally compliant?

As Bruce Ackerman argues in the excerpt below, procedural and logical irregularities—rarely mentioned in contemporary constitutional discussions—laced the process of ratifying the 13th and the 14th Amendments. Did flawed amendment procedures nonetheless change the Constitution? Or were the Reconstruction Amendments legitimated by other routes? Ackerman’s explanation is that constitutional processes other than judicial review—namely, elections and repeated multi-institutional reaffirmation—served to remedy a flawed amendment procedure. Is this American case a one-off, or should popular or multi-institutional ratification have a larger place in understanding the processes of and remedies for potentially unconstitutional constitutional amendments?

Bruce Ackerman
*Founding and Reconstruction**

. . . The prevailing patterns of professional narrative do not encourage lawyers and judges to reflect upon the things the Founding, Reconstruction, and the New Deal have in common. . . .

Modern lawyers simply assume that the Reconstruction Republicans obediently followed the formal tracks for constitutional amendment established by the Federalists in Article Five. According to received opinion, the Civil War Amendments are just that: ordinary amendments which, like all the others, owe their validity to the “rule of recognition” set out in the text of the 1787 Constitution. . . . While the professional narrative recognizes that Reconstruction was substantively creative, it supposes that it was procedurally unoriginal. . . .

For fifty years now, *Coleman* [*v. Miller* (1939)] has served as the “leading case” on Article Five, the first place a well-trained lawyer should look in her search for enlightenment. Despite the New Deal Court’s remarkable insights, modern lawyers have used [Justice] Hughes’ invocation of the “political question” doctrine as an excuse from further thought. Worse yet, this intellectual vacuum has given rise to a formalism that would have embarrassed even Butler and McReynolds. . . .

[I] challeng[e] the view that the Civil War Amendments were proposed and ratified in strict compliance with the rules of Article Five. Instead, the Republicans transformed the higher lawmaking system itself in their successful struggle to gain constitutional authority for their transformative initiatives.

. . . On December 18, Secretary Seward proclaimed the Thirteenth Amendment valid, explicitly citing the Southern ratifications in his official Proclamation. Two weeks earlier, the Republicans in Congress refused to seat any of the Southern representatives, and continued to deny the Southern states representation throughout the entire period during which the Fourteenth Amendment was proposed and “ratified.” Southern exclusion, moreover, was a necessary political condition for the Republicans to gain the two-thirds vote required by Article Five for the proposal of a constitutional amendment. How, then, can [we] explain the legitimacy of the proposal of the Fourteenth Amendment by the Rump Republican “Congress” without simultaneously

* Excerpted from Bruce Ackerman, *Constitutional Law/Constitutional Politics*, 99 YALE L.J. 453 (1989).

delegitimizing Secretary Seward's Proclamation validating the Thirteenth Amendment? . . .

The higher lawmaking process was nationalized yet further in the struggle over the Fourteenth Amendment. After taking unprecedented steps to gain ratification of the Thirteenth Amendment, Johnson opposed the congressional Republicans' demands for further aggressive action. His resistance led to a dramatic struggle between the Rump Congress and the Accidental President for the mantle of national leadership left in the wake of Lincoln's assassination.

The interbranch conflict evolved in four distinct stages. During most of 1866, Rump Congress and Accidental President struggled to an impasse from their citadels on either end of Pennsylvania Avenue. Each issued an escalating series of official messages which not only questioned the other's substantive vision of the Union, but also challenged the competitor's very right to speak on fundamental matters in the name of We the People of the United States.

This first period of constitutional counterpoint and institutional impasse induced the contending parties to transform the next regular election into one of the great higher lawmaking events of American history. The Congressional leadership proposed the Fourteenth Amendment as the platform on which they called upon the American people to renew the Republican mandate. Andrew Johnson used all the resources of the Presidency to mobilize constitutional conservatives, railroading around the country to denounce the legitimacy of the Rump Congress and to call upon the People to repudiate the proposed Fourteenth Amendment by returning solid conservatives to Congress.

The result of these exercises in popular mobilization was a decisive electoral victory for the party of constitutional reform. This inaugurated the second stage of the constitutional debate. The returning Republicans claimed a mandate from the People for the Fourteenth Amendment; the conservatives, led by Johnson, refused to accept the idea that the People had spoken decisively on the libertarian, egalitarian, and nationalistic themes advanced by the Republican text. Johnson encouraged the Southern governments to reject the Fourteenth Amendment, generating the formalist predicaments we have already canvassed.

The Republicans' decision to reject the validity of the Article Five veto inaugurated the third stage in the ratification process, which began with the enactment of the Reconstruction Act of March 2, 1867 and continued through the impeachment of Andrew Johnson one year later. Here, Congress claimed a mandate from the People to destroy the autonomy of dissenting institutions—including the Southern governments, the Presidency, and the Supreme Court—

that remained under control of constitutional conservatives, if these dissenting institutions did not recognize the validity of the Fourteenth Amendment. During this period—call it *the challenge to dissenting institutions*—it remained open for the dissenters to continue resistance in the hope that they could return to the American People in the next round of national elections and gain the decisive victory at the polls that had thus far eluded them.

And resist is precisely what the dissenters continued to do until they confronted their moment of truth in March of 1868, when the voters in the South, the constitutional conservatives on the Supreme Court, and, most crucially, President Andrew Johnson faced some of the most pivotal decisions in our constitutional history. The central event was the President's impeachment trial, precipitated by Johnson's effort to slow down the ratification of the Fourteenth Amendment so that its propriety could remain a campaign issue in the upcoming 1868 elections. Would the President continue to resist the Republicans' vision of the Union at the cost of grievously injuring the Presidency by allowing the Republicans to convict him of high crimes and misdemeanors? Or would he try to save the Presidency by changing course and indicating to the Senate and the country that he would no longer resist Reconstruction on the basis of the Fourteenth Amendment?

The President chose the latter course, inaugurating the final stage—which I shall call the “switch in time.” He called a halt to his efforts to obstruct Congress' attempt to replace the all-white governments that had rejected the Amendment with black and white governments willing to ratify it. No longer did he use his power as Commander-in-Chief to frustrate congressional demands for a speedy reconstruction. It was only after Johnson began to allow the reconstructed legislatures to ratify the Amendment that he gained sufficient Republican support at his impeachment trial to avoid conviction by a single vote in the Senate. Virtually simultaneous “switches” by the other dissenting institutions also allowed them to preserve their institutional autonomy so long as they unequivocally called off their resistance to the higher lawmaking claims of the Republican Rump Congress and recognized that We the People demanded a reconstructed Union on the basis of the Fourteenth Amendment. As a consequence of all these switches, a new institutional situation emerged in the months after the impeachment trial. Instead of escalating the constitutional conflict yet further, all the previously dissenting parts of the government—the Presidency, the Court, the Southern states—now accepted (however reluctantly) the higher lawmaking pretensions of the Reconstruction Congress and allowed the ratification of the Amendment to proceed. This new unanimity among the branches gained its formal expression in the remarkable story we have already told about Secretary of State Seward's two July Proclamations concerning the

Fourteenth Amendment. After using his first Proclamation to express the Johnson Administration's continuing legal doubts about ratification, the second Proclamation dramatized the fact that, after the four-stage process we have reviewed, the Executive was no longer prepared to deny that the Reconstruction Congress spoke for the People in nationalizing the process of ratifying the Fourteenth Amendment.

So much for a (bare-bones) summary of the higher lawmaking process that looms behind every legal citation to the Thirteenth and Fourteenth Amendments. Rather than consigning these facts to the hidden recesses of the legal mind, isn't it time for us to confront them? . . .

This nationalized process relied on two structures set in place by the Founders, but given new meaning during Reconstruction. First, the Republican pattern involved the rise of the separation of powers to prominence in higher lawmaking. Under the original Federalist Constitution, the basic building block for higher lawmaking was the division of powers between the national government and the states. . . . In the aftermath of Civil War, however, the contending constitutional movements transformed the national separation of powers into a process through which the protagonists might test each others' claims to a decisive "mandate" from the People on behalf of their rival visions of the reconstructed Union.

Second, the rise of the separation of powers led the contending movements to give a new meaning to the national elections that are a regularly scheduled part of the constitutional calendar. While the ideological meaning of these elections is normally diffused by a host of local and regional issues, a prolonged period of constitutional conflict in Washington may induce the protagonists to try to break their impasse by mobilizing their forces across the country in an effort to oust their opponents from positions of strength in the national government. When this leads to a clear and decisive victory for one side, as in 1866, the terms of the struggle for higher lawmaking authority shift: The winners claim a mandate for their constitutional initiative from the People and may demand that the dissenting branches reconsider their previous patterns of resistance. When faced with threats by the victorious branch(es) to their normal operation in the separation of powers, the dissenting branch(es) may find it more appropriate to recognize that the victors do speak for the People than to continue resisting in the hope that the voters will come to their assistance at the next election.

These two institutional structures—the separation of powers and national elections—interacted to form the process of constitutional debate and decision first elaborated during Reconstruction. As we saw in the struggle between

Johnson and the Rump Congress, this process has four characteristic stages. During the first stage—constitutional impasse—the constitutional protagonists contend with one another on relatively equal terms from different citadels of strength in the separation of powers. The effort to break the impasse is the second stage: a triggering election in which the contenders mobilize their forces in the country for a decisive political victory. While such victories often prove elusive, occasions do arise when one contender can plausibly claim a “mandate” from the People on behalf of its constitutional initiative. If, as will often happen, the electoral losers in the other branches remain skeptical of the breadth and depth of their opponents’ popular support, the electoral victors may provoke a third stage in the transformative process by challenging the normal institutional independence of dissenting branches. During this third stage—the challenge to institutional legitimacy—the incumbents of the challenged branches are faced with a hard choice. As in the impeachment trial of Andrew Johnson, they must decide whether they should continue to resist the victors in the hope that the People will vote the reformers out of office at the next regularly scheduled national election or whether they should protect the autonomy of their office by conceding that the People had indeed given their opponents a mandate for decisive constitutional change.

The final stage of the process—the “switch in time”—is reached if the dissenting branches decide that further resistance will only lead to institutional destruction rather than electoral vindication. As a consequence, they retain institutional autonomy in the system of separation of powers—but only on the understanding that they recognize that the People have indeed decisively supported the reformers’ vision of the Republic. If a simple schema will help:

Constitutional Impasse → Triggering Election → Challenge to Institutional Legitimacy → Switch In Time

It is this four part schema, more than the one sketched by the rules of Article Five, that structured the higher lawmaking process by which the American people defined, debated, and ultimately legitimated the Republicans’ Fourteenth Amendment. Rather than contenting ourselves with a professional narrative that consigns it to oblivion, constitutional lawyers should learn to see these changes in higher lawmaking process as part of the very same act of national reconstitution expressed by the new substantive principles introduced by the Republicans.

In the two jurisdictions discussed below—India in the 1970s and Hungary since 2010—constitutional amendment became the preferred weapon of prime ministers who were waging a battle against the courts. In 1970s India, the conflict was about redistribution of property and about whether private property rights, constitutionally protected and judicially defended, could block the reforms of Prime Minister Indira Gandhi. In 2010s Hungary, the conflict was between a supermajority electoral victory by a governing party seeking to consolidate its power and the Constitutional Court seeking to maintain the prior system of checked and separated powers. In both instances, the governments used constitutional amendments to block further judicial review. In both instances, the courts assumed the power to declare constitutional amendments unconstitutional in response. These cases raise the question of the role of courts in political struggles where constitutionalization of a particular political program is at stake. Should courts stand down and allow the government to remake the constitution if it has majority support behind it? Or should courts stand up for the prior constitutional order, which is being dismantled in the process?

India During the Emergency

Gábor Halmai

*Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?**

... At 300 pages and with over 370 articles, India's 1949 Constitution is ... the world's longest [constitution]. Though it does not contain any immutable provisions, the majority requirements for amending various passages differ, depending on the importance of the provision in question; the greater part of them can be changed with the vote of two-thirds of those present in both houses and the endorsement of the president. The most important articles also need to be ratified by the majority of states in addition to the aforementioned requirements, while a smaller part of the provisions may be amended with a simple majority of votes. Based on the constitutional interpretation advanced by India's Supreme Court [in its first two decades], ... judicial review of constitutional amendments may only take place if formal constitutional violations have [occurred]. The Supreme Court rejected the possibility of reviewing constitutional amendments first in 1951 and again in 1965.

* Excerpted from Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?* 19 CONSTELLATIONS 182 (2012).

Indira Gandhi, who first ascended to power in 1966, developed a penchant for using constitutional amendments to circumvent judicial review, primarily in the context of property rights issues. The case that brought about a shift in the Supreme Court's attitude was the 1967 *Golak Nath v. State of Punjab* case, in which a majority of the judges took the position that even a constitutional amendment adopted according to proper formal procedures may not violate constitutional rights. . . . “[T]hus commenced the war over primacy between Parliament and the Court.”²⁶ The decision also helped Indira Gandhi's populist campaign, which led to an electoral victory exceeding a two-thirds majority in 1971, and encouraged the prime minister to pass four constitutional amendments shortly thereafter. One of these (the 24th overall) expressly forbade the Supreme Court to review constitutional amendments.

The state of emergency imposed on account of the war with Pakistan and subsequent nationalization of lands led to the Court's most important decision, rendered in the *Kesavananda* case in 1973. The 800-page ruling, which resulted from a 7:6 vote, formally recognized Parliament's right to enact constitutional amendments that impinge on fundamental rights, and in that respect had the effect of overturning the *Golak Nath* decision. . . . At the same time, the majority of judges reserved the Court's right to invalidate constitutional amendments if those are in breach of the Indian Constitution's “basic structure.” [This “basic structure doctrine” was not in the text of the Constitution but was created by the Court itself and was modelled on the German approach to constitutional interpretation.]

In response to the charges of electoral fraud leveled against her, and to avert the threat of losing office, in June 1975 Indira Gandhi declared a state of emergency again, and among [the] first measures introduced in that context she initiated several historically unprecedented constitutional amendments. The first [of these amendments] barred the judicial route [of appeal] in controversies relating to the election of the prime minister. . . . [Another] ruled out constitutional review of laws that were enacted under the state of emergency and [that] violated fundamental rights. Gandhi's reasoning in justifying the amendments . . . suggested that the constituent and constitution-amending power were the unconditional expression of the people's sovereign will. This enraged the members of the Supreme Court so much that they—even while they upheld the validity of her election as premier—rejected the two constitutional amendments.

Prime Minister Gandhi struck back one last time in 1980 with Constitutional Amendment No. 42, which contained the provocative statement

²⁶ GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION. THE INDIAN EXPERIENCE* 198 (1999).

that “no constitutional amendment may be questioned on [any] grounds whatsoever or by any court.” In the case of *Minerva Mills Ltd. v. Union of India*, the Court struck down this amendment, too, by arguing that even though Parliament is entitled to change the Constitution any time, the latter is “a precious heritage; therefore, you cannot destroy its identity.” The firm stance adopted by the judges of the Supreme Court resulted in the doctrine of “basic structure” that has remained a protective element against aspirations to upset constitutionality in India, and may serve as a model for other countries. . . .

The case excerpted below arose as Indira Gandhi attempted to push through land redistribution in potential conflict with the constitutional protection of private property. To avoid the conflict, she initiated amendment of the Constitution. The 24th Amendment amending Article 368 of the Constitution provided that Parliament could amend any section of the Constitution even though the Supreme Court had earlier ruled that the fundamental rights could not be amended. The 25th Amendment permitted state legislatures to expropriate land in order to fulfill the Directive Principles (social goals) listed in the Constitution, even without full compensation. The 29th Amendment added a controversial state land reform law to a constitutional appendix, an addition which Prime Minister Gandhi must have assumed would have insulated it from judicial review. The petitioner in this case challenged the constitutionality of the three constitutional amendments.

His Holiness Kesavananda Bharati Sripadaglavaru v. State of Kerala

Supreme Court of India
A.I.R. 1973 SC 1461*

Held—(by Full Court):

The Constitution (Twenty Fourth) Amendment Act, Section 2(A) and 2(b) of the Constitution (Twenty Fifth) Amendment Act and the Constitution (Twenty Ninth) Amendment Act are valid.

* Excerpted from *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1309, 1309-14 (Norman Dorsen, Michel Rosenfeld, András Sajó, Susanne Baer eds., 2d ed. 2010).

By Majority: . . .

The power of amendment is plenary. It includes within itself the power to add, alter or repeal the various articles of the Constitution including those relating to fundamental rights.

The power to amend does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity. . . .

SIKRI, C.J.

. . . It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also, to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.

[A] necessary implication arises that there are implied limitations on the power of Parliament [and] that the expression “amendment of this Constitution” has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents. . . .

[I]f the meaning I have suggested is accepted[,] a social and economic revolution can gradually take place while preserving the freedom and dignity of every citizen. . . .

I am driven to the conclusion that the expression “amendment to this Constitution” in Art. 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated[,] reasonable abridgements of fundamental rights can be effected in the public interest.

It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with wisdom of the amendment. . . .

The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

- (2) Republican and Democratic form of Government;
- (3) Secular Character of the Constitution;
- (4) Separation of Powers between the Legislature, the Executive and the Judiciary;
- (5) Federal Character of the Constitution.

The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed. . . .

The meaning of the expression “Amendment of the Constitution” does not change when one reads the proviso. If the meaning is the same, Art. 368 can only be amended so as not to change its identity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two-third majority to [a] simple majority. Similarly it cannot get rid of the true meaning of the expression “Amendment to the Constitution” so as to derive power to abrogate fundamental rights. . . .

[I]t must be borne in mind that Art. 31(2) [on compensation for expropriated property] is still a fundamental right. Then, what is the change that has been brought about by the amendment? It is no doubt that a change was intended, it seems to me that the change effected is that a person whose property is acquired can no longer claim full compensation or just compensation but he can still claim that the law should lay down principles to determine the amount which he is to get and these principles must have a rational relation to the property sought to be acquired. . . .

RAY, J.

. . . [I]f compensation means market price then the concept of property right in [the Constitution] Part III [Fundamental Rights] is an absolute right to own and possess property or to receive full price while the concept of property right in [the Constitution] Part IV [Directive Principles] is conditioned by social interest and social justice. There would be an inherent conflict in working out the Directive Principles of Part IV with the guarantee in Part III. . . .

Social justice will require modification or restriction of rights under Part III. The scheme of the Constitution generally discloses that the principles of social justice are placed above individual rights and whenever or wherever it is considered necessary[,] individual rights have been subordinated or cut down to

give effect to the principles of social justice. Social justice means various concepts, which are evolved in the Directive Principles of the State.

PALEKAR, J.

. . . The absolute concepts of Liberty and Equality are very difficult to achieve as goals in the present day organized society. . . . Indeed the framers of the constitution took good care not to confer the fundamental rights in absolute terms because that was impractical. Knowing human capacity for distorting and misusing all liberties and freedoms, the framers of the constitution put restrictions on them in the interest of the people and the State thus emphasizing that fundamental rights[,] i.e. rules of civilized government[,] are liable to be altered, if necessary, for the common good and in the public interest. . . .

In a country like ours where we have, on the one hand, abject poverty on a very large scale and great concentration of wealth on the other, the advance towards social and economic justice is bound to be retarded if the old concept of individual liberty is to dog our footsteps. In the ultimate analysis, liberty or freedom which are so much praised by the wealthier sections of the community are the freedom to amass wealth and own property and means of production, which . . . our constitution does not sympathize with. . . . A blind adherence to the concept of freedom to own disproportionate wealth will not take us to the important goals of the Preamble, while a just and sympathetic implementation of the Directive Principles has at least the potentiality to take us to those goals, although on the way, a few may suffer some diminution of the unequal freedom they now enjoy. That being the philosophy underlying the Preamble[,] the fundamental rights and the Directive Principles taken together, it will be incorrect to elevate the fundamental rights as essentially an elaboration of the objectives of the Preamble. As a matter of fact a law made for implementing the Directive Principles of Article 39(b) and (c) [that the ownership of the material resources of the community and the operation of its economic system shall not be so concentrated as to harm the public interest], instead of being contrary to the Preamble, would be in conformity with it because while it may cut down the individual liberty of a few, it widens its horizons for the many. . . .

Hungary and European Norms after 2010

Kim Lane Scheppele

*The Unfolding Constitutional Conflicts in Hungary**

Elected in 2010 with a constitution-making two-thirds majority of seats in the Parliament, the Fidesz government of Hungary inaugurated a new constitution on January 1, 2012. By March 2013, the new constitution was amended for a fourth time. The early amendments had been accomplished not by amending the constitution directly, but instead by amending the “Transitional Provisions on the Constitution,” an act authorized by the constitution to specify how the new constitution was to be phased in. The Transitional Provisions as originally enacted on December 30, 2011, however, contained number of permanent amendments to the constitution. The early constitutional amendments that were enacted as part of the Transitional Provisions added even more permanent changes.

In a decision in December 2012, the Constitutional Court held that the permanent constitutional changes made through the Transitional Provisions were unconstitutional because they did not follow the proper procedure for a constitutional amendment, which required amending the constitutional text itself. The Parliament responded by passing the Fourth Amendment to the Constitution in March 2013, which: a) added directly to the constitution all but one of the nullified sections of the Transitional Provisions, even though some identical provisions of cardinal laws had been nullified on substantive grounds in the interim after the constitutional provisions had been struck, b) added directly to the constitution all but one of other laws that the Constitutional Court had previously ruled were unconstitutional under the new constitution, c) nullified the 22 years of case law of the Constitutional Court that preceded the adoption of the new constitution and d) removed the power of the Constitutional Court to review any amendment for its substantive conflict with the constitution.

The Commission on Democracy through Law of the Council of Europe (the Venice Commission) was asked its opinion on the Fourth Amendment to the Hungarian constitution:

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Opinion on the Fourth Amendment to the Fundamental Law of Hungary

European Commission for Democracy Through Law (Venice Commission)*

... 81. A consistent pattern of reacting with constitutional amendments to the rulings of the Constitutional Court may be observed in Hungary in recent times, and the Fourth Amendment follows this pattern. Provisions which were found unconstitutional and were annulled by the Constitutional Court have been reintroduced on the constitutional level: this pattern of 'constitutionalisation' of provisions of ordinary law excludes the possibility of review by the Constitutional Court.

82. The Constitutional Court itself found this in its decision 45/2012 . . . :
"... In a short period of time, numerous provisions that fell outside the regulatory scope of the Constitution have been incorporated into the Constitution, and the frequent amendments have made it difficult to follow and identify the Constitution's normative text in force. The amendments . . . jeopardised the stability and the endurance of the Constitution as well as the principles and the requirements of a constitutional State under the rule of law."

84. [T]he representatives of the Hungarian Government have correctly pointed out that it is a sovereign decision of the constituent power—in Hungary[,] Parliament with a two-thirds majority—to adopt a Constitution and to amend it. In itself, the possibility of constitutional amendments is an important counterweight to a constitutional court's power over legislation in a constitutional democracy, as well as an important element in the delicate system of checks and balances which defines a constitutional democracy. Nevertheless, this approach can only be justified in particular cases, based on thorough preparatory work, wide public debate and large political consensus—as in general is necessary for constitutional amendments. . . .

87. The Venice Commission is concerned that the approach of shielding ordinary law from constitutional review is a systematic one. This results in a serious and worrisome undermining of the role of the Constitutional Court as the protector of the Constitution. This is a problem both from the point of view of the

* Editors' Note: This excerpt comes from the Venice Commission, Opinion 720 / 2013 (17 June 2013) on the basis of comments by Mr Christoph Grabenwarter (Member, Austria), Mr Wolfgang Hoffmann-Riem (Member, Germany), Ms Hanna Suchocka (Member, Poland), Mr Kaarlo Tuori (Member, Finland), Mr Jan Velaers (Member, Belgium). All italics are in the original.

rule of law, but even more so from the point of view of the principle of democracy. Checks and balances are an essential part of any democracy. . . .

88. Article 19 of the Fourth Amendment . . . states that “*Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.*”

90. [T]he Commission fears that [this provision] will result in legal uncertainty. Previous decisions of the Constitutional Court are guidance not only for the Constitutional Court itself, but also for the ordinary courts who rely on the Constitutional Court’s case-law for their own interpretation of constitutional issues. While, over time, the Constitutional Court itself may be able to come to the same conclusions as in previous decisions, ordinary courts lack this essential point of reference with immediate effect. . . .

92. [E]arlier case-law, even adopted on the basis of constitutional provisions, which are no longer in force, is an important source for this coherent development of the law. In Hungary, many human rights principles have been formed over years and have found their expression in the practice of the Constitutional Court. . . .

94. Even if the constituent power were concerned that by basing itself on its earlier case-law, the Constitutional Court could perpetuate the old Constitution and would thus impair the effect of the new Fundamental Law, the complete removal of the earlier case-law would be neither adequate nor proportionate. Following any constitutional amendment, it is the task of constitutional courts to limit their reference to those provisions and principles that have not been affected by an amendment.

95. There is no evidence that the Hungarian Constitutional Court has not respected these limits. On the contrary, in its decision 22/2012, which was given when the Fundamental Law was already in force, the Constitutional Court argued that the Constitutional Court might use the arguments included in its previous decisions, adopted before the Fundamental Law came into force, “[. . .] *provided that this was possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution.*” This shows that the Constitutional Court was well aware of these limits. There was no need to enact a provision that could be read as depriving the Constitutional Court of the possibility to base itself on its prior case-law. . . .

96. The Venice Commission therefore cannot support the Hungarian authorities' argument that the Constitutional Court should be more free to decide. . . . It is inherent in a Constitutional Court's approach to interpret a constitution on the basis of its provisions and the principles contained in it. These principles transcend the constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. It is these principles which are reflected in the case-law of the Constitutional Court since its establishment. . . .

100. Article 12.3 of the Fourth Amendment amends Article 24.5 of the Fundamental Law, which reads: "*The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation. . . .*"

102. [In its] decision 45/2012, . . . the Constitutional Court indicated a possible competence to review constitutional amendments from the perspective of substantive constitutionality. While the wording of Article 24 of the Fundamental Law in the non-amended version specified the power of the Constitutional Court to examine "*any piece of legislation*" for conformity with the Fundamental Law and, arguably, constitutional amendments were not originally considered "pieces of legislation" by the drafters of the Fundamental Law, the Court clearly developed this understanding further in decision 45/2012.

103. The idea that a Constitutional Court should not be able to review the content of provisions of Fundamental Law is common ground as a general rule in many member States of the Council of Europe. . . .

104. As [we have pointed out in earlier opinions], in some states constitutional courts are able to review constitutional amendments under certain circumstances, as for instance in Austria, Bulgaria, Germany or Turkey. . . .

106. [An] inner hierarchy [of constitutional provisions that enables some to serve as the basis for evaluating others] is not a European standard, although it is a feature that arises more and more in States where Constitutional Courts are competent to annul unconstitutional laws. In the specific context of the Hungarian Fundamental Law, the Venice Commission notes, however, that the Hungarian Constitutional Court seems to have cautiously suggested such a hierarchy within the Fundamental Law: ". . . *the constituent power may only incorporate into the Fundamental Law subjects of constitutional importance that fall into the subjective regulatory scope of the Fundamental Law*" and ". . . *the amendments of the Fundamental Law may not result in any insoluble conflict within the*

Fundamental Law. The coherence of contents and structure is a requirement of the rule of law . . . to be guaranteed by the constituent power.” It seems that the Court even found a hierarchy stemming from international law: *“Constitutional legality has not only procedural, formal and public law validity requirements, but also [substantive] ones. The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the ius cogens, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the [substantive] requirements, guarantees and values of democratic States under the rule of law.”*

107. As concerns the review of the procedure of the adoption of constitutional amendments, in its decision 45/2012, the Constitutional Court insisted *“on its established practice, with regard to this case as well, of examining the Parliament’s decision-making process concerning its validity under public law—i.e. from the point of view whether the Parliament had fully complied with the procedural rules . . . now regulated in the Fundamental Law—irrespectively of whether it has acted as the constituent or the legislative power.”* The Court confirmed this position in its decision [12/2013]: *“The Constitutional Court extended the scope of [its] conclusions with regard to the invalidity under public law of the legislative process to apply to each constitutional provision and to their amendment; the Court also determined that the competence of the Constitutional Court to review constitutional provisions or constitutional amendments from the aspect of invalidity under public law cannot be excluded.”*

108. [T]he Fourth Amendment confirms the case-law of the Constitutional Court in the domain of procedural review, while negating further developments in decision 45/2012. The Constitutional Court seems to have accepted this development in its recent decision [12/2013] where it held that *“The power of the Constitutional Court is a restricted power in the structure of division of powers. Consequently, the Court shall not extend its powers to review the constitution and the new norms amending it without an express and explicit authorisation to that effect.”* However, in that decision the Court also held that *“the Constitutional Court shall moreover consider the obligations Hungary undertook in its international treaties or those that follow from membership in the EU, along with the generally acknowledged rules of international law, and the basic principles and values reflected therein. All of these rules—with special regard to their values that are also incorporated into the Fundamental Law—constitute such a unified system (of values), that shall not be disregarded either in the course of*

constitution-making or legislation, nor in the course of constitutional review conducted by the Constitutional Court.”

COURTS' ROLES: ROBUST REVIEW?

The excerpted commentaries by Aharon Barak and by co-authors Lech Garlicki and Zofia Garlicka debate how far judicial review of constitutional amendments should extend. The questions addressed are wide-ranging, such as whether judicial review should be limited to constitutions whose texts specify eternity clauses, or whether courts should understand themselves to be specially situated to provide a robust constitutional defense even when they are not explicitly authorized by the constitutional text to do so. For example, what if an amendment changes the amendment rule itself to permit the new amendments that might otherwise be blocked? What if amendments modify a constitution so that it no longer complies with international obligations, such as human rights treaties that the country has ratified? Is there an emerging international practice of courts that would be useful to jurisdictions for which these issues are new? If a court is addressing the constitutionality of a constitutional amendment as a matter of first impression, what comparative inquiries would be helpful?

Aharon Barak

*Unconstitutional Constitutional Amendments**

... An examination of comparative law regarding the constitutionality of amendments to constitutions raises four key issues. First, one must differentiate well between the question whether the court has the authority to perform judicial review of the constitutionality of an amendment to the constitution, on the one hand, and the question what the standards for such review are, on the other. Courts have not, for the most part, interpreted the silence of the constitution regarding the issue of the court's authority to perform judicial review of the constitutionality of a constitutional amendment as a negation of that authority. The opposite is true: courts have usually determined that, if there is an argument against the constitutionality of an amendment to the constitution, it should be

* Excerpted from Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321 (2011).

examined on its merits. Thus, for example, we have seen that the silence of the Constitutions of Germany, Austria, and Turkey (until 1971) regarding the court's authority to examine the constitutionality of an amendment to the constitution did not lead the Constitutional Courts of those countries to conclude that they do not have such authority. They assumed as obvious that they have such authority. . . .

The differentiation between the question of authority and the question of standards raises difficulties where the amendment to the constitution denies the court's authority to examine the constitutionality of the amendment. Is such an amendment constitutional? In order to answer this question, must the court examine whether there are restrictions on the authority to amend the constitution? The question of authority is thus a derivative of the question of standards. . . .

The second key issue concerns the standard according to which it will be determined whether or not an amendment to the constitution is constitutional. Comparative law indicates that a proper cause for review in this context is that the amendment to the constitution is unconstitutional because it violates express eternity clauses in the constitution. The eternity clause is intended to fortify the constitution against improper amendments. . . . Against this backdrop, the German Constitutional Court's case law is understandable. It has not only recognized its own authority to examine the constitutionality of constitutional amendments but has also determined that the standard for that examination is found in the eternity clauses in the constitution. . . .

The third issue is that a natural standard for examining the constitutionality of a constitutional amendment is to examine the requirements in the constitution regarding constitutional amendments. Indeed, an amendment to the constitution can only have effect if it has been enacted in accordance with the requirements in the provision dealing with constitutional amendments. . . . These requirements are usually of a formal character, such as the identity of the body that enacts the amendment (the people, the federal legislature, or the state legislature) and the majority required to do so. The key question that arises in this context is whether it is possible to derive "substantive" standards from the provisions regarding the amendment of the constitution. This question arises primarily in the case of constitutions that are easy to amend. If a temporary majority can change a constitution, and thus undermine the foundations upon which it rests, the question arises whether there are constitutional restrictions upon the power of the majority. . . . Without special substantive provisions, and without eternity clauses, the question arises whether the very use of the term "amendments" to the constitution radiates substantive meaning. Can it not be said that the term "amendments" indicates that the amended document is left standing?

According to this approach, the amendments clause in the constitution cannot serve as a source for the establishment of a new constitution. . . .

This view can be seen in the judgment of some of the Indian Supreme Court justices in *Kesavananda*. According to their approach, an amendment to the constitution does not permit its replacement with another constitution. Thus, there is a substantive requirement that the basic structure of the constitution should not be changed via such an amendment. This approach sees the term “amend” as the “hook” upon which the substantive test is hung. In light of this, the question arises—as it did in India—what happens when an amendment to the constitution is enacted that removes this “hook.” This can be achieved by amending the constitutional provisions on the amendment of the constitution in such a way that there are no longer any restrictions on parliament’s power to amend the constitution. As a result, the ability to amend the constitution includes the ability to replace the entire constitution. Is this type of amendment to the constitution constitutional? If the sole source of the substantive requirement regarding the basic structure of the constitution is the clause on the amendment of the constitution, then amending this provision would pull the rug out from under this requirement. However, if the substantial requirement regarding the basic structure of the constitution is entrenched not only in the provision on the amendment of the constitution but in the entire constitution, then the amendment of the amendments provision is insufficient, as the amendment itself would be unconstitutional. If the requirement regarding the basic structure indeed arises from the language of the entire constitution, then a new constitution is necessary in order to remove the requirement regarding the basic structure. In fact, this is how the Supreme Court of India ruled in *Minerva Mills*. The Constitutional Court of Italy has also ruled similarly.

The final issue that often arises in situations involving unconstitutional amendments to the constitution concerns the status and role of the courts in a given society. . . . On the one hand, it is argued that the boundary of judicial legitimacy should be drawn at the judicial review of the constitutionality of a regular statute. Beyond this boundary, it is not legitimate, barring an express provision in the constitution, for a court to annul an amendment to the constitution on the grounds that it is unconstitutional. The court itself acts by virtue of and in accordance with the constitution. It should not prevent amendments to the constitution. The court does not have the authority to create judicial eternity clauses. It must make do—and even this is controversial—with an examination whether the formal conditions for amending the constitution have been met. Beyond that, the issue is essentially political. It concerns the most sensitive aspects of democracy. If judicial review of the content of a constitutional

amendment is recognized, such recognition should be laid down in an express provision of the constitution. It should not be introduced impliedly.

On the other hand, it is claimed that there is no real difference between judicial review of the constitutionality of a regular statute and judicial review of an amendment to the constitution. In both cases, the judicial review is intended to safeguard the constitution and its (express or implied) content. The court thus fulfils its classic role. The authority to amend the constitution does not include the authority to enact a new constitution. And when the court defends the constitution and prevents the use of the amendment process to establish a new constitution, it safeguards the sovereignty of the people. This is true in general; it is especially true in cases where the constitution is easily amended. The natural role of the court in a modern democracy is to protect the constitution and to prevent bodies that were created by the constitution from exceeding their authority. The political character of judicial activity resulting in the annulment of an amendment to the constitution should not tie the hands of the court. The court is not protecting itself: it is protecting democracy. . . .

Lech Garlicki and Zofia A. Garlicka

*Review of Constitutionality of Constitutional Amendments
(An Imperfect Response to Imperfections?)**

. . . Constitutional amendments are omnipresent in democratic constitutional systems of the modern world. But, as constitutional practices of many countries demonstrate, formal amendments constitute but one of the methods of the “higher lawmaking.” Constitutions are altered also by other means, like periodic replacement of the entire document, legislative revision and—last, but certainly not least, judicial interpretation. . . .

There is no general pattern as to the use of formal constitutional amendments. The practice varies even in countries that adopted similar systems of government and represent a similar level of democracy and rule of law. Some

* Excerpted from Lech Garlicki & Zofia A. Garlicka, *Review of Constitutionality of Unconstitutional Amendments (An imperfect Response to Imperfections?)*, 1 ANAYASA HUKUKU DERGISI: JOURNAL OF CONSTITUTIONAL LAW 185 (2012). This article arose out of a paper presented to the Istanbul Round Table of the International Association of Constitutional Law.

countries may be more inclined either to modify the texts of their constitutions⁸ or to resort to separate “constitutional laws” that also enjoy the supralegislativ authority.⁹ In other countries, the use of formal constitutional amendments remains exceptional; the United States belongs to that group.¹¹ . . .

[U]sually, at least in the post-war democratic Europe, constitutional modifications fit well into the process of developing democracy, rule of law and individual rights. But, as history shows, a constitutional amendment may also run counter [to] those values. . . .

[T]here have been situations in which the goal of an amendment was to overrule certain, already pronounced, judicial interpretations of the existing constitutional provision.¹⁸ There also have been situations in which a constitutional amendment was adopted, let us say—preventively, to limit the judicial discretion in constitutional interpretation. Unlike traditional, “open-

⁸ In Europe: the German Basic Law of 1949 was modified on more than fifty occasions; the 1958 French Constitution on 25 occasions; the 1937 Constitution of Ireland on 29 occasions. On the other hand, the 1978 Constitution of Spain was modified only twice.

⁹ In Austria, since 1945, there [have] been more than 800 modifications of the 1920 Constitution, mostly via separate constitutional laws or special constitutional provisions inserted into ordinary laws. In Italy, next to 14 amendments introduced into the text of the 1947 Constitution, twenty separate “constitutional laws” have been adopted.

¹¹ However, while it is true that, since 1787, there has been only 27 amendments to the federal Constitution (and the last ones were adopted in 1964, 1967, 1971 and 1992), the situation is quite different on the state level. According to a 1991 study, the state rate of amendment was about 9.5 times the national rate.

¹⁸ Some “classic” examples can be found in the US constitutional history. The 16th Amendment was adopted to overrule the Supreme Court’s position in income tax matters (*Pollock v. Farmers’ Loan and Trust Co.* (1895)). Amendment proposals were submitted, in reaction to *Hammer v. Dagenhart* (1918), to allow regulation of child labour. During the so-called New Deal controversy, the administration did not dispose of a sufficient majority to initiate the amendment process, however was able to find other ways to persuade the Court to “switch-in-time.” Also the Anti-Slavery Amendments (13th-15th) were meant to overrule the *Dred Scott* holding (1857), however the problem of the Supreme Court was but secondary in the dramatic setting of the Civil War.

In Albania, a constitutional amendment was used in 1997 to overrule the decision of the Constitutional Court that declared unconstitutionality of legislation intervening into the so-called banking-pyramid-scams. As it was later observed by the Venice Commission (Opinion no. 9/1998, par. 62): “the constitutional amendment has a legitimate purpose and may have been required by specific and temporary needs. [The Commission] cautions, however, against the repeated use of such ad hoc constitutional amendments, in the area of economic regulation and considers that the text actually chosen should not be integrated as it is into the future Constitution of Albania.”

ended” constitutional provisions on individuals’ rights, such amendments were drafted in a very exact and careful manner.¹⁹

Thus, at least potentially, constitutional amendment can serve as a powerful instrument of a modification or, even, of a decomposition of the existing constitutional arrangements. The question [arises] . . . whether there are some . . . modifications [so basic] that they cannot be adopted [except] in an entirely new constitutional instrument. If we answer in the affirmative, a—logically unavoidable—conclusion is that constitutional amendments that transgress those limits should be qualified inadmissible as *ultra vires*, i.e. unconstitutional.

And if we accept the intellectual construction of an unconstitutional constitutional amendment, we should also accept that, under the substantive constitutional law, [said] amendment should be deprived not only of its legitimacy, but also of its legal validity. In consequence, the institutional constitutional law should provide for a forum and for a procedure to decide on constitutionality and validity of constitutional amendments. . . .

[I]t seems possible to distinguish three types of arrangements which ensure the rigidity of the amendment process:

- Procedural arrangements: while decisions on constitutional amendments, like all other legislative decisions, are taken in the parliament, the procedure of their adoption is more complicated; in particular, it requires a “supermajority” in both houses. Furthermore, in several countries, an amendment adopted by the national parliament may also require further ratification or confirmation: either by a national referendum or by the next parliament or, in federal systems, by representations of the states or provinces. Sometimes, the national parliament must also consult other bodies, in particular the constitutional court.
- Time and situational limitations: in many countries, constitutional amendment[s] cannot be adopted during the state of emergency; sometimes, amendments rejected by the parliament or by the referendum, cannot be reintroduced before the next parliamentary election.

¹⁹ For example, the 1993 amendment of the 1949 German Basic Law introduced a very detailed (and quite restrictive) regulation of the “right of asylum.” Thus, less regulation was left for the ordinary laws that could be subjected to a full review of the Constitutional Court. It seems worth [noting] that the Court was, nevertheless, invited to review the constitutionality of the amendment, but—in 1996—decided that it did not encroach upon any of the “intangible principles of the German Constitution.” . . .

- Content-based limitations: some constitutions (Austria and Switzerland are the best known European examples) distinguish between “amendments” and “revisions.” The latter is reserved for a change that affects the most important constitutional structures or arrangements and cannot be adopted without following very demanding procedural requirements.²³ . . .

In several countries . . . the judicial branch is regarded as better placed to decide on procedural regularity of constitutional amendments. . . .

[T]he question arises whether constitutional and/or supreme courts are ready to accept that they have jurisdiction over procedural regularity of constitutional amendments[.] . . .

Finally, some constitutions vest constitutional/supreme courts with a power to examine draft amendments before their final adoption by the parliament.³¹ While[] this “a priori review” may also be focused on the substance

²³ Article 44 sec. 3 of the 1920 Constitution of Austria uses the term “total revision” without however defining its nature and scope. Such revision must be, at first, adopted by the two-thirds majority of the National Council (and, in respect to amendments intervening into so-called “federal matters,” also by the same majority of the Federal Council) and, subsequently, must be confirmed by a national referendum.

In Switzerland, all constitutional amendments must be adopted or confirmed [by] national referendum. Nevertheless, Articles 192-195 of the 1999 Constitution provide for a distinction between its total and partial revision. On top of that, Article 193 sec. 4 provides that even a total revision “must not violate the mandatory provisions of international law.”

Also other European countries adopt content-based procedural limitations. The 1978 Constitution of Spain distinguishes between “partial revision” and “total revision” and, furthermore, assimilates “partial revisions” concerning some basic provisions with the procedure required for the “total revision” (Article 167-168). The 1997 Constitution of Poland adopted a formal distinction: provisions contained in its Chapters 1 (General Principles of the Constitutional Regime), 2 (Individual Rights) and 12 (Constitutional Amendment) are subjected to a most complicated amendment procedure that may also involve a popular referendum. The most radical procedural arrangement was adopted in the 1993 Constitution of Russia: if the “supermajority” of the Federal Parliament adopts amendments concerning Chapters 1 (Basic Principles), 2 (Rights and Liberties) or 9 (Constitutional Amendment) of the Constitution, the matter is transmitted to a specially appointed Constituent Assembly and this Assembly either rejects the proposed amendments or initiates the procedure of adoption of a new Constitution (Article 135). Finally, Article 138 of the Italian Constitution distinguish[es] between “laws on constitutional revision” and “other constitutional laws,” without, however, differentiating the procedure of their adoption.

Outside Europe, the procedural distinction between “modification” and “revision” is e.g. adopted in the 1949 Constitution of Costa Rica (Articles 195 and 196).

³¹ Article 93 no. 3 of the 1980 Constitution of Chile provides that the Constitutional Court adjudicates “on questions regarding constitutionality that might arise during the processing of bills

of a proposed amendment, it constitutes a necessary stage of the legislative procedure. In other words, procedural regularity of a constitutional amendment may be challenged if the Constitutional Court has not been duly involved.³²

On the other hand, the courts in some other countries arrived at the conclusion that procedural review of constitutional amendments is so distinct that, [absent] a clear constitutional regulation, it must remain outside their jurisdiction. Such, in particular, has always been the position of the U. S. Supreme Court, according to which review of constitutional amendments represents a “political question” and, as such, remains excluded from the judicial review. The most prominent elaboration of that position took place in *Coleman v. Miller* (1939). While *Coleman* was adopted in a quite particular context of the New Deal, it was later cited with approval, in *Baker v. Carr* (1962), i.e. in one of the most activist periods of the Supreme Court. Thus, it is not impossible to assume that *Coleman* may be still regarded as a valid precedent. On the other hand, *Coleman* dealt with a very particular question (whether a state is empowered to ratify an amendment whose ratification it had earlier rejected) and, even if several amendments were adopted within next 80 years, none of them offered a genuine occasion to re-invite

or of constitutional amendments”; see: H. Molina Guaita: *Derecho constitucional*, Santiago 2009, p. 504.

The 1991 Constitution of Romania vested the Constitutional Court with the competence to review, ex officio, all proposal of constitutional amendments. This provision was maintained by the 2003 revision of the Constitution (Article 146). See e. g. Decision no. 148 of the Constitutional Court of Romania (16 April 2003) on the issue of constitutionality of the legislative proposal to revise the Constitution of Romania, sec. I (Monitorul Oficial no. 317/2003).

Article 159 of the 1996 Constitution of Ukraine provides that: “A draft law on introducing amendments [...] is considered by the [parliament] upon the availability – the Parliament may decide on the amendment only after the Court has confirmed its admissibility of an opinion of the Constitutional Court on the conformity of the draft law with the requirements of Articles 157 and 158 of the Constitution” (all quotations from: *Konstitucija Ukrainy. Constitution of Ukraine*, Odessa 1999). It means that the Parliament may adopt a constitutional amendment only after the Court has confirmed its admissibility (see e.g. decision of 1.4.2010, 1-12/2010, in which the Constitutional Court confirmed the admissibility of an amendment concerning immunities of the highest officials of the State).

³² Another form of an a-priori involvement of the Constitutional Court is its participation in the drafting process of a new constitution. It seems that the Republic of South Africa delivered here the most spectacular example. The 1994 Interim Constitution adopted 34 principles that had to be followed by the drafters of the new Constitution and vested the Constitutional Court with a power to assess whether the new Constitution has followed the above-mentioned principles. In May 1996, the newly elected Constituent Assembly adopted the Constitution. However, the Constitutional Court, in September 1996, refused certification since, in its opinion, the Constitution did not respect some of the principles. It was only after the text had been amended that the Court, in December 1996, certified the Constitution as compatible with all principles imposed by the Interim Constitution.

the Supreme Court to review the procedural regularity of the ratification process. . . .

In Europe, only few courts did actually decide that a constitutional amendment was invalid or [inoperative] for failure to comply with the procedural requirements imposed on the amendment process. It has never happened in Germany. On the other hand, in [the] practice of the Austrian Constitutional Court (which, as is well-known, cannot be qualified as a particularly activist one) there are cases in which a “procedural unconstitutionality” of a constitutional law was declared. All those decisions resulted from the Austrian distinction between “partial” and “total” modifications: the Court disqualified a couple of amendments finding that, while their content amounted to a “total revision,” they had been adopted in a procedure of a “simple amendment,” i.e. without subsequent approval in a national referendum. . . .

Outside Europe, in South Africa, the Constitutional Court on four occasions reviewed (and upheld) the procedural constitutionality of amendments to the Constitution. In Costa Rica, the Supreme Court (Constitutional Chamber) has jurisdiction to assess the procedural regularity of constitutional amendments. While there have been cases in which the problem was raised, it never prompted the Court to a declaration of unconstitutionality. . . .

[T]he clear success of the judicial review of ordinary legislation was due to a combination of four factors: systemic (comprehensive) nature of the (constitutional) norms of reference, relative precision of those norms, procedural accessibility of review, and binding effects (finality) of review.

Such [a] combination is not present in respect to the “higher” level of review, i.e. to the assessment whether constitutional amendments are compatible with higher norms and principles contained in the text or in the spirit of the actual constitution. This [leads] us to a conclusion that the concept of “constitutional eternity clauses” does not seem to be sufficiently developed to be regarded as a common solution to protect [the] stability of modern constitution[s] . . . against future amendments of [a] disruptive nature. That is why the effective protection of basic (i.e. also universal) values and principles should go beyond the “internal” mechanisms which [the] constitution itself adopts to protect its spirit and identity. In this perspective, it may also be attractive to refer to the “external” norms of reference, particularly to . . . international human rights law.

Sympathy for those “external” norms . . . should not warrant, however, a conclusion that nothing can be offered by the “internal” mechanisms of protection. Several important constitutions address the problem and establish, in

an explicit or implicit manner, [a] certain internal hierarchy of their norms. . . . It is true that in most cases, courts are not (yet?) ready to exercise their powers. Neither, however, are they ready to rule that those powers remain entirely outside their jurisdiction. . . .

Judicial review of [the] constitutionality of constitutional amendments offers no more than an imperfect response to the problem. However, as the problem is not of a purely theoretical nature, even an imperfect response may be more useful than no response at all.



PUZZLES OF STATE IDENTITY,
PRIVATIZATION, AND CONSTITUTIONAL
AUTHORITY

DISCUSSION LEADERS

MANUEL JOSÉ CEPEDA-ESPINOSA AND JUDITH RESNIK

II. PUZZLES OF STATE IDENTITY, PRIVATIZATION, AND CONSTITUTIONAL AUTHORITY

DISCUSSION LEADERS:

MANUEL JOSÉ CEPEDA-ESPINOSA AND JUDITH RESNIK

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COURTING SOVEREIGNTY

Public and private sectors have long been entangled in the governance of states and of corporate entities. What is new is the constitutionalization that the twentieth century generated, which imposed legal constraints on the exercise of power.

This Chapter explores challenges brought to courts about the decisions made by other branches of government that shift state-based activities either to the private sector or to another government. Litigants argue either that such transfers are impermissible *per se* or that, whether undertaken by a public or private actor, constitutional constraints apply. In response, courts have puzzled about whether state sovereignty has an “essence” that cannot be outsourced, about what consequences attach to a public/private distinction, and about the roles that constitutions play in defining aspects of sovereignty and in shaping the contours and reach of rights.

The first set of cases excerpted below involves objections to decisions by a legislature or the executive to shift a function, currently associated with the state, to a private entity. One view is that courts have nothing to say about such decisions. For example, a scholar of comparative law enlisted in support of the privatization of a prison in Israel opined that “essential components of governance were matters of political, economic and social preference . . . properly, in a democracy, left to the choice of the electorate.”¹ More of his views are excerpted below, as are opinions in the Israel Supreme Court decision holding that privatizing a prison violated Israel’s Basic Laws; the Costa Rica Supreme Court judgment upholding a contract for a private prison; and the ruling of the Supreme Court of India, rejecting private policing in the State of Chattisgarh.

A second set of cases prompting judicial inquiries into the character of sovereignty arises when power moves from one government to another. This Chapter’s exemplars include litigation over the Lisbon Treaty and about federal statutes in the United States regulating state workers. Just as the justices in the privatization cases struggle to define “core” government functions, these judgments on inter-government transfers also focus on whether certain activities are quintessentially “government’s” work, on whether defining a state’s essence is feasible, and if so, on whether the sources are constitution-specific, historically contingent, democratically obliged, and/or inherent in concepts of sovereignty.

¹ Opinion, Jeffrey Jowell, H CJ 2605/05 *Academic Center of Law and Business v. Minister of Finance* (Isr. Aug 20, 2006).

A third set of cases in which jurists sort actions as “public in nature” or “private” arises because, in some jurisdictions, both obligations and remedies vary depending on whether the actors are “the state” or private entities. The availability and the form of remedies can vary; state actors may have special obligations or immunities that private actors do not. The cases excerpted include a U.K. judgment about whether state-funded caregivers have human-rights obligations and a U.S. decision on whether operators of opera houses and of restaurants can discriminate on the grounds of race. While these doctrine are jurisdiction-specific (“state action” and “public functions” are not issues in jurisdictions where those exercising “private powers” can be challenged), the question of the reach and content of constitutional rights is not. In countries in which “private powers” must respect constitutional rights, the debate is not about “state action” but about the situation of the proposed rights-holder; inquiries include the degree of that person’s dependency, subordination, and defensiveness.

Some of the excerpted cases reason from the assumption that actions are either “public” or “private.” Yet many empiricists and much theoretical work reject that framing. Many undertakings are a *mélange*, as sovereign states and corporate actors have long been interdependent. Illustrative in the eighteenth and nineteenth centuries were the British and the Dutch East India Companies, whose names reflect that intermingling, ranging from profit-making to running police, jails, and courts. During the past century, oil companies provided another example. In the 1920s, the British Government was central to the formation of the Anglo-Iranian Oil Company, for which Britain negotiated exclusive rights to oil in what was then Persia. That company joined in a colonializing competition (and occasionally alliances) with Royal Dutch-Shell and with the U.S.-based Standard Oil. Iran’s nationalization of its oil industry in the early 1950s ended that structure, which in turn came to be replaced by another public/private venture, the British Petroleum Company (now known as BP). In the late 1970s, British Prime Minister Margaret Thatcher famously privatized ownership through a “public” offering of five percent of the company stock, and total divestment followed thereafter. Some commentators advise that the term “re-privatization” is thus more accurate than privatization.

Further, as exemplified in this and in Chapter III, the forms of privatization are highly variable—making the plural form “privatization(s)” also apt. For example, Israel’s legislature authorized a for-profit firm to operate a prison but imposed state oversight and required specific compliance with detailed government regulation. In contrast, the State of Chattisgarh delegated policing to young individuals given relatively little oversight. Surveillance and military outsourcing, on the other hand, enables governments to keep control but obscure their decisions. And, as discussed in Chapter III, privatization of adjudicatory

processes often moves activities that had taken place in public courts to another forum, such as private arbitration, over which the state imposes relatively little oversight of actors deputized to generate outcomes that have the force of law. In short, the examples here but skim the surface. Debates in many jurisdictions range across a host of domains—education, utilities, communication, and health—which are services understood in many countries (including several in Latin America) to be the responsibility of the state.

History illuminates the longevity of the intermingling of public and private sectors, but does not inform the contemporary legal questions. Until the twentieth century, decisions on privatization were generally unencumbered by obligations to respond to challenges that government lacked the authority to divest or that its and private entities' actions violated individuals' liberty, equality, or dignity. What is *new* is the development of constitutional constraints imposed on a host of activities. Extensive regulation of police, courts, and prisons is a twentieth-century phenomenon; private forms of these services are not.

The relatively recent imposition of such constraints clarifies the stakes: whether the legal standards forged during the twentieth century will remain intact regardless of the identity of the service provider, and what shape and impact rights will have. In response, justices and commentators probe constitutional texts (such as clauses establishing branches of government, obliging the state to provide services such as health or education, or mandating respect for liberty, equality, and dignity) and political theories of sovereignty. Sometimes the issue is whether private actors may be permitted to do “public” work; in other cases, whether the work done ought to be understood as “public,” and in yet others, the needs of the proposed rights-holder. The case law focuses on a variety of markers (state funding, state regulation, state employees, state encouragement, the nature of the activity, the obligations entailed, the nexus between the state and the action, the dependency and needs of the persons affected, and the balancing of interests), as courts articulate tests about whether an activity or an actor ought to be seen to be “the state,” whether to require adherence to constitutional and regulatory precepts, and how to define the contours of constitutional rights regardless of whether public or private sector entities imposed a harm.

A central question lacing the materials is whether the frame proffered—public/private—is helpful. The puzzles are not only about the challenges of identifying state functions and the permissibility of their devolution or outsourcing to private parties or to other governments, but also about what turns over the long run on the shift from one provider to another.

Why might one care if services come in the name of the state, and from those employed by the state? What are the implications of categorizing a good, service, or function as “public” or “private”? Does the importance derive from the relationship of those categories to regulation and the consequences for liability and remedy rules? From empirical findings that different sectors are welfare-maximizing? From the need to develop a socio-political identity for the state and its citizens through the relationships between states and individuals that develop as a result of government-provided services? Are responses to these specific to particular constitutional texts or do transnational constitutional principles emerge when courts insist on their authority to mark boundaries of sovereignty and rights?

PUBLIC AND PRIVATE PRISONS AND POLICE

Incarcerating

The Israel Private Prison Litigation

In 2004, the Israeli Knesset enacted the Prisons Ordinance Amendment Law (amendment no. 28), which was the first to authorize a private, for-profit corporation to operate a prison in Israel. In 2005, the Academic Center of Law and Business, a private entity “acting as a public petitioner” and joined by a retired member of the Israeli Prison Service and later by a prisoner, brought a facial challenge to the legislation. They argued that amendment No. 28 violated the Israeli Basic Law on Human Dignity and Liberty, and specifically Section 2 (“one may not harm the life, body or dignity of any person”); Section 5 (“There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition, or otherwise”); and Section 8 (“There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”).

The government defended in part by proffering an expert opinion, by a UK-based professor, Jeffrey Jowell, on “the constitutionality of the contracting out of executive functions in general . . . [and] prisons in particular . . . and how the constitutionality of the Law would be assessed” by the European Court of Human Rights (ECtHR), the European Court of Justice, Great Britain, and South Africa. Jowell’s opinion, filed in 2006, noted that “no claims have been raised” in those jurisdictions on the privatization of prisons and that, in his view, none would be successful “inter alia because of the economic character of the issue and

the lack of a ground of incompatibility with the provisions of the European Convention on Human Rights [ECHR].”

Opinion of Jeffrey Jowell*

Academic Center of Law and Business v. Minister of Finance
Supreme Court of Israel
Case No. HJC 2605/05 (Aug 20, 2006)

. . . 7. As regards the United Kingdom (“UK”): . . . [T]here would be no violation of constitutional principle or human rights protection since contracted-out prisons are not shielded from a minimum degree of political and legal accountability. . . .

29. [P]erceptions of the appropriate scope of governmental power have varied over time. Until the late 19th Century the state performed the minimal functions of foreign affairs, defence, taxation and the keeping of the Queen’s peace. During the first half of the 20th Century increasingly interventionist governments added to the list of necessary governmental functions. Thus the Labour Government of 1945 nationalised industries . . . considered imperative for national security (such as coal, steel, railways etc.) and . . . for the state to control the ‘commanding heights’ of the economy.

30. However, in the latter quarter of the 20th Century the state increasingly divested itself of those functions, largely in the interests of efficiency. The boundaries of the state . . . contracted, and it became clear that a number of functions . . . earlier regarded as essential components of governance were matters of political, economic and social preference: a preference properly, in a democracy, left to the choice of the electorate. . . .

31. [T]here is no clear understanding of what constitutes a “core” function of the executive. . . . [But the] Royal Prerogative may be defined as that legacy of common law authority in the hands of the Crown. It includes treaty-making, defence of the realm (from internal and external threat), prosecution powers, the dissolution of Parliament etc. It has never been suggested that powers of detention

* Editors’ Note: Some of the paragraphs in this excerpt, as the numbering suggests, have been rearranged.

of prisoners come within the definition of prerogative powers, or . . . ‘keeping of the Queen’s peace’ or defence of the realm.

32. In the absence of . . . actual criteria of a core function, . . . it should be regarded as one which involves decisions on fundamental matters of *policy* for which the decision-maker must remain politically and legally accountable. Such a power should not be delegated if the result would be to insulate the decision-maker from political or legal responsibility. . . .

8. As regards South Africa: [A]ll human rights may be limited in accordance with the standard of proportionality. . . .

The Constitution expressly defines executive powers, but does not list the running of prisons among them. . . .

South Africa has embarked on a programme of privatisation of some industries and the contracting out of some governmental functions, including prisons

[T]he Constitutional Court has recently held that courts should not stand in the way of contracting out . . . aimed at pursuing the effective ordering of society [and] that the substance rather than the form of contracted-out bodies should result in their being treated as performing public functions and therefore subject to legal accountability as organs of the state. . . .

10. As regards the European Convention on Human Rights: The European Court of Human Rights [ECtHR] has established that the fundamental rights protected in the Convention are enforceable against ostensibly private bodies where (as in the contracting out of prisons) the state has retained a high level of responsibility for their regulation.

The Convention does not contain any impediment to contracting out and any challenges would fail where the state has retained a sufficient degree of regulatory control over the contracted-out enterprise. . . .

129. [T]he ECtHR . . . has held State Parties responsible for the acts of ostensibly private bodies where . . . the state [was] sufficiently involved in the operation or [when] the state has failed to take positive steps to prevent the violation by a private body. *Costello-Roberts v United Kingdom* (1993) concerned corporal punishment by the headmaster of a private school which a pupil . . . alleged constituted violations of his rights to be free from inhuman and degrading treatment or punishment and to respect for his private life. The UK government denied that it was responsible . . . since the school was not publicly funded and

was not under the direct control of the Department of Education. The Court rejected this argument:

[T]he State cannot absolve itself from responsibility [under Article I to secure the Convention's "rights and freedoms"] by delegating its obligations to private bodies or individuals. . . .

Academic Center of Law and Business v. Minister of Finance
Supreme Court of Israel
Case No. HJC 2605/05 (2009)

President D. BEINISCH

. . . The arrangement provided in amendment 28 leads to a transfer of basic powers of the state in the field of law enforcement—imprisonment powers—the exercise of which involves a continuous violation of human rights, to a private profit-making corporation. . . . [T]his transfer . . . violates the constitutional rights . . . enshrined in the Basic Law: Human Dignity and Liberty. . . .

12. [A]lthough the governor of the privately managed prison was not given important powers . . . given to the governor of an Israel Prison Service prison (including the power to extend the period for holding an inmate in administrative isolation for more than 48 hours and jurisdiction regarding prison offences), the law still gives him powers that, when exercised, involve a serious violation of the rights to personal liberty and human dignity. These powers include, *inter alia*, the power to order an inmate to be held in administrative isolation for a maximum period of 48 hours; . . . the conducting of an external examination of the naked body of an inmate; . . . the taking of a urine sample from an inmate; . . . [approval of] the use of reasonable force in order to carry out a search on the body of an inmate; . . . to order an inmate not to be allowed to meet with a particular lawyer, . . . [as well as the authority] to use a weapon . . . to prevent . . . escape . . . [and the power] to arrest and detain a person without a warrant . . . and . . . to carry out a search . . . of an inmate when . . . admitted . . . and during his stay in the prison. . . . [An] employee of the concessionaire . . . is also entitled . . . to use reasonable force and to take steps to restrain an inmate

14. [A] law passed by the Knesset . . . enjoys the presumption of constitutionality [T]he court should . . . strik[e] a delicate balance between the principles of [1] majority rule and the separation of powers, . . . and [2] the protection of human rights and the basic values underlying the system of government in Israel

17. [O]ur deliberations . . . are based on the premise that imprisoning a person and holding him in custody . . . violates [the] . . . right to liberty and freedom of movement. . . . even when the imprisonment is lawful. . . . [T]he loss of personal liberty and freedom of movement of an inmate . . . inherent in the actual imprisonment, does not justify an additional violation of the other human rights . . . [that are] not required by the imprisonment itself or in order to realize an essential public interest recognized by law. . . .

20. [L]ike all human rights, the right to personal liberty . . . is not an absolute right. . . .

23. [In] *Leviathan*, . . . published in 1651, Thomas Hobbes [said]: . . .

Publique Ministers are also all those, that have Authority from the Sovereign, to procure the Execution of Judgements given; to publish the Sovereigns Commands; to suppress Tumults; to apprehend, and imprison Malefactors; and other acts tending to the conservation of the Peace. For every act they doe by such Authority, is the act of the Common-wealth; and their service, answerable to that of the Hands, in a Bodie naturall

[John] Locke . . . presents his position that society rather than each of the individuals within it has jurisdiction regarding offences and the punishment for them

25. [F]rom a normative viewpoint, the decision of the competent courts . . . to sentence a particular person . . . is the source of the power to violate the constitutional right of . . . liberty. But the actual violation of the right . . . takes place on a daily basis as long as he remains an inmate

28. [A] prison, even when it operates within the law, is the institution in which the most serious violations of human rights that a modern democratic state may impose on its subjects may and do occur. . . .

[T]he power of imprisonment and the other invasive powers . . . are . . . some of the state's most distinctive powers as the embodiment of government, . . .

[reflecting] the constitutional principle that the state has a monopoly upon exercising organized force . . . to advance the general public interest. . . .

30. [T]he inmate of a privately managed prison is exposed to a violation of his rights by a body . . . motivated by . . . interests . . . different from [what] motivates the state The independent violation of the constitutional right to personal liberty . . . exists even if we assume that from a factual-empirical viewpoint it has not been proved that inmates in that prison will suffer worse physical conditions and invasive measures than those in the public prisons. . . .

34. [A]mendment 28 also violates the constitutional right to human dignity . . . enshrined in section 2 of the Basic Law

36. [I]mprisoning inmates in a privately managed prison . . . run with a private economic purpose *de facto* turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit. . . . [T]he very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of . . . human dignity . . . does not depend on the extent of the violation of human rights that actually occurs behind the prison walls. . . .

37. [This] violation . . . is not [based on] the subjective feelings of those inmates, but an objective violation of their constitutional right to human dignity.

38. An additional aspect of the violation of . . . human dignity . . . lies in the social and symbolic significance of imprisonment in a privately managed prison. . . .

[T]his approach requires us to examine the significance that Israeli society attached to a prison . . . operated by a private corporation

39. [T]his action—both in practice and on an ethical and symbolic level—expresses a divestment of a significant part of the state's responsibility for the fate of the inmates

44. [T]he rights to personal dignity and human dignity . . . are not absolute

[T]he limitations clause [section 8 of the Basic Law] provides that four cumulative conditions need to be satisfied . . . : the violation of the right should be made in a law (or by virtue of an express authorization in a law); the law should benefit the values of the State of Israel; the purpose of the law should be a proper one; and the violation of the constitutional right should not be excessive. . . .

47. [W]e are prepared to assume for the sake of argument . . . the rational connection regarding the purpose of amendment 28

48. The second test of proportionality is . . . the least harmful measure test, which requires that . . . the measure that violates the protected constitutional right to the smallest extent should be chosen. . . .

50. The third subtest of proportionality . . . is essentially an ethical test . . . [of] whether the public benefit . . . is commensurate with the damage to the constitutional right caused by that act of legislation. . . .

51. [W]hen the power to deny the liberty of the individual is given to a private corporation, the legitimacy of the sanction of imprisonment is undermined and the extent of the violation of liberty is magnified. . . .

52. [T]he state argued that this benefit . . . achiev[es] a significant financial saving, which . . . is expected throughout the whole period of the concession . . . to reach the amount of NIS 290-350 million, while improving prison conditions for the inmates. . . .

54. [T]he violation of the inmates' human rights . . . occurs continuously for as long as an inmate is . . . subject to the authority of . . . a private concessionaire. . . .

55. [W]hen we balance the violation of the human rights of prison inmates as a result of their being imprisoned in a privately managed prison . . . against the realization of the purpose of improving prison conditions while achieving greater economic and administrative efficiency, the constitutional rights to personal liberty and human dignity are of greater weight. . . . Indeed, in so far as the state is required to improve the prison conditions of inmates—a proper and important purpose—it should be prepared to pay the economic price . . . , and it should accept that 'efficiency' . . . is not a supreme value

57. [W]e think it right to address in brief the parties' arguments regarding the phenomenon of prison privatization around the world. . . .

58. 'Privatized' prisons operate today in various countries . . . differ[ing] . . . both in the spheres of activity . . . that can be privatized and in the degree of the state's supervision [I]n the United States . . . private concessionaire[s have] the responsibility for all of the aspects involved in managing and operating the prison In Britain . . . the scope of the powers . . . is more limited . . . than in the American model. . . . [A] different model of prison privatization has been adopted in France (and in Germany). . . . [P]rivat

concessionaires were not given all of the duties and powers involved in managing and operating a prison, but . . . only those relating to logistic services. . . .

61. [A] comparative analysis . . . shows that no court has yet held that the privatization of prisons is unconstitutional. . . .

62. [D]ifferent countries are likely to have different outlooks on the subject of the duties and obligations of the state in general and of the government in particular. . . . The main concern raised in [the academic] literature is that economic considerations will give the private enterprise . . . an incentive to increase the number of inmates . . . , extend their terms of imprisonment or reduce prison conditions . . . in such a way [as to] lead to a greater violation of the inmates' human rights [than] . . . necessitated by the actual imprisonment. Moreover, . . . parties with economic interests will have an influence on the length of the terms of imprisonment and the types and levels of sanctions. . . .

63. [Section] 1 of the Basic Law: the Government, which provides that 'The government is the executive branch of the state,' is essentially a declarative section . . . intended to establish in principle the role of the government in the Israeli constitutional system. There is therefore a difficulty in using it as a basis for arguments against the constitutionality of the privatization of various government services. . . . [Section] 1 . . . does not expressly determine specific duties or spheres of activity where the government has an exclusive responsibility to act. Notwithstanding, . . . we are inclined to interpret [this] provision . . . in a manner that enshrines on a constitutional level the existence of a 'hard core' of sovereign powers that the government as the executive branch is liable to exercise itself and that it may not transfer or delegate to private enterprises. . . . [T]he powers involved in the imprisonment of offenders and in the use of organized force on behalf of the state are indeed included within this 'hard core.' Naturally, adopting an interpretation of this kind will require us to define clearly the limits of that 'hard core,' since it may be assumed that there is no constitutional impediment to privatization of the vast majority of services provided by the state, and this matter lies mainly within the scope of the discretion of the legislative and executive branches. [Given our reliance on prisoners' rights to liberty and dignity], we are not required to make any firm determination [on] the interpretation of [Section] 1

65. [O]ur conclusions . . . do not express any opinion on the legality of the privatization of government services in other fields (such as health, education and various social services) . . . different from the powers involved in holding prison inmates under lock and key. . . .

69. [S]ince the privately managed prison whose establishment is regulated by amendment 28 has not yet begun to operate, we see no reason to suspend the declaration that amendment 28 is void. . . .

* * *

The judgment of President Beinisch was joined by Vice-President Rivlin, and Justices Procaccia, Grunis, Naor, Arbel, Joubran and Hayut. Justice Levy dissented. Brief excerpts from a few of the lengthy concurrences detail some of the differences in the analyses.

Justice Arbel wrote:

. . . 4. [G]ranting a power to employ invasive powers of these kinds [to a private body] . . . no longer relies on the broad consensus that is intended to allow a safe society, but on a shirking of a significant part of the direct responsibility and the need for accountability. It abandons the prison inmate, who is already at the bottom of the social ladder and in a sensitive and vulnerable situation, to his fate.

5. [T]he main goal of exercising the power of imprisonment openly and unashamedly becomes a business goal; the inmates become *de facto* a means of realizing this goal; the ‘customers’ to whom the corporation is accountable are its shareholders; the scope of considerations is restricted and may become distorted; and the public purposes underlying imprisonment unintentionally become a secondary goal. The aspiration to reduce costs, which according to the supporters of the market economy approach is restrained in ordinary business activity by the ‘concealed hand’ in . . . competition, has no restraint . . . where there is no competition

[T]he transfer of the power . . . to a private enterprise . . . undermines the moral authority . . . and public confidence This is not a mere matter of aesthetics; the harm is real . . . [and] results in an independent violation of the right of prison inmates to dignity. . . .

Justice E. Hayut thought that the amendment posed difficulties from “the perspective of the general public” by undermining the “the Social Contract . . . invented by the fathers of modern political thought [T]he divestment by the state of its powers of imprisonment . . . given by the Social Contract violates the

terms of that contract and the fundamental principles on which the whole system of government is based and on which law-abiding citizens and victims of crimes rely”

Justice S. Joubbran concluded that “the essence of the prison cannot be summarized by the actual loss of liberty This phenomenon of the prison and the development of its nature as a sanction carried out by the modern state are aptly described by the French philosopher Michel Foucault in his book about the ‘birth’ of prisons . . . [as] ‘an exhaustive disciplinary apparatus.’

[T]he transfer of the management of a prison to private hands . . . constitute[s]. . . the divestment by the state of a central layer in its sovereign authority to punish its citizens. . . . [A]ll of [inmates’] lives inside the prison walls, *beyond* the actual decision to imprison them, are replete with the exercise of sovereign force, which regulates and disciplines their lives and their bodies. The transfer of these powers over the inmates to private hands effectively makes [inmates] ‘*pseudo*-subjects’ of the private enterprise. . . .”

Justice M. Naor focused on the line between permissible “delegation of administrative powers [that] allows the state to avail itself of the ‘assistance’ of a private enterprise” and impermissible use of the concessionaire “as an extension of the state in order to exercise one of its main and most invasive powers—the power to *enforce the criminal law and to maintain public order*. . . . The power given to *manage the prison*—the exercise of authority, power and discipline—is clearly recognized as one of state sovereignty and requires discretion when exercising it.” Further, “both the sanction (imposing the custodial sentence) and its actual enforcement (in the prison) are a part of the ‘process of administering criminal justice’ and both involve the exercise of discretion.”

In his view, the law violated “the principle of equality between inmates [by creating a] distinction between . . . one group [that] will be imprisoned in a private prison that is managed by a profit-making concessionaire, and the other group . . . in a *state* prison The first group . . . is discriminated against . . . since the private profit-making enterprise is not subject to the same ‘civil service ethos in the broad sense of this term’ . . . ; it is tainted by an inherent conflict of interests in exercising sovereign authority, because it . . . is motivated by considerations of profit This is an *a priori* conflict of interests that does not require any specific factual proof.” Further, the equality violation also produced a violation of human dignity “with respect to a very weak and vulnerable sector of society.”

He added that the judgment “does not determine any hard and fast rules regarding the broad range of products and services that may be privatized. The ‘age of privatization,’ which seeks to reduce government involvement in economic and social life, includes a broad range of matters that may fall within its scope Public law is one entity, but its application may change from one type of privatization to another and according to the circumstances of the case.”

* * *

DISSENTING OPINION OF JUSTICE E.E. LEVY

. . . 2. [I] am in complete agreement with . . . the need to guarantee the basic rights of the inmates. . . . [From the rights of liberty and dignity] one can derive . . . the right to proper prison conditions, which has aspects of a social right that addresses the position of a prison inmate in society both before . . . and after . . . sentence. As such, the state has a central role in realizing it: ‘Social rights have huge importance from the viewpoint of the weaker echelons of society, who particularly require help and protection from the public administration. Social rights require considerable involvement on the part of the public administration.’

3. [B]ecause of budgetary and other crises, the subject of imprisonment [is] frequently relegated to a low place in the . . . government’s priorities. . . .

[A]pplications . . . to the courts . . . portray . . . a chilling picture of what happens in the prisons, despite the efforts of the Israel Prison Service to improve the situation. [Cases have detailed]

‘[b]latant departures from the minimum requirements for holding persons under arrest . . . , especially with regard to the problem of overcrowding and overpopulation and the lack of sufficient living space for each person, sleeping on the floor without a bed, the lack of cleanliness and sanitary rules and the lack of sufficient ventilation.’ . . .

[I]n the current situation the basic rights of inmates are being seriously violated:

‘Israel still has a number of prisons in unsuitable buildings and in a terrible physical state, completely unsuitable for holding prisoners and caring for them. In addition, there is severe crowding in Israeli prisons, that among other things results in hundreds of prisoners sleeping on mattresses on the floors of their cells.’* . . .

4. Amendment 28 of the Prisons Ordinance is an innovation . . . based on two foundations . . . : an improvement in professionalism . . . and [in] economic efficiency

[D]ealing with complex management tasks is often beyond the capabilities of government officials, and they do not have the same degree of success as persons in the private sector, who acquire . . . expertise in carrying out these tasks. . . .

6. I am prepared to agree that the privatization of prison services inherently exacerbates the violation of the dignity of the prison inmate. There is an element of humiliation in a person knowing that another, who is no different from him, is responsible for his imprisonment and exercises force to deprive him of what only the state usually has the power to deny, while that other is deriving a personal profit . . . from that imprisonment. . . .

7. The economic incentive is merely a tool in the service of the public interest. The financial profit is merely a means of achieving the purpose of the amendment, . . . an improvement in prison conditions and making the prison system more efficient. The degree to which it is possible to further this purpose depends, *inter alia*, on the incentive mechanisms stipulated in the arrangements . . . and on their proper functioning. . . .

9. [I]f it is found that the amendment of the Prisons Ordinance is incapable of achieving the purpose for which it was intended (the first test of proportionality), or, alternatively, if it is possible to point to an executive act that will violate the protected right to a lesser degree (the second test of proportionality), then it is possible to reject the executive act that causes the violation

First, . . . it is not possible to ignore the fact . . . that there are other cases where the privatization of core powers has already become firmly rooted in our legal system and . . . that we have become reconciled to them. . . .

* Uri Timor, Privatization of Prisons in Israel: Gains and Risks, 39 ISR. L. REV. 81, 100 (2006).

Second, we should set against the concern of a disproportionate violation of protected rights the supervisory mechanisms that have not been omitted from the normative arrangements surrounding the operation of the private prison. . . .

12. . . . The heart of the matter is the principle of state sovereignty. An accepted outlook is that the sovereign state contributes to the combined happiness of its subjects by guaranteeing their safety and welfare. It is also possible to say that each member of the community has ‘a civil genetic code,’ which leads him to define himself not only as an independent and separate entity but also as a part of a larger social-human fabric, of which the prime expression today is the sovereign state. An important theoretical basis for the principle of sovereignty lies in the concept of the social contract, which is a cornerstone in the life of modern civil society. . . .

The modern state is a developing and changing entity, and the arrangements in force in it also reflect the changes in the times, without this implying that the state has lost its sovereignty. . . .

[A]n attempt to rely on a general reference to the ‘social contract’ as support for an approach concerning the process of privatization will . . . have difficulty in succeeding. It is admittedly possible to speak of an ‘Israeli social contract,’ but then it will be necessary to give this idea content and outline its boundaries, . . . [and] to what extent this or any other outlook is incorporated in the concept of privatization. . . .

17. . . . [T]he basic principle on which the opposition to the privatization of prisons is based—that the sovereign authorities should have a monopoly on sovereign power—may be regarded as a basic constitutional principle even though it does not directly relate to human rights. The same is true with regard to the idea that undermining the symbols of sovereignty—for example by allowing prisons to be run by employees of a private concessionaire who will not wear state uniforms or don its symbols—may obscure the representative character of the state authorities, its image and its status as the source of the power to impose sanctions, thereby leading to a contempt for the law, enforcement and sentencing. . . .

19. . . . [R]esorting to these constitutional or quasi-constitutional tools has not yet found a firm foothold in our law. Adopting an approach of this kind amounts to the beginning of a new constitutional era, a fourth age, whose boundaries have not yet been sufficiently outlined

[W]e are . . . entering a legal field that . . . has not become established case law. It is possible that it is also for this reason that my colleagues decided to focus their consideration . . . on rights, a very fertile soil which has been well cultivated in our legal system. . . .

The Costa Rica Private Prison Litigation

The General Directorate of Social Adaptation of the Ministry of Justice and Grace of Costa Rica, assisted by its National Tender Board, opened bidding for new prison facilities to invite “the introduction of private capital and management experience into the prison system. . . .” The government explained that it aimed

1—to protect the Costa Rican public by keeping individuals sent to prison . . . in a safe, secure, healthy and dignified environment; 2—to reduce crime by giving prisoners a constructive regime to counteract offensive behavior, improve educational and work skills and promote law-abiding behavior, both during custody and after release; 3—to introduce new and efficient prisoners programs and facility management techniques . . . and 4—to ensure all the above . . . in a cost-effective manner

Bidders were to build according to government specifications and “at a fixed cost and by a guaranteed completion date [and to] secure all necessary funding for the design and construction,” to “maintain facilities” in accordance with government standards, and to run “daily operations . . . including . . . security, programs, management of the prisoners, and other supplementary functions”

José Manuel Echandi Meza and Max Alberto Esquivel Faerrón (the Ombudsman and Deputy Ombudsman of Costa Rica, statutorily empowered to investigate individual claims that the government had violated their rights or used powers beyond those authorized), challenged the January 2002 award to Management and Training of Costa Rica, LLC. They sought a declaration that both the act and “International Public Bid No. 02-2001 . . . for the Design, Construction, Financing, Operation and Maintenance of Pococí Penitentiary” violated “the constitutional principles of the separation of state powers, of the non-delegability of public powers, of legality and due process, and affects the

powers of the executive branch [granting] . . . the contractor . . . powers belonging solely to the Costa Rican government.”

The Ombudspersons alleged that “activities involving the exercise of public powers (‘potestades de imperio’) [were] not subject to contracting, because they [were] state functions [that could not be] concessioned. . . . [Included were] national defense and security, taxation, immigration, administration and surveillance, and penal services involving police power.” They argued that it was “unconstitutional to contract out functions involving the security and custody of prisoners, as it is the responsibility of the state to execute and enforce all resolutions . . . issued by the courts . . . and [the responsibility] of the President and Minister of Interior to deploy the police power to preserve the order, defense and security of the nation, as provided in Article 140 paragraphs 9) and 16) of the Constitution. . . .”¹ Further, “the principle of humanity must prevail in the execution of sentences and resocialization and rehabilitation are functions that cannot be delegated.”

Supreme Court of Costa Rica
Decision No. 10492 (2004) *

. . . [The company and its architects responded] that the contested measures do not involve the privatization of Pococi Penitentiary [because it would] . . . operate under the same principles and regulations as any other national penitentiary . . . [and, that] the state will retain all public powers and that the contractor shall be subject to surveillance, supervision and constant monitoring. . . .

VI. [A]rticle 9 of the Constitution provides:

“ . . . The Government of the Republic is popular, representative, participatory, alternating, and responsible. It is exercised by the

¹ The Constitution of Costa Rica, article 140, provides:

The following are joint powers and duties of the President and the appropriate Cabinet Minister: . . . 9) To execute and enforce all resolutions and provisions on matters within their jurisdiction entered and issued by the Courts of Justice and electoral organizations, at their request; . . . 16) To dispose of the law enforcement forces to preserve the order, defense, and security of the country . . .

* Translated by Andrea Scoseria Katz.

people and three distinct and independent branches, the legislative, executive and judicial.

None of the branches may delegate the exercise of functions belonging to it. . . .”

[W]ith regard to . . . actors who may be allowed to carry out public functions (licensees, permittees, managers), none of these shall be authorized to perform duties involving the exercise of core state powers. . . . Article 74 of the Administrative Contracting Act [specifies]:

“[T]he government can manage, indirectly and by concession, services under its jurisdiction which, by their economic nature, may be subject to commercial operation. This concept may not be applied when the service involves the exercise of state powers or legal authority. . . .”

VII. [T]he Costa Rican legal system is based on a clear division of powers among the different constitutive bodies of the penal system. . . . [C]onstitutional Article 39* reserves to public authority the power to set criminal offenses and penalties for harmful acts of real legal significance. This standard, in accordance with section 153 of the Constitution,** confers to the judiciary a monopoly on the processing and resolution of criminal proceedings

[I]t is clear that many of the activities . . . in the administration of the correctional system involve the use of state powers, . . . even authorizing the use of physical force in exceptional cases . . . to ensure peaceful cohabitation within the prison If through the contracting process. . . , the state should cede some of its core powers by delegating to a private individual or body the exercise of [these core powers], [this] would be contrary to the . . . Constitution. . . .

* Editors' Note: Article 39 of the Constitution of Costa Rica provides:

No one shall be made to suffer a penalty except for crime, unintentional tort or misdemeanor punishable by previous law, and in virtue of final judgment entered by competent authority, after opportunity has been given to the defendant to plead his defense, and upon the necessary proof of guilt. . . .

** Editors' Note: Article 153 of the Constitution provides:

[T]he Judicial Branch shall hear civil, criminal, commercial, labor, and administrative-litigation cases . . . ; enter final resolutions thereon and execute the judgments entered, with the assistance of law enforcement forces, if necessary.

IX. [W]hile the design, construction and maintenance of prisons are state functions, . . . nothing prevents the execution of such tasks from being contracted out to a third party, even a privately-held company. . . .

[The bid makes] clear that the licensing authority expressly recognizes that the administration of penal and criminological activities is the government's responsibility, so that the licensee's function . . . shall be limited to that of a mere collaborator. . . . Thus, the direct use of force, decision-making and sentencing powers, the exercise of disciplinary authority, etc., are not faculties intended to be transferred to the contractor. . . .

XII. [T]his Court must determine whether the duties assigned to the contractor in [the bid] are constitutionally valid, insofar as they grant it the authority to carry out disciplinary procedures against inmates who . . . have breached . . . prison rules. . . . [D]ecisions made by the contractor imposing punishments upon detainees may be "appealed before the relevant government authorities" [The specific provisions of the bid] would not be valid if these provisions transferred any sentencing power . . . to the contractor. . . . [T]his Court believes that it is possible to give these [provisions] an interpretation conforming to the Constitution. . . . The contractor's actions should be limited to those of procedural oversight, with sufficient capacity to conduct investigations, collect necessary evidence, address inquiries by interested parties and issue final reports, which may even contain recommendations regarding the decision to be adopted in the case However, the public authorities shall be responsible for making the appropriate determination in each case, which may be based on the non-binding recommendations issued by the contractor Thus applied, the clauses in question are not contrary to the . . . Constitution.

Police, Peace, and Security

At issue in the Indian *Sundar* case, excerpted below, was the constitutionality of The Chattisgarh Police Act of 2007, which provided:

. . . Section 9(1): . . . The Superintendent of Police may at any time, by an order in writing, appoint any person to act as a Special Police Officer

Section 9(2): Every special police officer . . . shall have the same powers, privileges and . . . duties . . . as the ordinary officers

Section 23: The . . . functions and responsibilities of a police officer [include]:

(1) (a) To enforce the law, and to protect life, liberty, property, rights and dignity of the people; . . .

(d) To preserve internal security, prevent and control terrorist activities and to prevent breach of public peace; . . .

(j) To gather intelligence relating to matters affecting public peace and crime;

The Chattisgarh Act was related to the Indian Police Act of 1861, providing that “[w]hen it shall appear that any unlawful assembly or riot or disturbance of the peace has taken place . . . and that the police force . . . is not sufficient for . . . the protection of the inhabitants . . . it shall be lawful for any police-officer . . . to appoint . . . residents of the neighborhood . . . as special police-officers for such time and within such limits as he shall deem necessary” Further, “[e]very special police-officer so appointed shall have the same powers, privileges and . . . duties . . . as the ordinary officers”

In 2007, Dr. Nandini Sundar, a sociologist, Dr. Ramachandra Guha, a historian, and E.A.S. Sarma, a former civil servant in the Indian government challenged Chattisgarh’s appointment of Special Police Officers (“SPOs”) as violating India’s Constitution - specifically Articles 14 (“The State shall not deny to any person equality before the law or the equal protection of the laws”); Article 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”), and Article 355 (“It shall be the duty of the Union to protect every State against external aggression and internal disturbance”).

Nandini Sundar v. State of Chattisgarh
Supreme Court of India
7 S.C.C. 547 (2011)

1. We, the people as a nation, constituted ourselves as a sovereign democratic republic to conduct our affairs within the four corners of the Constitution, its goals and values. We expect the benefits of democratic participation to flow to us—all of us—[so] that we can take our rightful place, in the league of nations, befitting our heritage and collective genius. Consequently, we must also bear the discipline, and the rigour of constitutionalism, the essence

of which is accountability of power This case represents a yawning gap between the promise of principled exercise of power . . . and the reality . . . in Chattisgarh, where . . . the State . . . claims that it has a constitutional sanction to perpetrate, indefinitely, a regime of gross violation of human rights . . . by adopting the same modes[] as . . . Maoist/Naxalite extremists. The State of Chattisgarh . . . claims . . . it has the powers to arm, with guns, thousands of mostly illiterate . . . young men of the tribal tracts, . . . appointed as temporary police officers, with little or no training . . . to fight . . . against alleged Maoist extremists. . . .

3. [G]iven humanity's collective experience with unchecked power . . . resulting in the eventual dehumanization of all the people, the scouring of the earth by the unquenchable thirst for natural resources by imperialist powers, and the horrors of two World Wars, modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetrate state's violence against any one, much less its own citizens, unchecked by law, and notions of innate human dignity

4. [T]hat large tracts of the State of Chattisgarh have been affected by Maoist activities is widely known. . . .

6. That violent agitator politics, and armed rebellion in many pockets of India have intimate linkages to socio-economic circumstances . . . and a corrupt social and state order . . . has been well recognized. . . .

12. [T]he Constitution . . . demands that the State shall strive . . . to promote fraternity amongst all citizens such that dignity of every citizen is protected

13. Policies of rapid exploitation of resources by the private sector, without credible commitments to equitable distribution of benefits and costs, and environmental sustainability, . . . eviscerate the promise of equality before law, and equal protection of the laws, promised by Article 14, and the dignity of life assured by Article 21. . . . [T]he collusion of the extractive industry . . . and some agents of the State, necessarily leads to evisceration of the moral authority of the State

20. The primary task of the State is the provision of security to all its citizens, without violating human dignity. . . . To claim that [a] resource crunch prevents the State from developing appropriate capacity in ensuring security for its citizens through well trained formal police and security forces . . . would be an abandonment of a primordial function of the State. . . .

29. [Special Police Officers, SPOs] are paid a monthly honourarium of Rs 3000, of which 80% is contributed by Government of India

30. [The State of Chattisgarh contends]

(iv) That SPOs serve a critical role in mitigating the problem of inadequacy of regular police . . . ; that . . . at present the State only has a total of 40 battalions . . . ; that the shortfall is 30 battalions.

(v) That the appointment of SPOs is necessary because of the attacks against relief camps . . . by Naxals; that the total number of attacks by Maoists between 2005 to 2011 were 41, in which 47 persons were killed and 37 injured . . . ; that tribal youth are joining the ranks of SPOs “motivated by the urge for self-protection and to defend their family members/villages from violent attacks;”

(vii) That a total training of two months is provided . . . including: (a) musketry weapon handling, (b) first aid and medical care; (c) field and craft drill; (d) UAC and Yoga training; . . . (e) Law . . . ; (f) Human Rights and other provisions of Constitution of India . . . ; (g) use of scientific & forensic aids in policing . . . ; (h) community policing . . . ; and (i) culture and customs

41. We must . . . express our deepest dismay at the role of [the] Union of India [P]olicing, and law and order, are state subjects. However, for the Union of India to assert that its role . . . is limited only to approving the total number of SPOs, and . . . reimbursement of “honourarium” paid to them, without issuing directions as to how those SPOs are to be recruited, trained and deployed for what purposes is an extremely erroneous interpretation of its constitutional responsibilities Article 355 specifically states that “[I]t shall be the duty of the Union to protect every State against external aggression and internal disturbance”

42. [T]he financial assistance . . . given by the Union . . . is enabling the State of Chattisgarh to appoint barely literate tribal youth as SPOs. . . . That the Union of India has not seen . . . fit to evaluate the capacities of such tribal youth[,] . . . the dangers that they will confront, and . . . the adequacy of their training, is clearly unconscionable. . . . [T]he Union of India had abdicated its responsibilities

44. . . . [T]he lives of . . . youth appointed as SPOs are placed in grave danger 173 of them have “sacrificed their lives” in this bloody battle

48. . . . [G]iven the levels of education . . . and the training . . . , they would simply not possess the analytical and cognitive skills to . . . understand . . . the potential legal liabilities

55. . . . We simply fail to see how Article 14 is not violated in as much as these SPOs are expected to perform all the duties of police officers, be subject to all the liabilities and disciplinary codes, as members of the regular police force, and in fact place their lives on the line, plausibly even to a greater extent than the members of the regular security forces, and yet be paid only an “honourarium”

56. . . . The State of Chattisgarh has also revealed that 1200 of SPOs appointed so far have been dismissed for indiscipline or dereliction of duties [out of 6500 who have been appointed]. . . .

61. Article 14 is violated because subjecting such youngsters to the same levels of dangers as members of the regular force . . . would be to treat unequal as equals. . . . [T]he policy of employing such youngsters as SPOs engaged in counter-insurgency activities is irrational, arbitrary and capricious.

63. . . . The State, has been found to have the positive obligation, pursuant to Article 21, to . . . undertake those steps that would enhance human dignity, and enable the individual to lead a life of at least some dignity. . . .

64. To employ such ill equipped youngsters as SPOs . . . endanger[s] the lives of others in the society . . . [in] violation of Article 21 rights of a vast number of people in the society.

65. . . . [F]urther violations of Article 14 and Article 21 [come from paying] . . . only an honorarium to those youngsters, even though they place themselves in equal danger, and in fact even more, than regular police officers, is to denigrate the value of their lives. . . . [T]o engage them in activities that endanger their lives, and exploit their dehumanized sensibilities, is to violate the dignity of human life, and humanity. . . .

73. . . . [T]he State is using the engagement of SPOs . . . to overcome the shortages and shortcomings of currently available capacities and forces within the formal policing structures. . . . [S]uch actions . . . may be an abdication of constitutional responsibilities to provide appropriate security to citizens, by having an appropriately trained professional police force of sufficient numbers

and properly equipped on a permanent basis. These are essential state functions, and cannot be divested or discharged through the creation of temporary cadres with varying degrees of state control. They necessarily have to be delivered by forces that are and personnel who are completely under the control of the State, permanent in nature, and appropriately trained to discharge their duties within the four corners of constitutional permissibility. . . .

76. . . . [W]e hold that appointment of SPOs to perform any of the duties of regular police officers, other than those specified in Section 23(1)(h) and Section 23(1)(i) of Chattisgarh Police Act, 2007 [which provide authority to “help people in situations arising out of natural or man-made disasters, and to assist other agencies in relief measures” and to “To facilitate orderly movement of people and vehicles, and to control and regulate traffic”], to be unconstitutional. . . .

Private individuals become police through a variety of mechanisms, including through employment by private entities—a practice common in the United States. For example, Yale’s Police Department (YPD), founded in 1894, describes itself as one of the oldest, created because of “violent” encounters with some of the city police, of whom “Yale students were extremely distrustful.” As of 2012, the YPD had eighty-seven sworn officers, as contrasted with the 425-500 sworn officers working for the New Haven Police Department. Like the City’s police, Yale’s police are uniformed, investigate crimes, and “have full powers of law enforcement and arrest.”

The growth in Yale’s private police mirrors trends around the United States and beyond, as David Sklansky discusses in his analysis of the political theories that undergird private policing and the transnational human rights laws that might constrain it.

David A. Sklansky
*The Private Police**

. . . The fraction of security work contracted out by federal, state, and local governments [in the United States] increased from 27% to 40% between 1987 and 1995. . . . Much out-contracted security work consists of parking enforcement,

* Excerpted from David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

traffic direction and other tasks unlikely to bring the private employees into contact with the criminal justice system. Increasingly, though, government agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities A few municipalities have hired private security companies to provide general patrol services

[P]eacekeeping, property protection, and law enforcement are often considered the clearest examples of functions that are essentially and necessarily public, and therefore . . . the job of government. The idea here—loosely shared by John Locke and Max Weber, and latterly by Robert Nozick and Ronald Reagan—is that the very point of government is to monopolize the coercive use of force, in order to ensure public peace, personal security, and the use and enjoyment of property. (Hence the classic description of the libertarian ideal: “the night watchman state.”) . . .

On the other hand, private policing can easily be understood as the natural product of three paradigmatically private functions. The first is self-defense, widely viewed as an inherent right, particularly in America The second is economic exchange, the “free market” that . . . transformed the eighteenth-century constabulary from a civic duty to a specialized form of employment. The third is the use and enjoyment of property, generally thought to include the right of owners to place conditions on those invited onto their property.

. . . [P]rivate policing has been welcomed as more *flexible* than traditional, public law enforcement. Private guard companies, unlike public police forces, are free from civil service rules, reporting requirements, and the range of other rules characteristically imposed on government agencies. In addition, private companies lack many of the bureaucratic traditions that may handicap . . . the public police. . . .

. . . [P]rivate policing has been celebrated as more *accountable* than its public counterpart . . . [as it is required] to answer to the discipline of the market. . . .

. . . [F]inally, private policing has been thought beneficial because it *empowers* those it protects. . . . The argument here has two strands. The first is *individualistic*: it appeals to the notion that every citizen should take responsibility for his or her own protection, that it is ultimately enfeebling to depend on the government for protection. The second is *communitarian*: the idea here is that arranging for private policing generally entails a more or less voluntary association of residents or business owners that, in the process of

providing joint security, also builds social capital—which itself can help reduce crime. . . .

Each of these claimed advantages . . . has a flip side. . . . Where some see the greater flexibility of private policing, others see the threat of policing that is uncontrolled. . . .

[Private] guards are accountable exclusively to their customers. And even some of the customers, when they venture outside their own territory, may wish that the various uniformed patrol personnel they encounter were less proprietary, more answerable to the general public.

More broadly, there are grounds for doubting that market forces will deliver optimum levels of police protection. . . .

[D]ifferent explanations have been offered for the stunning growth of private policing in recent decades. The first . . . attributes it to ideological shift: police privatization . . . is part of a broader shift of resources and responsibilities away from government and toward the private sector. . . .

A second . . . explanation . . . [is the] significant increase in the amount of “public” activity taking place on . . . large, privately owned facilities such as shopping malls, office buildings, housing complexes, manufacturing plants, recreational facilities, and university campuses. . . .

[T]he most widespread explanation [is] the failure of public law enforcement to provide the amounts and the kinds of policing that many people want. . . .

[N]ot all of the growth in private policing has been driven by preexisting demand. Some of the growth has been fueled by crime-related anxieties that the marketing arms of private security firms, along with escalating coverage of crime by the news media, have helped to amplify

[S]ome part of the demand for private security services is . . . for keeping certain kinds of people—typically poor or members of racial minorities—out of the business districts, amusement parks, and residential areas that private guards are hired to patrol. Not only is this a demand the government has no business helping to meet; it is one that most people today believe that government should help suppress. . . .

David A. Sklansky

*Private Policing and Human Rights**

. . . It is not self-evident . . . that the language of rights is the most helpful tool for thinking about the non-utilitarian considerations raised by private policing. . . . [M]any of the concerns one might raise about private policing in terms of violations of human rights—concerns about detentions, uses of force, invasions of privacy, and interrogation tactics—can also be expressed in the language of welfare economics; deontological concerns about dignity, autonomy, and privacy can piggyback, as it were, on more prosaic, utilitarian concerns about police abuse and declines in the perceived legitimacy of the legal order. The main question with regard to these concerns is empirical, not moral or philosophical: to what extent, if at all, are private police more likely than public police to engage in abusive conduct? Adding the language of rights . . . does not help answer that question. Things are different with regard to concerns about democratic self-government . . . [which] do not easily piggyback on utilitarian considerations. But . . . concerns about democratic self-government are not naturally expressed in the language of human rights, either.

[T]he most important practical consequences of invoking the language of human rights [are that] it brings international law and international advocacy into the picture. . . . [Equality and dignity] might be thought violated when a state fails to provide all of the people within its borders with some basic, minimally acceptable level of police protection against private violence. The category may also include rights to democratic government: the right to “self-determination” recognized in the ICCPR [International Covenant on Civil and Political Rights] (art. 1(1)) and the ICESCR [International Covenant on Economic, Social, and Cultural Rights] (art. 1(1)); and the UDHR [Universal Declaration of Human Rights] rights to “take part in government . . . directly or through freely chosen representatives” (art. 21(2)); to “periodic and genuine elections” making “[t]he will of the people . . . the basis of the authority of government” (art. 21(3)). These rights might be thought violated when a state gives up too much control over the legitimate exercise of coercive force, effectively delegating governance to private parties. . . .

The recent decision by the Supreme Court of Israel [holding private management of a prison unlawful] . . . raises a number of questions. . . . [W]ould a non-profit corporation, highly attentive to costs and paying lucrative salaries [and providing private prison services], raise the issues? . . . [I]f the real problem is

* Excerpted from David A. Sklansky, *Private Policing and Human Rights*, 5 L. & ETHICS HUM. RTS. 112 (2011).

allowing prisons to be operated by *any* organization driven by economic considerations, then what is the difference between the state hiring a private organization and hiring private individuals . . . [who] usually perform their jobs in large part to make money, and—like a private organization— . . . have private goals that are typically very different from the goals of the government that hires them[?]

One way that hiring a private organization *is* different than hiring a private individual is that [it interposes] . . . an additional layer of bureaucracy between the government and the actions being carried out in the government's name, potentially impairing transparency and accountability. Hiring a private prison operator (or a private police force) may obscure lines of responsibility in a way that hiring guards (or police officers) does not. So delegating governmental power to a private *organization* may, in fact, threaten the project of democratic self-government in ways that entrusting governmental power to private *individuals* does not. . . .

[T]he right to minimally adequate protection against private violence really *does* seem like a principle that lends itself to the language of rights. It seems intuitively plausible that states have an obligation—at least moral, and possibly legal—to protect the liberty, security, and privacy of the individuals they govern against private attacks. . . .

[O]ver the long term, private policing can wind up displacing public law enforcement, rather than just augmenting it, by reducing demand for public police services among the wealthy and politically powerful. Along with private schooling and private medical care, private policing can easily become part of a “secession of the successful,” leading not just to unequal protection against private policing, but also to a decline, in absolute terms, in the quality of police protection provided to the poor and politically disempowered. . . .

[T]here is broad agreement that even the most minimal, stripped down account of human rights must include a right to physical security. . . . [A] right to protection against private violence is most naturally characterized as an “affirmative” rather than a “negative” right: a right to have the government do something [T]he right to protection against private violence is explicitly recognized in some domestic constitutions, has been found by courts to be implied in others, and is a growing fixture of international law, especially the case law of the European Court of Human Rights [in part due to] increasing concern for . . . women [T]here is a straightforward argument that human rights are violated when a state delegates too much responsibility for policing to private

parties and fails to provide a minimally adequate level of protection to everyone, free of charge. . . .

[T]he worldwide growth of private policing therefore raises real concerns about the commitment to provide all people with a certain minimally adequate level of protection against private violence. . . . [Yet that problem exists as well in that public] police forces have a long tradition of failing to provide poor neighborhoods the same level of protective services they provide wealthier areas—a disparity that can coincide, notoriously, with a concentration of certain kinds of repressive enforcement activities in poor neighborhoods. But public police forces, unlike private security firms, are at least nominally devoted to the egalitarian project of giving everyone some minimal level of safety and security. Moreover, inequalities in the level of public police protection require conscious, explicit decisions, which can make it politically cumbersome for the wealthy to fund only their own protection. Private policing makes it much simpler, maybe even inevitable. . . .

Private Armies and Surveillance

Governmental reliance on the private sector includes the use of for-profit security firms in theaters of war and for surveillance work. An example much in the news is that Edward Snowden was an employee of a private company, Booz Allen Hamilton, when, in June of 2013, he made U.S. national security documents publicly available. Questions of state identity, accountability, and redress lace this arena as they do policing and prisons. A glimpse of the magnitude of outsourcing and its political/legal implications in the United States comes from the brief excerpts by Jon Michaels, below.

Jon D. Michaels

Privatization's Pretensions *

. . . A large percentage of [the United States's] troop commitment in Iraq and Afghanistan is comprised of contractors. For example, a 2007 estimate had 180,000 contractors supporting roughly 160,000 [uniformed] troops in Iraq; to the extent official numbers list just the 160,000 [uniformed] military personnel, the

* Excerpted from Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010).

government can give the impression that [its] footprint is only half its actual size. As Charles Tiefer has written, the Pentagon “ardently desired . . . to keep the illusion of a low number of troops.” The illusion was certainly enhanced by efforts, intentional or not, to conceal military contracts by routing them through civilian agencies, to refer to contract services in official documents in generic and arguably misleading terms (such as “information technology” specialists rather than as “interrogators”), and to complicate the contracting processes such that the federal government still has trouble providing an accurate contractor headcount. . . .

This misperception of the [actual size and scope of the] war effort generates tangible effects that redound specifically to the executive’s benefit [vis-à-vis Congress and the electorate]. Concealing these costs, the people are less sensitive to the President’s handling (or mishandling) of the military campaign. In turn, the executive has more political capital and thus more maneuverability in conducting the war. Indeed, without contractors: (1) the military engagement would have had to be smaller—a strategically problematic alternative; (2) the United States would have had to deploy its finite number of active [uniformed] personnel for even longer tours of duty—a politically dicey and short-sighted option; (3) the United States would have had to consider a civilian draft or boost retention and recruitment by raising military pay significantly—two politically untenable options; or (4) the need for greater commitments from other nations would have arisen and with it, the United States would have had to make more concessions to build and sustain a truly multinational effort. Thus, the tangible differences in the type of war waged, the effect on military personnel, and the need for coalition partners are greatly magnified when the government has the option to supplement its troops with contractors. . . .

Jon D. Michaels

All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror^{*}

The “War on Terror” has dramatically increased the nation’s need for intelligence, and the federal government is increasingly relying, as it does in so many other contexts, on private actors to deliver that information. While private-

^{*} Excerpted from Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901 (2008).

public collaboration in intelligence gathering is not new, what is novel today . . . is that some of these collaborations are orchestrated around handshakes rather than legal formalities, such as search warrants [or government contracts], and may be arranged this way to evade oversight and, at times, to defy the law.

[In matters of domestic counterintelligence], there is no better ally than the private sector. Its comparative advantage over the government in acquiring vast amounts of potentially useful data is a function both of industry's unparalleled access to the American public's intimate affairs—access given by all those who rely on businesses to facilitate their personal, social, and economic transactions—and of regulatory asymmetries insofar as private organizations can at times obtain and share information more easily and under fewer legal restrictions than the government can when it collects similar information on its own. . . .

Perhaps the most infamous private-public intelligence partnership has involved the major telecommunications companies granting the [National Security Agency (NSA)] warrantless access to monitor international telephone calls and electronic correspondences, even when at least one of the targeted parties was a U.S. person acting on American soil. Under the so-called Terrorist Surveillance Program (TSP), which President Bush reportedly authorized in a secret executive order, the NSA listened in on “as many as five hundred people in the United States at any given time,” cumulatively spying on millions of Americans' telephone calls and email correspondences.

Evidently, among other things, the NSA “secretly arranged with top officials of major telecommunications companies to gain access to large telecommunications switches carrying the bulk of America's telephone calls,” and the companies granted that access “without warrants or court orders.” . . .

[O]bservers were equally surprised by the telecommunications companies' complicity. . . . [B]efore September 11, FedEx would hardly have been considered a dependable ally of America's law-enforcement agencies. Citing customer privacy concerns, FedEx routinely refused to grant the government access to its databases and frequently denied law-enforcement requests to lend uniforms and delivery trucks to agents for undercover operations. But since September 11, the courier company has reportedly placed its databases at the government's disposal and, among other things, demonstrated a willingness to open suspicious packages at the government's informal request (i.e., without a warrant), something that the United States Postal Service (USPS) cannot legally do, and something that United Parcel Service (UPS) reportedly has refused to do. . . .

[S]ometime after September 11, the U.S. government gained unprecedented access to the world's banking databases through its new relationship with the Society for Worldwide Interbank Financial Telecommunications (SWIFT). SWIFT is a Belgium-based cooperative that serves as "the central nervous system of international banking." It carries information for nearly 8,000 financial institutions on up to 12.7 million financial transactions a day, leading American officials to call SWIFT's databases a "unique and powerful window into the operations of terrorist networks." . . .

[I]nformal intelligence-gathering arrangements may produce at least three sets of structural or institutional harms as well. One of these harms is the creation of an accountability gap, as informal collaborations are masked from Congress and the courts. The second results from privatizing sensitive responsibilities in a way that provides private actors with considerable power over personal information (far more than what they have when they possess the information outside of the intelligence-partnership context). A third is that informality may generate a ripple effect of questionable practices that reverberates throughout the federal government's regulatory and procurement realms. . . .

Judith Resnik

Globalization(s), Privatization(s), Constitutional-ization, and Stat-ization: Icons and Experiences of Sovereignty in the 21st Century^{*}

. . . What is the appeal of locating services as "governmental"? A central conceptual challenge for centuries past was how to legitimate authority to pursue collective aims. When god and monarchy no longer sufficed, the provision of "peace and security" became a pillar of sovereignty, manifested through the development of administrative capacities to police, adjudicate, and punish. Democratic regimes offered another basis, popular sovereignty, in which the relationship between citizen and state licensed governments to impose violence on their own populations. Constitutions—democratic and not—codified both that authority and its limits. Twentieth-century egalitarian movements, shifting the focus from nationalism to democratic self-governance, embedded another layer by

^{*} Excerpted from Judith Resnik, *Globalization(s), Privatization(s), Constitutional-ization, and Stat-ization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L. J. COMP. CONST. L. 162 (2012).

reading obligations into old constitutions and writing new ones to include all persons, regardless of race, ethnicity, and gender, within the circle of rights-holders. Aspirations for states expanded, as constitutions elaborated a range of rights beyond security. India's Constitution, for example, protects rights to education and access to legal aid; several of the constitutions in Central and South America elaborate environmental rights. But challenges of implementation and radical inequalities persist, posing renewed puzzles about how to legitimate collective action and expand opportunities across class lines.

Many tasks that have historically been associated with sovereignty—war-making, imposing taxes, and legislating—can be remote from wide segments of the population, either because the activities occur offshore, involve a small set of participants, are episodic, or concentrated at a single site such as the one city in which a legislature sits. In contrast, the institutions on which sovereigns have relied to monitor and control—police, courts, and prisons—turn the abstraction of government into a material presence, personifying the state and demonstrating its capacity to provide goods and services—peace and security—that have utilities for the private as well as the public sector. . . .

Through millions of exchanges, on street corners and inside courts and prisons, rules have been shaped expressing values about the relationship of governed and government. Practices in these institutions produce norms and ideologies that make words like “the police,” “the judge,” and the “prison warden” intelligible and laden with behavioral expectations. In many eras, those rules authorized autocratic power; hierarchies of status rendered some individuals abused on the streets, marginalized in courts, and mistreated in prisons, as the personages of police, judge, and custodian embodied inhospitable and often oppressive control.

More recently, democratic constitutions have added attributes modeling these state actors as accountable and constrained. Constitutional injunctions now frame the exchanges and require trained officials to treat individuals (suspects, detainees, litigants, witnesses) with dignity. . . .

The relationship between policing and state formation that turned the police officer into “the most visible representative of the state” has been charted, as have contemporary trends to privatize and to globalize policing. . . . I seek to anchor an appreciation both for the longevity of these institutions as sources of experiences of sovereignty and for the novelty of their current constitutional obligations. . . .

Although not often characterized as “social rights,” police, courts, and prisons are government-provided services to be added to a list usually referencing rights to education, health, and work. These older social rights are embedded in the broader effort to generate a secure environment in which political and economic institutions can function and prosper. Police, courts, and prisons have come to seem so natural to government as to go unnoticed as requiring significant state commitments supporting daily services. The infrastructures that legislatures have funded to sustain these functions (with occasional interventions by judiciaries and oversight through executive officials) illuminate the ways in which content could be given to more recently crafted social rights. And these exemplars prompt inquiry into what other infrastructure rights ought to be integrated into the political-social welfare activities of democratic states.

My argument is that these forms of identitarian interactions *become* state functions by placing them outside the purview of total third-party provisioning, even when, as the Israeli and Indian Supreme Courts exemplify, the decision to outsource may be the product of democratic decision-making. Other such rights need to be constructed—not essentialized but *made*—to enable individuals to experience democratic states as vital resources facilitating collective debate about the import of state identity and producing inter-generational benefits across class and racialized lines. The building of state and citizen relationships through experiences beyond Michel Foucault’s surveillance (even when disciplined by constitutional norms) gives states an identity predicated on more than control and offers individuals roles other than customers.

The challenges are many, including whether one can locate normative criteria to identify services that states must provide. . . . My focus is not on an empirical quest for the timeless essence of the state but on the normative question about what it is that democratic constitutional polities—want to make . . . *to be* a function of the state, both transnationally and within a particular government. “Why a constitutional state?”—might well be the retort and is certainly the challenge posed by globalization and privatization. An abbreviated response is that states continue to offer opportunities for self-governance; that, in the last century, democratic constitutional states have produced new rights to equality and dignity for sets of persons that were long excluded; that constitutional states aspire to fair distributions of opportunity while also continuing commitments to personal liberty and security. This packet of concerns is not one on which globalization can deliver and in which privatization has interest. . . .

[T]his set of aspirations is relatively new and potentially fragile. . . . [T]o do so (and thereby to join privatization and globalization as twenty-first century

metanarratives) requires more than insisting that the uniqueness of the constitutional state resides in prohibition and punishment. . . .

What else is there? Constitutions, transnational conventions, and social practices are the resources to mine for richer accounts. Constitutions specify a host of aspirations and make legal commitments to which a state can be held, even as the content varies over time and implementation comes through “progressive realisation” (to borrow the formulation from the South African Constitution). Thus, responses to the question—what do/must constitutional states offer that multinational corporations and global governance cannot—come in part through the methods used by the Israeli and the Indian courts, intent on interpreting their respective constitutive laws in the context of transnational precepts and admonitions. . . .

Constitutional states have more collective problems to solve than regulating violence, and more institutional structures than police, courts, and prisons in which to express commitments to their values and to developing reciprocal relationships with their populations. My interest is in identifying other structural facets of governance that can be understood—either within a given nation state or transnationally—as entitlements and appreciated for their collective utilities in producing identity for and affiliation to the constitutional state. . . .

The history and practices of policing, courts, and prisons . . . offer insights into some of the attributes that make state-based services recognizable, entrenched, and durable. All three serve the state, while being useful to individuals and to enterprises, made more secure in their persons and transactions through state control. All three create opportunities for encounters that forge identities, both collective and individual (e.g., suspect or victim, litigant, detainee, judge, warden, cop). . . . Today, these institutions are the subject of privatization efforts that put at risk opportunities to experience the state as providing sustenance. . . .

OUTSOURCING TO ANOTHER GOVERNMENT

This section examines the movement of power from member states to the European Union and from states within the United States to the federal government. These cases again invoke state sovereignty and democratic

accountability, as some justices insist on “essential” or “core” functions that are not transferrable to or subject to regulation by another level of government, even if they may be transferable to private entities. Once again, the decisions could be read as about state authority and identity and/or about the content of the underlying rights.

Excerpted below is the German Constitutional Court’s decision about the Lisbon Treaty, which came into force in 2009 and prompted a decision the same year about whether the authority given to Europe was consistent with the German “inviolable constitutional identity.” The United States Supreme Court faced a parallel question in *National League of Cities v. Usery*, when a five-person majority held that Congress had exceeded its powers under the Commerce Clause by applying the Fair Labor Standards Act (FLSA) to municipal government employees because decisions about their salaries were “functions essential to” the separate sovereign existence of states. Within a decade, the Supreme Court returned to, and reversed, 5-4, its earlier ruling—on the grounds that articulating unique, integral, or traditional state functions was impossible and unwise.

Are analyses of state functions and attributes of sovereignty aimed at understanding the constitutionally-stipulated parameters of the states or are they methods to balance the interests affected? If one is enthusiastic about deference to legislatures (in the United States, termed by Herbert Wechsler as “the political safeguards of federalism”) and believes that courts ought to be minimally involved in the allocation of power in federations (and otherwise), ought the same presumption have guided the Supreme Courts of Israel and India, when analyzing power transfers to private sector actors? Chapter III returns to these issues as justices debate how to characterize a government-based electricity and water “district” for purposes of ruling on who has rights to vote for its directors.

The German Constitutional provisions relevant to the Lisbon Treaty decision are:

Article 1: (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. . . .

Article 23: (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of

subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

Article 38: (1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

Article 79: (2) Any . . . law [expressly amending the Basic Law] shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 93: (1) The Federal Constitutional Court shall rule: . . . (4a) on constitutional complaints, which may be filed by any person alleging [violations of] . . . basic rights . . . infringed by public authority.

Lisbon Treaty Case
Federal Constitutional Court of Germany
2 BvE 2/08 (2009)

. . . 208. The standard of review of the Act Approving the Treaty of Lisbon is determined by the right to vote . . . a fundamental right . . . [that] establishes a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. . . .

216. The principle of democracy [may not be balanced against] other legal interests; it is inviolable. . . . The Basic Law thus not only presumes sovereign statehood for Germany but guarantees it. . . .

219. [T]he empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic Law This applies as far as the limit of the inviolable constitutional identity (Article 79.3 . . .). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law. . . .

251. [I]t cannot be overlooked . . . that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification related to the nation-state, language, history and culture. The principle of democracy as well as the principle of subsidiarity, which is also structurally required by Article 23.1 . . . therefore require[s] factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal development and the shaping of living conditions by social policy. . . .

252. Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5). . . .

257. [T]he principle of the social state establishes a duty on the part of the state to ensure a just social order

259. Accordingly, the essential decisions in social policy must be made by the German legislative bodies on their own responsibility. In particular the securing of the individual's livelihood, which is a responsibility of the state that is based not only on the principle of the social state but also on Article 1.1 of the Basic Law, must remain a primary task of the Member States, even if coordination which goes as far as gradual approximation is not ruled out. . . .

260. [F]inally, democratic self-determination relies on the possibility to assert oneself in one's own cultural area, especially relevant in decisions made concerning the school and education system, family law, language, certain areas of media regulation, and the status of churches and religious and ideological communities. Those activities of the European Union that may be already

observed in these areas intervene in society on a level that is the primary responsibility of the Member States and their component parts. . . . Like the law on family relations and decisions on issues of language and the integration of the transcendental into public life, the manner in which school and education are organised particularly affects established rules and values rooted in specific historical traditions and experience. Here, democratic self-determination requires that a political community bound by such traditions and convictions remains the subject of democratic legitimation. . . .

National League of Cities v. Usery
Supreme Court of the United States
426 U.S. 833 (1976)

Mr. Justice REHNQUIST delivered the opinion of the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act [FLSA], and required employers covered by the Act to pay their employees a minimum hourly wage and to pay them at one and one-half times their regular rate of pay for [overtime] hours

The original Fair Labor Standards Act . . . specifically excluded the States In 1974, however, Congress . . . extended the minimum wage and maximum hour provisions to almost all public employees employed by the States Appellants . . . include individual cities and States, the National League of Cities, and the National Governors' Conference; they [challenge] . . . the 1974 amendments [because they] . . . "infringed a constitutional prohibition" running in favor of the States as states. . . .*

This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise

* The United States Constitution, Amendment X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. . . .*

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ . . . to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence"

Judged solely in terms of increased costs in dollars, these allegations show a significant impact on the functioning of the governmental bodies involved. The Metropolitan Government of Nashville and Davidson County, Tenn., for example, asserted that the Act will increase its costs of providing essential police and fire protection, without any increase in service or in current salary levels, by \$938,000 per year. . . . The State of California, which must devote significant portions of its budget to fire-suppression endeavors, estimated that application of the Act . . . will necessitate an increase in its budget of between \$8 million and \$16 million. . . .

[T]he Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. . . . It may well be that, as a matter of economic policy, it would be desirable that States, just as private employers, comply with these minimum wage requirements. But . . . the federal requirement directly supplant[s] the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage. But the Act would forbid such choices by the States. . . .

[The FLSA amendments'] application will . . . significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which

* Article I, Section 8, Clause 3 of the United States Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"

governments are created to provide, services such as these which the States have traditionally afforded their citizens. . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3. . . .

* * *

Justice Blackmun concurred, commenting that the majority's "balancing approach" did not prohibit federal action in areas where the federal interest "is demonstrably greater," such as environmental protection. Justice Brennan, joined by Justice White and Marshall, dissented and argued that the majority opinion's "essential function" test was unworkable. Justice Stevens' dissent noted that, given that the federal government's power to regulate workplace safety and clean water, all of which affected activities of the "State qua State," the FLSA was likewise permissible.

Garcia v. San Antonio Metropolitan Transit Authority
Supreme Court of the United States
469 U.S. 528 (1985)

Justice BLACKMUN delivered the opinion of the Court.

. . . Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. . . .

In the present cases, a Federal District Court concluded that municipal . . . operation of . . . [the San Antonio Metropolitan Transit Authority (SAMTA)] is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA. . . .

Our examination of this "function" standard applied . . . over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism [*National League of Cities*], accordingly, is overruled. . . .

[W]ere SAMTA a privately owned and operated enterprise, it could not credibly argue that Congress exceeded the bounds of its Commerce Clause powers in prescribing minimum wages and overtime rates for SAMTA's employees. Any constitutional exemption from the requirements of the FLSA therefore must rest on SAMTA's status as a governmental entity

[T]he present case[] has focused on . . . [whether] the challenged federal statute trench[es] on "traditional governmental functions." . . . [C]ourts have held that regulating ambulance services; licensing automobile drivers; operating a municipal airport; performing solid waste disposal; and operating a highway authority are functions protected under *National League of Cities*. At the same time, courts have held that issuance of industrial development bonds; regulation of intrastate natural gas sales; regulation of traffic on public roads; regulation of air transportation; operation of a telephone system; leasing and sale of natural gas; operation of a mental health facility; and provision of in-house domestic services for the aged and handicapped are not entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best. . . .

[R]eliance on history as an organizing principle results in line-drawing of the most arbitrary sort [C]ourts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated. . . .

[T]he goal of identifying "uniquely" governmental functions . . . has been rejected by the Court in the field of government tort liability in part because the notion of a "uniquely" governmental function is unmanageable. . . . The fact that an unregulated market produces less of some service than a State deems desirable does not mean that the State itself must provide the service; in most if not all cases, the State can "contract out" by hiring private firms to provide the service or simply by providing subsidies to existing suppliers. . . .

Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. . . .

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity . . . that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule

leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. . . .

JUSTICE POWELL, JOINED BY CHIEF JUSTICE BURGER, AND JUSTICES REHNQUIST AND O'CONNOR, DISSENTING.

. . . In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as “typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.” Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government. . . . These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee. . . . The Court emphasizes that municipal operation of an intracity mass transit system is relatively new in the life of our country. It nevertheless is a classic example of the type of service traditionally provided by local government. It is local by definition. It is indistinguishable in principle from the traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems. . . . State and local officials . . . know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. . . .

* * *

Within months of the decision, states and localities persuaded Congress to amend the FLSA to permit their governments to provide compensatory time off, in lieu of cash payments, to employees who worked overtime.

“FUNCTIONS OF A PUBLIC NATURE,” STATE ACTION, AND STATE LIABILITIES

Many legal systems require private as well as public actors to respect fundamental constitutional rights, as illustrated by arguments in the Israel prison litigation that privatization was unproblematic because both public and private prison managers have the same legal obligations and liabilities.¹ This segment focuses on those systems that do not impose the same obligations on public and private providers. That dividing line prompts debates about how to characterize actors as a public or state actor—whether the services provided are the touchstone because some services are intrinsically “public functions,” or whether that distinction is irrelevant because obligations flow across the public/private divide. One could read these cases as mining (again) the nature of sovereignty or the nature of rights or the interdependencies of the two.

For example, *YL v. Birmingham City Council*, excerpted below and involving care for the aged, became an occasion on which to explore the meaning of the U.K.’s 1998 Human Rights Act (HRA), making it unlawful for a public authority to act incompatibly with the European Convention on Human Rights (see § 6(1)). Section 6(3)(b) defines “public authority” to include “any person certain of whose functions are functions of a public nature.” Section 6(5) adds that “a person is not a public authority . . . if the nature of the act is private.”

The Birmingham City Council had a contract with Southern Cross, a for-profit, private company that ran nursing homes. The Council paid the Social Services Department fees for the City’s residents, and the local NHS Primary Care Trust paid for nursing care. Of the 29,000 care home beds provided by Southern Cross, local authorities funded approximately 80%, including that of YL, an 84-year-old woman with Alzheimer’s disease who became a resident at a Southern Cross home in January of 2006. About six months thereafter, Southern Cross notified YL’s daughter that, because of a strained relationship between the daughter and the home staff, Southern Cross was ending the contract and YL would have to leave.

The opinions in *YL v. Birmingham City Council* debate whether Southern Cross was performing “functions of a public nature” and thus a “public authority” subject to the HRA. In a 3-2 decision, the House of Lords held that Southern Cross was not. What animates the conclusion that individuals such as YL are

¹ An example of an alternative approach comes from the United States. According to a 2011 Supreme Court decision, federal prisoners placed in private prisons cannot pursue constitutional remedies but rather only those remedies available under state tort law.

differently situated, vis-à-vis the state, than those in detention in the Israeli prison system? Were the views about state functions independent of the source of the rights and kinds of remedies that YL was claiming?

YL v. Birmingham City Council
United Kingdom House of Lords
[2007] UKHL 27

LORD BINGHAM OF CORNHILL

. . . 15. . . . [F]or the past 60 years or so it has been recognised as the ultimate responsibility of the state to ensure that [the poor, elderly, and vulnerable] are accommodated and looked after through the agency of the state and at its expense if no other source of accommodation and care and no other source of funding is available. . . .

16. Sections 21 and 26 of the National Assistance Act 1948 . . . impose a statutory duty . . . on the relevant local authority. . . .

17. The provision of residential care is the subject of very detailed control by statute, regulation and official guidance, and criminal sanctions apply to many breaches of the prescribed standards. . . .

20. . . . The performance by private body A by arrangement with public body B, and perhaps at the expense of B, of what would undoubtedly be a public function if carried out by B is, in my opinion, precisely the case which section 6(3)(b) was intended to embrace. . . .

LORD SCOTT OF FOSCOTE

. . . 27. . . . [T]he fees charged by Southern Cross and paid by local or health authorities are charged and paid for a service. There is no element whatever of subsidy from public funds. It is a misuse of language . . . to describe Southern Cross as publicly funded. . . . It is simply carrying on its private business with a customer who happens to be a public authority. . . .

28. The position might be different if the managers of privately owned care homes enjoyed special statutory powers over residents entitling them to restrain them or to discipline them in some way

30. . . . If every contracting out by a local authority of a function that the local authority could, in exercise of a statutory power or the discharge of a statutory duty, have carried out itself, turns the contractor into a hybrid public authority for section 6(3)(b) purposes, where does this end? . . .

BARONESS HALE OF RICHMOND

. . . 50. Section 21(1)(a) of the National Assistance Act 1948 originally required each local authority to provide 'residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them.' Accommodation could be provided either in homes owned and run by the authority, or by another local authority, or by a voluntary organisation, but not by private persons. Residents were required to pay for their local authority accommodation according to their ability to pay. . . .

51. But supply was never able to match demand. . . . The result was . . . the National Health Service and Community Care Act 1990 [which required local authorities to] . . . to develop a 'mixed economy of care' making use of voluntary, not for profit and private providers whenever this was most cost-effective [so as] . . . to move away from the role of exclusive service provider and into the role of service arranger and procurer

54. The purpose of the 1998 Act . . . was to ensure that people whose rights under the European Convention on Human Rights had been violated would have an effective domestic remedy in the courts of this country . . . and would not have to seek redress in the European Court of Human Rights in Strasbourg. [As the Labour party's consultation paper said:]

" . . . the central purpose of the ECHR is to protect the individual against the misuse of power by the state. The Convention imposes obligations on states, not individuals, and it cannot be relied upon to bring a case against private persons. . . ."

56. Strasbourg case law shows that there are several bases upon which a state may have to take responsibility for the acts of a private body. The state may have delegated or relied upon the private body to fulfil its own obligations under the Convention: as in *Van der Musselle v Belgium* (1983), in which the provision of legal aid was delegated to the Belgian bar which required young advocates to provide their services pro bono; or . . . in *Costello-Roberts v United Kingdom* (1993) where the fact that education is itself a convention right was influential in engaging the state's responsibility for corporal punishment in private schools. The

state may have delegated some other function which is clearly a function of the state to a private body: as in *Wós v Poland* [2005], where the Polish Government delegated to a private body the task of allocating compensation received from the German Government after World War II. The state may itself have assisted in the violation of convention rights by a private body: as in *Storck v Germany* (2005), where the police had assisted in the illegal detention of a young woman in a private psychiatric hospital by taking her back when she ran away. . . .

61. . . . It is common ground that it is the nature of the function being performed, rather than the nature of the body performing it, which matters under section 6(3)(b). . . .

63. . . . It is common ground that privately run prisons perform functions of a public nature. In a similar category are private psychiatric hospitals when exercising their powers of compulsory detention under the Mental Health Act 1983. . . .

65. . . . While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest. . . .

72. The fact that other people are free to make their own private arrangements does not prevent a function which is in fact performed for this person pursuant to statutory arrangements and at public expense from being a function of a public nature. . . .

73. Taken together, these factors lead inexorably to the conclusion that the company, in providing accommodation, health and social care of or the appellant, was performing a function of a public nature. . . .

LORD MANCE

. . . 116. In providing care and accommodation, Southern Cross acts as a private, profit-earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses

119. . . . As to the direct application of the Convention as against a care home, it is less incongruous to distinguish between residents in privately owned, profit-earning care homes on the one hand and residents in a local authority owned and managed care home on the other hand, than it is to distinguish between publicly and privately funded residents in one and the same care home. Residents in a local authority owned and managed care home have the protection

of the Convention not because the function of providing care and accommodation for those in need is inherently public in nature, but simply because a local authority is a core public authority, all of whose activities are, whatever their nature, subject to the Convention under section 6(1) of the Human Rights Act.

123. . . . Southern Cross . . . is not exercising functions of a public nature within section 6(3)(b) of the Human Rights Act 1998. . . .

LORD NEUBERGER OF ABBOTSBURY

. . . 154. . . . The factors which I have . . . considered to support the case for saying that . . . Southern Cross was performing a “function which is public in nature” are . . . :

- a. The existence and detailed nature of statutory regulation and control over care homes;
- b. The provision of care and accommodation for the elderly and infirm is a beneficial public service;
- c. The elderly and infirm are particularly vulnerable members of society;
- d. The care and accommodation was provided pursuant to the local authority’s statutory duty to arrange its provision;
- e. The cost of the care and accommodation is funded by the local authority pursuant to its statutory duty;
- f. The local authority has power to run its own care homes to provide care and accommodation for the elderly and infirm;
- g. The contention that section 6(3)(b) should apply to a contracting-out case.

155. . . . [E]ach factor, at least if taken individually, would be insufficient to render the provision of care and accommodation by Southern Cross in its care home to Mrs YL a “function of a public nature”. However, it must be right to consider the effect of the various factors together, and, indeed, in the broader policy context. . . . I still do not find it very persuasive. . . .

160. . . . [T]he following considerations . . . are in point:

a. The activities of Southern Cross in providing care and accommodation for Mrs YL would not be susceptible to judicial review;

b. Mrs YL would not, I think, be treated by the Strasbourg court as having Convention rights against Southern Cross, and she retains her Convention rights against Birmingham;

c. Southern Cross's functions with regard to the provision of care and accommodation would not be regarded as "governmental" in nature, at least in the United Kingdom;

d. . . . [A] care home proprietor such as Southern Cross has no special statutory powers in relation to those it provides with care and accommodation, or otherwise;

e. Neither the care home nor any aspect of its operation, as opposed to the cost of the care and accommodation provided to Mrs YL and others in her situation, is funded by Birmingham;

f. The rights and liabilities between Southern Cross and Mrs YL arise under a private law contract.

161. . . . [Therefore,] despite being arranged and paid for by Birmingham pursuant to its statutory duty . . . , [Southern Cross's care of YL] is not a function "of a public nature" within section 6(3)(b). . . .

From the Civil Rights Cases of 1883 to the Contemporary U.S. Doctrine

In the United States, a long line of cases address the authority of government to implement rights guaranteed by the Thirteenth Amendment (abolishing slavery) and by the Fourteenth Amendment, which reads:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Both amendments included parallel clauses, stating that the “Congress shall have the power to enforce” those amendments “by appropriate legislation.”

Congress has done so through a series of provisions, including in statutes known as the Civil Rights Acts, dating from 1866 through 1871 (some of which are now codified as amended at 42 U.S.C. §§ 1981-85), and in much more recent legislation.

To whom does the Constitution speak? And what may Congress do when acting under its constitutional authority to implement these provisions? Does the Constitution have horizontal effect, imposing obligations such as equal treatment on “private” actors? May Congress do so through its constitutional mandate to implement the Thirteenth and Fourteenth Amendments? Ought the courts oversee congressional judgments about what role to take?

A vast body of doctrine and commentary has developed—glimpsed below through the 1883 Civil Rights Cases and brief notes—to illuminate the parallels between the U.S. state action debate and the “public function” Convention law. Again, the questions are when and how to identify actors as the “state” or as “private” and the wisdom of seeking to divine such a line when reasoning about the obligations that a given constitutional regime seeks to instantiate.

In 1883, the Supreme Court insisted on the limits of federal power when it interpreted Section 1 of the 1875 “Act to protect all citizens in their civil and legal rights,” in which Congress required that:

all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

The act authorized that aggrieved persons could seek penalties of “\$500” per person or that violators could be subject to a criminal misdemeanor prosecution.

Efforts to implement these provisions gave rise to what are known as “The Civil Rights Cases,” decided in 1883. Individuals challenged theater owners for refusing to permit citizens of “every race and color” to sit in all the seats in Maguire’s Theatre in San Francisco and in the Grand Opera House in New York, and the Memphis & Charleston Railroad Company for denying a seat in the

“ladies car” of the train to a woman because she was a “person of African descent.”

The Civil Rights Cases
Supreme Court of the United States
109 U.S. 3 (1883)

Justice Curtis Bradley, writing for the Court.

... Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. . . .

... The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. . . .

* * *

A distinct question was whether the 13th Amendment, prohibiting slavery and involuntary servitude, could support congressional action because forms of segregation in public accommodations were “badges and incidents of slavery.” The Court rejected that position on the grounds that Congress had not assumed,

under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the

community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery. . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.

An additional aspect of the U.S. context needs to be underscored. The majority opinion repeatedly adverted to the importance of constraints on federal power vis-à-vis states to ensure that state power, “the domain of local jurisprudence,” would not be displaced. Indeed, the Court commented that too wide sweeping a federal power would be “repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.”

In dissent, Justice Harlan argued that the “purpose of the . . . act of Congress . . . was to prevent *race* discrimination.” He reminded his colleagues that, under the Fugitive Slave Law of 1793 and the Fugitive Slave Act of 1850, federal courts had insisted upon the return of slaves to masters, and “implied” a federal power to do so. Further, he read the Thirteenth Amendment as investing Congress with the power to protect “against all discrimination” predicated on race. After marshaling cases addressing the exercise of eminent domain powers on behalf of railroads and obligations imposed to carry passengers, he explained:

[I]n every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and function, to governmental regulation. It seems to me that . . . a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States. . . .

* * *

The majority's approach launched the quest in United States law to define "state action" for purposes of the post-Civil War constitutional amendments and the federal laws produced in their wake. In the twentieth century, the question of when to attribute action to the state returned in *Shelley v. Kraemer* (1948), in which both Missouri and Michigan courts had enforced "private agreements, generally described as restrictive covenants" prohibiting land sales to "people of the Negro race."

Chief Justice Vinson, writing for the Court, held that "judicial enforcement by state courts" of such covenants violated the Fourteenth Amendment. While the "restrictive agreements, standing alone" could not constitute state action, judicial enforcement did. "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." But for the "active intervention of the state courts, supported by the full panoply of state powers," the purchasers would have owned their land. Thus the state deprived them of equal protection of the law, which included the "enjoyment of property rights."

In *Burton v. Wilmington Parking Authority*, decided in 1961, the Court again identified the state as the relevant actor. William Burton had sought to enjoin the Wilmington Parking Authority, which had leased space to a coffee shop, from permitting the restaurant to refuse to serve Mr. Burton "solely because he [was] a Negro." The Delaware courts held that the coffee shop was acting as "a purely private capacity" and therefore outside the reach of the Fourteenth Amendment. The U.S. Supreme Court disagreed, identifying a series of factors that rendered the exclusion state action.

[T]he parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee. . . . [T]he building [was] . . . dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' The costs of land acquisition, construction, and maintenance are defrayed entirely . . . by the City of Wilmington [The] commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its [parking facility] project as a self-sustaining unit. . . .

Much of the development of this body of law in the 1960s and thereafter came by way of cases filed under another of the post-Civil War civil rights statutes, 42 U.S.C. Section 1983, first enacted in 1871 (as section 1 of the "Ku Klux Klan Act") and authorizing litigation against those acting "under color of"

state law. Section 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

In the middle of the twentieth century, James Monroe alleged that 13 Chicago police officers had, without a warrant, broken into his apartment, and made his family “stand naked in the living room, and ransacked every room.” Thereafter, Mr. Monroe was taken to the police station and later released without any charges filed. Monroe filed a lawsuit alleging a violation of Section 1983; the defense was that such actions did not fall within the scope of Section 1983 because the officers were not acting “pursuant to state law” but on their own initiative.

In *Monroe v. Pape*, decided in 1961, the Court rejected that view. “State officers in performance of their duties”—whether directed by a specific state law or not—acted “under color of state law.” This holding was the predicate to a variety of lawsuits against state employees in schools, hospitals, prisons, and other institutions (some of which are discussed in Chapter IV), and was thereafter followed by the development of doctrine crafting immunities for those acting based on a “good faith belief” of the constitutionality of their actions.

State action doctrine narrowed thereafter. In *Flagg Bros., Inc. v Brooks*, (1978), the Court concluded, over three dissents, that “the settlement of disputes between debtors and creditors is not traditionally an exclusive public function” and therefore that New York’s delegation by statute to a warehouseman to sell goods taken from evicted tenants could not be fairly attributed to the state. The

challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign. . . .

[In contrast, there] are a number of state and municipal functions not covered by [public function doctrine case law] which have been administered with a greater degree of exclusivity. . . . Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to

which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.

More recently, in *United States v. Morrison*, (2000), the Court held, 5-4, that the Congress lacked power—under either the Fourteenth Amendment or the Commerce Clause—to create a new civil rights action in the Violence Against Women Act of 1994, which had authorized victims of violence by private defendants acting based on “animus” against an individual “because of gender,” to bring lawsuits in federal court. Once again, Chief Justice Rehnquist wrote and, echoing his views in *National League of Cities* and in *Flagg Brothers*, insisted that the Constitution requires a distinction between the “truly local” and the “truly national.”

As that divide implies, the constraint imposed on Congress was justified in part as constitutionally-obliged deference to the states—which are governments that, in the United States, have long regulated private actors through general police powers as well as by tort and other forms of common law actions. While cutting off civil rights remedies in federal courts, the Supreme Court did not preclude state-based legal remedies. One additional note is in order: the horizontal application of civil rights is not completely absent from U.S. jurisprudence, as federal statutes such as Title VII of the Civil Rights Act of 1964, enacted pursuant to the federal government’s authority to regulate interstate commerce, prohibit discrimination by most private employers.

An influential 1982 essay by Paul Brest* provided a summary of the approaches taken by the justices and makes plain the parallels between the U.S. state action doctrine and the EU “public function” inquiries. The U.S. Supreme Court has taken different approaches, a first of which, used in *Burton v. Wilmington*, rejected a “precise formula” for state responsibility and looked instead to “sifting facts and weighing circumstances.” A second, adopted in *Flagg Brothers*, asked whether the state had “authorized” or “encouraged” a private action related to an “exclusive” state function; state “acquiescence” was insufficient. A third asked whether the state had delegated “a public function” to a private party, while a “formalist” approach looked to whether state officials acted directly. Brest thought the cluster of different efforts was a “crude substitute for addressing and accommodating the concerns to prevent abuse of power on the one hand and to protect individual autonomy and federalist values on the other.” Further, the doctrine reflected that “American constitutional jurisprudence has

* Paul Brest, *State Action and Liberal Theory: A Case Note on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982).

never adopted any pure political theory.” However, the “Whitmanesque capacity to encompass contradictory theories” produced doctrine that was “seldom” used “to shelter citizens from coercive federal or judicial power,” and more often “employed to protect the autonomy of business enterprises.”

Robert Post and Reva Siegel returned to these questions in 2000, as the Supreme Court struck several congressional statutes as outside legislative power under either the Fourteenth Amendment or the Commerce Clause.* The Court insisted (often 5-4) on its authority to interpret the bounds of the equality mandate and on its prerogative to protect states from federal encroachment. The result, as Post and Siegel explained, was that 2000 was the “first time since Reconstruction that the Court has declared that Congress lacked power to enact legislation prohibiting discrimination.”

If one approach toward such limitations criticizes the refusal to understand the need to redress certain forms of harms and to appreciate the intermingling of public and private actions producing those injuries (the “total constitution,” if you will, to borrow from Mattias Kumm**), another set of critiques raises questions about the future coherence of delineating state and private action in a world in which patterns of sovereignty and of capital formation are shifting, globally.

REJECTING THE FRAMING OF A PUBLIC/PRIVATE DIVIDE

Gunther Teubner

*After Privatization? The Many Autonomies of Private Law****

. . . The last twenty years have seen an important shift in the pattern of public service provision throughout the countries of the OECD. Across a whole range of services—higher education, research and development, utilities, transport, telecommunications, the media, health and social services, security, and

* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

** Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

*** Excerpted from Gunther Teubner, *After Privatization? The Many Autonomies of Private Law*, 51 CURRENT L. PROBS. 393 (1998).

law enforcement—there has been a transfer of responsibility from the public to the private sector. . . .

The privatization phenomenon . . . is observed only along one dimension, as a move in a perennial oscillation between the public and private sectors, swinging like a pendulum from . . . nineteenth century liberal society, turning then forth to the modern welfare state and finally back to the future of the new private globalized regimes. . . .

[T]he crucial problem is not how to compensate for the loss of the public interest in privatization. Rather, it is how to move out of the reductive public/private dichotomy itself and how to make private law responsive to a plurality of diverse private autonomies in civil society.

[T]he adequate reaction to privatization is not to impose public law standards on private law, [but] rather to transform private law itself into the constitutional law of diverse private governance regimes which will amount to its far-reaching fragmentation and hybridization. . . .

[T]he public/private distinction has over the centuries maintained a remarkable viability. This is due to its chameleon-like character which swiftly adapted in its long history to structural changes in society. It changed its appearance from *polis* versus *oikos* in the old European society to State versus society of the bourgeois era and survives in the contemporary distinction between the public and the private sector. . . .

Not only is it argued here that the public/private distinction is an oversimplified account of contemporary society. More controversially, I argue that any idea of a fusion of the public and private spheres is equally inadequate. *As an alternative conceptualization, it is proposed that the public/private divide should be replaced by polycontextuality. . . .* [C]ontemporary social practices can no longer be analysed by a single binary distinction; the fragmentation of society into a multitude of social sectors requires a multitude of perspectives of self-description. Consequently, the simple distinction of State/society which translates into law as public law *v.* private law needs to be substituted by a multiplicity of social perspectives which are simultaneously reflected in the law. . . . The simple dualism private law *v.* public law, which reflects the dualism of political *v.* economic rationality, cannot grasp the peculiarities of social fragmentation. Is a research project public or private in its character? Surely there is more to a doctor-patient relationship than a market transaction regulated by some governmental policies.

Neither public law, as the law of the political process, nor private law, the law of economic processes, has the capacity to develop adequate legal structures in relation to the many institutional contextures of civil society. But, at the same time, neither is there a new fusion of private and public law as suggested by such seductive slogans as 'private life is public' or 'everything is politics.' Rather, private law needs to re-enforce its elective affinity to the contemporary plurality of discourses—not only its affinity to the economy as it is predominantly understood today, but also private law's close relations with the many contexts of intimacy, health, education, science, religion, art, and media. This would lead to a thorough-going reflection within private law of the distinctive *Eigenlogics* [separate logics] of these various realms of discourse—a reflection which would encompass their internal rationality as well as their inherent normativity.

The point of strengthening these various relations is simultaneously to de-politicize private law and to de-economize it, to distance it not only from the public sector but also from the private sector. It has become commonplace today to stress the difference of an efficiency-driven private law from the regulatory policies of the welfare state and to stress the autonomy and decentralized rule production of the former from central legislative intentions of the latter. But it is much less understood that private law cannot be identified simply with juridification of economic action. Indeed, this has been the great historical error of private law doctrine: contract law is increasingly reduced to the law of market transactions; the law of private associations has been boiled down to the law of business organizations. We have increasingly come to view property law only as the basis for market operations and to shape tort law as the set of policies and rules that internalize economic externalities and eradicate third party effects. . . .

There is, however, one crucial normative consequence to be drawn from the pluralism of private autonomies. The remarkable responsiveness private law has in the past developed toward economic markets by elaborating complex commercial contracts, business organizations, economic property rights, and business standards, may serve today as the great historical model for its relation to other autonomous discourses in civil society. The precarious balance between self-regulation and intervention, which private law has maintained in its relation to economic markets, needs to be institutionalized in other sectors of civil society. Private law's respect of the autonomy of the market sector needs to be expanded to other autonomous spaces. . . .

Privatization itself appears in a quite different light if one abandons the private/public dichotomy in favour of the notion of polycontextuality, if one realizes that the one private autonomy is in fact many private autonomies of spontaneous norm formation. What one then sees is more than the mere transfer

of activities from the State to the market. Privatization does not, as usually understood, redefine the distribution between political and economic action. Rather it transforms the character of autonomous social systems—which I call activities—by changing the mechanisms of their structural coupling with other social systems—which I call regimes. In contrast with a process in which genuinely political activities oriented toward the public interest are transformed into profit-oriented economic activities, one sees a set of distinctive and autonomous activities—e.g. research, education, health—each of them displaying their proper principles of rationality and normativity, which in the process of privatization are undergoing changes in their institutional regimes. Thus, instead of a bipolar relation between economics and politics one has to think of privatization in terms of a triangular relation between these two and the public service activities involved. The traditional view sees them as either political or economic in character. Only by overlooking the distinctive rationality of the third vertex, the activity (which may be facilitated or obstructed by different institutional or political regimes) does it become plausible to claim that it is privatization that unleashes the potential blocked by the old public regime. But at the same time new blockages appear. Old mismatches between activities and regime are replaced by new mismatches. . . .

What is different in this about the post-privatization legal regime? How does it differ from modern private law, the law of mixed economies which aims to correct market failures via policy interventions—consumer protection, public policy clauses, expansion of good faith? . . . First, it is no longer the more or less marginal *post hoc* correction of an essentially economic transaction. Instead, from the very beginning, contract is seen as constituted by two equally important social dynamics and law's job is not just correction but a thoroughgoing balancing of conflicts. Secondly, the non-economic aspects of the private law relation are no longer filtered and distorted by the political process, and in this distorted form translated into legal policies, as tended to be common practice in the private law of the welfare state. Rather, private law would turn directly to the spontaneous norm production in the social field involved. It would count on a division of labour between the dynamics in the social field involved and the dynamics of private law litigation which could be described as learning by mutual anticipation. . . .

PRIVATIZATION AND REGULATION

DISCUSSION LEADERS

JON MICHAELS AND SUSAN ROSE-ACKERMAN

III. PRIVATIZATION AND REGULATION

DISCUSSION LEADERS:

JON MICHAELS AND SUSAN ROSE-ACKERMAN

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Outsourcing Sovereignty Across Generations

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Governments rely heavily on private actors to advance public goals. This reliance has transformed the relationships among governments, private actors entrusted with new responsibilities, and the citizens and firms that deal with them. This session invites discussion of the constitutional questions raised by five developments: (1) the creation of private “governments” within sovereign states’ borders; (2) the privatization of public utilities and the role of the agencies that regulate them; (3) the promulgation, by private entities, of legally binding regulatory standards; (4) the interrelationship between adjudication by public and private bodies; and, (5) public/private partnerships in which government officials contract with commercial enterprises in ways that limit the policy choices open to subsequent generations and that can obscure questionable practices verging on corruption.

We begin, first, with seemingly extreme proposals to create “charter cities”: privately administered jurisdictions within—but legally autonomous from—the host nations. Recently, the Honduran Supreme Court struck down one such effort—invoking both its own constitution and the Universal Declaration of Human Rights. Yet proponents of charter cities remain eager to carry out their experiment elsewhere. Moreover, such experiments are not as novel as some suggest—exemplified here by a 1946 decision by the United States Supreme Court, reversing a criminal conviction in a “company town” based on free speech, free exercise, equality, and due process rights. Further, these proposed carve-outs are the analogues of special-purpose enclaves, such as water districts in the United States, prompting the Supreme Court in 1981 to rule on the validity of their distinctive voting rules. The larger questions, some of which are also raised in Chapter II, concern the constitutional limits on governments’ ability to cede authority to quasi-privatized domains, and legal theories of state sovereignty.

Second, governments today have privatized, or partially privatized, many formerly state-owned utilities. Often adopting the independent agency model based on long-standing United States practice, governments have created new regulatory bodies to constrain monopoly power and to limit political interference. These agencies carry out a regulatory function that is distinct from the management of firms, some of which may still be wholly or partly owned by the state. European Union directives mandated the privatization of public utilities and the creation of new, independent agencies. These directives pose special constitutional challenges in Member States with unitary parliamentary systems. Outside of the EU, in Commonwealth countries (such as Canada) and in strong presidential systems (such as Brazil), similar reforms challenge constitutional presumptions of the separation of powers. These agencies raise a series of questions, ranging from which branch of government has the authority to create such institutions, the substantive and procedural values that guide their work, their

accountability under national constitutions, and the possible tensions between the functional arguments for independence and political accountability.

Third, private business and trade associations have long regulated their members' behavior. But can such private entities create regulations enforced by the state? Should their output be called "law" and how might it constitutionally acquire that status? The issues arise in different contexts. A state may incorporate standards set by nominally private actors (both domestic and international) into legally enforceable statutes and rules. Alternatively, a state may deputize private bodies to accredit professionals and businesses and to certify compliance with standards.

Fourth, when is it constitutional to allow judicial functions to be carried out by private bodies, be they international arbitration bodies, private providers of dispute resolution, or private persons domestically deputized to be "judges"? Must access to the courts always be ultimately available, and must private adjudicators comply with certain procedural and transparency standards if they wish to have their judgments enforced by the state's formally-constituted courts?

Fifth, private-public partnerships permit government to contract out service delivery to private enterprises. Such partnerships raise important questions of constitutional law related to state sovereignty. Long-term contracts, if enforced, bind successor governments, thus disenfranchising future polities that might have different priorities. These agreements raise concerns about the transparency and accountability of public policymaking, and about the breadth and specificity of delegations to private bodies.

PRIVATE GOVERNMENTS: SOVEREIGNTY, FREE SPEECH, EXIT, AND VOTING

Some critics of corrupt or "illiberal" domestic legal regimes have proposed the creation of independent charter cities. These cities would be autonomous from the host nations with their ostensibly retrograde laws and regulations. We begin with these proposals, using them as a launching point to consider other forms of privatized government, including "company towns" and political districts organized around commercial pursuits. The judges in the cases excerpted below rely on a mix of domestic and transnational law to reject some of these efforts or to limit such carve-outs.

Charter Cities

Charter Cities Organization *Concept*^{*}

... A charter city is a new type of special reform zone. It extends the concept of a special economic zone by increasing its size and expanding the scope of its reforms. It must be large enough to accommodate a city with millions of workers and residents. Its reforms must extend to all the rules needed to support exchange in a modern market economy and structure interactions in a well-run city.

The concept allows for cross-national government partnerships. . . . By adhering strictly to two key principles—that the new rules apply only to people who choose to live under them and that they apply equally to all residents—rules can be copied from elsewhere and still achieve a high degree of local legitimacy. . . .

The broad commitment to choice means that no person, employer, investor, or country can be coerced into participating. Only a country that wants to create a new charter city will contribute the land to build one. Only people who make an affirmative decision to move to the new city will live under its rules. They will stay only if its rules are as good as those offered by competing cities.

A charter should describe the process whereby the detailed rules and regulations will be established and enforced in a city. It should provide a foundation for a legal system that will let the city grow and prosper. This legal system, possibly backed by the credibility of a [foreign] partner country, will be particularly important in the early years of the city's development, when private investors finance most of the required urban infrastructure.

There are three distinct roles for participating nations: *host*, *source*, and *guarantor*. The host country provides the land. A source country supplies the

* Excerpted from *Concept*, CHARTER CITIES, <http://chartercities.org/concept> (last visited June 25, 2013).

Editors' Note: The Charter Cities organization, which aims to promote information and analysis about this idea, is a tax-exempt organization run by an economics professor at the NYU Stern School of Business. See *About Us*, CHARTER CITIES, <http://chartercities.org/concept> (last visited June 25, 2013).

people who move to the new city. A guarantor country ensures that the charter will be respected and enforced for decades into the future. . . .

The Economist
Hong Kong in Honduras*

. . . The Honduran government wants to create what amounts to internal start-ups—quasi-independent city-states that begin with a clean slate and are then overseen by outside experts. They will have their own government, write their own laws, manage their own currency and, eventually, hold their own elections.

This year the Honduran legislature has taken the first big steps towards the creation of what it called “special development regions.” It has passed a constitutional amendment making them possible and approved a “constitutional statute” that creates their autonomous legal framework. . . . And on December 6th Porfirio Lobo, the Honduran president, appointed the first members of the “transparency commission,” the body that will oversee the new entities’ integrity. . . .

[P]erhaps the most important feature of the new venture is the “transparency commission,” a kind of board of trustees that appoints the governors, supervises their actions and is meant to make sure that the entities are beyond reproach, not least when it comes to the corruption (often fuelled by the drugs trade) that plagues the region. . . .

[T]he plan is . . . attracting heated criticism. Some find the explicit (if temporary) rejection of democracy repellent. Others detect a whiff of neocolonialism: gimmicks dreamed up in rich countries being foisted on poor ones. They believe that the project is especially misplaced in Honduras, a country crippled by weak state machinery and courts that flounder in the face of organised crime. The new entity may suck tax revenues and talent away from the rest of the country, critics fear. Another worry is that the new entities may prove more like Macau than Hong Kong: easy prey for gangsters, money-launderers and other shady characters. . . .

* Excerpted from *Hong Kong in Honduras*, ECONOMIST, Dec. 10, 2011, <http://www.economist.com/node/21541392>.

Then there is the general population. The regions are supposed to be open to anybody, but the inflow of people may have to be controlled. What is more, success or failure will depend not just on good rules, as in laws, but on the social norms that are established by its first inhabitants. . . . The key . . . is to begin with a core of people who share certain new norms—rather as when William Penn attracted people to Pennsylvania who were committed to his charter’s legal promise of freedom of religion. Once the norms are well established in a community, subsequent immigrants will adapt to them.

Last, but not least, comes security. Private security firms will have to protect the population in the new cities. Honduras is one of the world’s more corrupt countries, in 129th place out of 183 in a survey of outsiders’ perceptions by Transparency International, a Berlin-based lobby group. It also has the region’s highest murder rate. The local police have a poor reputation. Last month 176 police officers were arrested in a corruption crackdown. . . .

Private Cities Case
Supreme Court of Honduras
Decision 769-11 (2012)

. . . WHEREAS (12): [Complainants]* point out that, among other considerations, the guarantee to foreign investors of territorial, organizational and functional autonomy, necessarily implies ceding to said [investors] a part of the national territory [This] would constitute a privatization of the State of Honduras, giving way to the emergence of a large business corporation. . . . [N]ot just territory, but also the population, the government and the legal order are constitutive elements of the State, and therefore . . . by their very nature cannot be reformed without triggering a process of self-destruction

* Editors’ Notes: This judgment, translated by Andrea Scoseria Katz, was issued by the majority of the full Court; Justices Jorge Alberto Aviles and Oscar Fernando Rivera Banegas Chinchilla issued separate dissenting opinions.

The case was filed by a group of private Honduran lawyers (the *recurrentes*), who initiated an Action of Unconstitutionality (*Recurso de Inconstitucionalidad*). Article 185 of the Constitution of Honduras authorizes such suits, permitting citizens “who consider[] [themselves] injured in [a] direct, personal, and legitimate interest” to petition the Supreme Court to review the constitutionality of a law. The litigants alleged that the legislation, which paved the way for the “special development regions,” violated “irreformable provisions [of the Constitution] such as those relating to national territory and the form of government, . . . as well as fundamental rights and guarantees recognized by the Constitution and international treaties.”

WHEREAS (13): The complainants point out that [the Special Development Regions (SDR) constitutional reforms] . . . violat[e] [the principle of] sovereignty as the primary source of the form of government, which leads to the violation of the powers of the branches of government. . . . [S]overeignty is the right of a State to self-organization, self-government and self-limitation, without interference from any internal or external force. Sovereign authority resides in the people and is exercised through public power, as established by the Constitution . . . in Article 2: “Sovereignty belongs to the people from whom emanate all the powers of government to be exercised by representation.” . . . Considering the attributes of each of the branches of government and the provisions of the [contested SDR] statute, which proclaims . . . the jurisdictional autonomy of the SDRs and . . . their independence from the rest of the country, this Court finds that [these] provisions violate constitutional law in regulating matters properly within the powers of each of the branches of government, among them matters economic, financial, and jurisdictional, [as well as in creating] courts of exception, which, constitutionally, can never be created at any time. . . .

WHEREAS (14): The third motive for unconstitutionality . . . concern[s] . . . the breach of the principle of equality enshrined in Article 60 of the Constitution, which reads: “All men are born free and equal in rights. There are no privileged classes in Honduras. All Hondurans are equal before the law. . . . ” . . . The complainants also argue that the reforms in question violate the rights of citizens to free movement and freedom of residence contained in article 81 of the Constitution. . . . Article 13 of the Universal Declaration of Human Rights makes reference to four distinct and complementary rights: 1) The right of state nationals and of legal resident aliens to free movement within their state. 2) The right of nationals and of legal resident aliens of choosing their residence within the state. 3) The right to leave any country, even the country of which a citizen is a national. 4) The right to return to a state. . . . The SDR statute restricts these rights insofar as when an individual becomes a citizen of an SDR, he or she is subject to specific limits and conditions different from those pertaining to citizens outside of the SDRs. . . . [M]oreover, citizens residing in territory that might be occupied by the SDRs would be forced to change residence should they not accept the new provisions, . . . [a]ll of which is arbitrary and contrary to the constitutional provisions that protect citizens. Consequently this Supreme Court of Justice finds that [the SDRs] conflict with the rights of citizens to free movement and residence of citizens . . . and should be declared unconstitutional. . . .

WHEREAS (17): Sovereignty, as the primary source of the form of government, cannot be delegated to a person or group of people, such as those that may comprise the SDR; nor can the people be excluded from decisions taken in relation to the State of Honduras and its territory. Thus the principle of the

separation of powers is breached in . . . delegating to the SDRs the power to issue their own legal rules, which [belongs] exclusively to the National Congress (legislative branch); in managing the civil service in their territory (executive branch). . . [in] assailing constitutional prohibitions on creating any courts of exception to dispense justice [and] in proclaiming its judicial autonomy (judicial branch)

WHEREAS (24): The National Congress of the Republic . . . has gone outside the scope of the powers conferred upon it by the National Constituent Assembly. . . . For the abovementioned reasons, [the SDR statute] . . . conflict[s] with the Constitution of the Republic and the international conventions and treaties adopted and ratified by Honduras . . . and thus should be expelled from the Honduran legal system

U.S. Company Towns and Planned Developments

If a private organization owns and operates what functionally amounts to a town that is open to residents and visitors, does it have to abide by constitutional constraints on government? Are the services it provides, to borrow the language from contemporary European cases excerpted in Chapter II, “functions of a public nature”? Or, in the parlance of the United States, are they “essential” government functions? If a government entity sells electricity and water, ought it be seen as a “commercial” actor? What flows from the categorization of public and private—obligations or exemptions from constitutional obligations such as protecting freedom of speech and ensuring that all have equal voting opportunities? Do answers depend on factors such as easy access by outsiders to “company towns” or “water districts”? Could outsiders be barred from entry or from buying certain services?

Below, we consider two cases. In *Marsh v. Alabama*, a deputy county sheriff, “paid by the company” that owned the “town,” arrested Grace Marsh, who was giving out religious pamphlets on town property. She argued successfully that the federal Constitution applied to the private town and forbade the state from convicting her of trespassing. *Ball v. James* concerned a commercial but publicly constituted irrigation district. The majority held that the water and electricity provided by the district were not “essential” government functions. Hence it need not adhere to a one-person, one-vote system when choosing its elected officials.

Marsh v. Alabama
Supreme Court of the United States
326 U.S. 501 (1946)

Mr. Justice BLACK delivered the opinion of the Court.

. . . [W]e are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. . . . The town and the surrounding neighborhood, which cannot be distinguished from the [adjacent, public] property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. . . . There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveller may make free use of the facilities available there. In short, the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, . . . stood [on the sidewalk in Chickasaw's shopping center] and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: 'This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.' Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. . . . The deputy sheriff arrested her and she was charged in the state court with violating [a state law] which makes it a crime to enter or remain on the [private] premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted [because] . . . title to the sidewalk was in the corporation. . . .

Had the title to Chickasaw belonged not to a private but to a municipal corporation . . . it would have been clear that appellant's conviction must be reversed. . . . [N]either a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. . . . [H]ad the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? . . .

We do not agree that the corporation's property interests settle the question. . . . Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . [T]he owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. . . .

[T]he managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute . . . which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution. . . .

* * *

Justice Frankfurter concurred, insisting that "a company-owned town is a town" and that "in its community aspects," freedom of a person to "exercise his religion and to disseminate his ideas" trumped the property rights of the town's owners. Justice Reed, joined by Chief Justice Stone and Justice Burton, dissented. "Both Federal and Alabama law permit . . . company towns, . . . an area occupied by numerous houses, connected by passways, fenced or not," and Alabama's trespass statute, protecting private property, was properly applied to support the arrest. In the *Sundar* case, excerpted in Chapter II, the India Supreme Court prohibited state-paid ad-hoc "private" police. In *Marsh*, none of the opinions paused over the proposition of a "private" town making payments to a "deputy of

the Mobile County Sheriff” (not described as “off-duty”) to enforce state law on that company town’s premises.

A sequel of sorts to *Marsh* is the 1980 decision in *Pruneyard Shopping Center v. Robins*; there the U.S. Supreme Court found that California could protect free speech rights of individuals distributing leaflets on a 21-acre “private” shopping center. The question that frames *Ball v. James*, below, is whether the Salt River Project Agricultural Improvement and Power District is a public or a private entity for the purpose of deciding who was eligible to vote for the District’s directors.

Ball v. James
Supreme Court of the United States
451 U.S. 355 (1981)

Justice STEWART delivered the opinion of the Court.

This appeal concerns the constitutionality of the system for electing the directors of a large water reclamation district in Arizona, a system which, in essence, limits voting eligibility to landowners and apportions voting power according to the amount of land a voter owns. The case requires us to consider whether the peculiarly narrow function of this local governmental body and the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment.

The public entity at issue here is the Salt River Project Agricultural Improvement and Power District [“District”], which stores and delivers untreated water to the owners of land comprising 236,000 acres in central Arizona. The District . . . subsidizes its water operations by selling electricity . . .

[T]he [Arizona] legislature allowed the District to limit voting for its directors to voters . . . who own land within the district, and to apportion voting power among those landowners according to the number of acres owned. . . .

This lawsuit was brought by a class of registered voters who live within the geographic boundaries of the District, and who own either no land or less than an acre of land within the District. The complaint alleged that the District enjoys such governmental powers as the power to condemn land, to sell tax-exempt

bonds, and to levy taxes on real property. It also alleged that because the District sells electricity to virtually half the population of Arizona, and because, through its water operations, it can exercise significant influence on flood control and environmental management within its boundaries, the District's policies and actions have a substantial effect on all people who live within the District, regardless of property ownership. Seeking declaratory and injunctive relief, the appellees claimed that the acreage-based scheme for electing directors of the District violates the Equal Protection Clause of the Fourteenth Amendment. . . .

Reynolds v. Sims (1964) held that the Equal Protection Clause requires adherence to the principle of one-person, one-vote in elections of state legislators. In *Hadley v. Junior College District*, the Court . . . stated: "It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required"

[The District represents one such case] First, the District simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. . . .

Second, . . . even the District's water functions . . . are relatively narrow. . . . The District simply stores water The constitutionally relevant fact is that all water delivered by the Salt River District . . . is distributed according to land ownership, and the District does not and cannot control the use to which the landowners who are entitled to the water choose to put it. [T]hough the state legislature has allowed water districts to become nominal public entities in order to obtain inexpensive bond financing, the districts remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners. . . . [T]he nominal public character of such an entity cannot transform it into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election.

Finally, . . . the provision of electricity is not a traditional element of governmental sovereignty, and so is not in itself the sort of general or important governmental function that would make the government provider subject to the doctrine of the *Reynolds* case. . . . The Arizona Legislature permitted the District to generate and sell electricity to subsidize the water operations which were the beneficiaries intended by the statute. . . . [T]he voting scheme for a public entity like a water district may constitutionally reflect the narrow primary purpose for which the district is created. . . .

The functions of the . . . District are therefore of the narrow, special sort which justifies a departure from the popular-election requirement of the *Reynolds* case. . . . The voting landowners are the only residents of the District whose lands are subject to liens to secure District bonds. Only these landowners are subject to the acreage-based taxing power of the District, and voting landowners are the only residents who have ever committed capital to the District through stock assessments charged by the Association. . . .

[W]e conclude that the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives. . . . Therefore, . . . the State could rationally limit the vote to landowners. Moreover, Arizona could rationally make the weight of their vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations. . . .

* * *

Justice Powell concurred, stressing that state legislatures were “better qualified” than federal Courts to decide when “an impermissible delegation of . . . government powers” had taken place. Justice White, joined by Justices Brennan, Marshall, and Blackmun, dissented. Justice White argued that “the provision of water and electricity to several hundred thousand citizens” was not a “peculiarly narrow function” to which the principle of one person, one vote had no application. “Supplying water for domestic and industrial uses is almost everywhere the responsibility of local government, and this function is intimately connected with sanitation and health. Nor is it anymore accurate to consider the supplying of electricity as essentially a private function.”

REGULATION OF PRIVATELY PROVIDED PUBLIC SERVICES: INDEPENDENT AGENCIES, SEPARATION OF POWERS, AND CONSTITUTIONAL CONSTRAINTS

This section assesses independent government agencies [IAs] charged with overseeing firms providing public utility services—both wholly private firms and those owned in part or in whole by the state. These regulatory entities differ from core executive agencies and operate with some independence from the

cabinet structure of government. They are also meant to be independent of the firms they regulate.

The next two sections turn the tables on government oversight of private firms. They consider, first, private bodies that have regulatory and standard-setting functions traditionally associated with the executive and the legislature, and second, nongovernmental agencies, such as the World Anti-Doping Agency, that exercise judicial functions.

In all three sections some issues to discuss include: First, how and where do such entities, both IAs and private bodies, fit into the constitutional structures of nation-states? Second, should new constitutional rights develop given the growth and importance of these bodies? Third, must such entities abide by due process norms? Fourth, what role should courts play in developing new norms to constrain or to protect this array of increasingly powerful, prominent entities?

Independent Agencies and Constitutional Structure

This subsection explores the tension between constitutional claims that IAs are too independent of the executive and legislature and functional claims that independent entities are beneficial regulatory institutions. We focus on the regulation of public utilities where the firms may include a mixture of public, private, and hybrid entities. We consider the way constitutional imperatives interact with agency design in the U.S., the EU, Brazil and Canada.

The United States led the way in the creation of independent agencies. But what are they independent of? Some claim that the signature feature of U.S. agencies is their insulation from presidential removal power. Cabinet departments have leaders who serve at the pleasure of the President; the heads of independent agencies are generally protected against summary termination. This feature reflects Congress's concern that presidential meddling could overly politicize expert, rational public administration. However, Congress has its own political interests. It seeks not only to assure competence but also to avoid giving up all political control. It has often struck this balance through the creation of multi-member commissions whose implementing statutes require political party balance. Even if they are appointed in a partisan process, the requirements of party balance, termination only for cause, and staggered terms are designed to prevent any one, potentially partisan, commissioner from monopolizing the agency's agenda. In practice, of course, agencies are not apolitical entities. The constitutional question is whether any structural features must be part of an

agency's design, and if so, whether such features should prioritize impartial expertise.

The U.S. Supreme Court periodically grapples with constitutional challenges to independent agencies. At issue, often, is whether an agency's independence impermissibly interferes with the President's "take care" powers under Article II of the Constitution. The U.S. case, summarized by Martin Shapiro, can be contrasted with the regulation of public utilities by newly created independent agencies in the EU, Brazil and Canada. The EU has many so-called "independent" agencies but most are not really independent of the Commission; they are instead governed by bodies that represent Member States. Brazil has a strong presidency. Yet some of its agencies are strongly independent. This commitment to agency independence is in part designed to reassure foreign investors in public utilities. But it also raises constitutional questions. Canada is a parliamentary system, in which the whole notion of independence seems to fly in the face of entrenched constitutional traditions inherited from the UK.

Martin Shapiro

*A Comparison of US and European Independent Agencies**

A comparison of 'independent' agencies in the United States and Europe inevitably must address two questions. First, what do we mean by independence and from whom? Second, why do we want some agencies to be independent? I consider each issue in turn for the United States and the European Union.

[T]wo theories of public administration had coexisted in the U.S. from the founding of the republic. A Hamiltonian theory had touted government by experts. The Jacksonian theory proclaimed that the average citizen should take a short time away from his plow to perform public service and then return to his fields. This would be 'rotation in office.' Given American, competitive two-party, electoral democracy, Hamilton gives us a career civil service staffed by technical experts isolated from politics, and Jackson gives us the 'spoils system' in which the winning party staffs government service with its own stalwarts.

[T]he Progressive era gave us... career civil services recruited by examinations testing specialized technical knowledge and skills and the commission form, that is multi-headed administrative agencies. To put an agency

* Excerpted from Martin Shapiro, *A Comparison of US and European Independent Agencies*, in *COMPARATIVE ADMINISTRATIVE LAW 293* (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

‘in commission,’ that is, to replace a single executive head with a governing board, would reduce the chances of corruption as the commissioners watched one another. Or, at the very least, it would be more expensive and riskier to attempt to bribe three or five or seven commissioners than a single agency head.

‘Independence’ was part of this Progressive package and went hand-in-hand with the commission form. . . .

[I]ntervention in the private sector called for particular vigilance in combating the downside of the democratic dimension of public administration, that is of the inclination of the democratically responsible public administrators to seek partisan, electoral political advantage. Here, of course, comes ‘independence.’

At first glance, and by hindsight, . . . the concept of the ‘independent regulatory commission’ . . . appears to involve independence from the President. [However, it is] . . . much more an effort to insulate . . . [the commissions] from partisan, party attempts to seek electoral advantage through regulatory decisions. It is here that the connection between independence and the commission form becomes crucial.

One paradox of the independent regulatory commissions is that they rather openly combine executive, legislative and judicial functions in a political system deeply dedicated to ‘three great branch’ separation of powers. However, . . . the [Interstate Commerce Commission (ICC), created in 1887,] and subsequent regulatory commissions were placed firmly within the executive branch. The commissioners are presidential appointees. The staff are members of the general federal civil service. The general administrative law rules and procedures that govern the rest of the executive branch govern the commissions. . . . The sole, completely clear and specific constitutional dimension of independence is thus a limitation on the President’s removal powers imposed by the Supreme Court almost fifty years after the establishment of the first independent commission.* [In

* Editors’ Note: In the United States, the general pattern has been Congress imposing restrictions on the President’s removal power, followed by constitutional challenges asking whether Congress may properly limit the President’s control over a given officer or set of officers. In *Humphrey’s Executor v. United States* (1935), the Court sustained a provision in the Federal Trade Commission’s authorizing act that allowed the President to remove a sitting commissioner only for “inefficiency, neglect of duty, or malfeasance in office.” The Court’s approval or disapproval of legislative attempts to insulate officers from at-will removal turns on the language of Article II of the U.S. Constitution, on considerations pertaining to the separation of powers, and on functional assessments of whether such insulation impermissibly interferes with the President’s constitutional responsibilities. *See, e.g., Morrison v. Olson* (1988). Dissenting in *Morrison*, Justice

1889, Congress revised the ICC's mandate to insulate ICC commissioners from at-will Presidential removal.]

Congress had been thinking of independence in a somewhat different way; as independence from party, electorally oriented politics. What makes . . . [an agency] independent is far less its location outside of any of the cabinet departments than the statutorially prescribed terms of its commissioners. For the ICC and the later commissions, each commissioner serves for a longer term than that of the president, and their terms are staggered. Given the American competitive two-party system, typically at any given moment the Commission will enjoy a rough balance between Republican and Democratic commissioners. Indeed the statutes creating many of the later commissions formally require such a balance. . . .

The European Union is a fascinating focus for comparative studies because it is so new that it is still in the process of inventing itself. One of its inventions is a great proliferation of independent agencies. . . .

[Allow us to] tentatively define an EU independent agency as an administrative agency that is not a sub-unit of one of the Directorates General (DG) of the Commission. . . .

Today there are over thirty EU independent agencies, with some units so anomalous as to defy classification. A few, such as the Office for Harmonization in the Internal Market and the Community Plant Variety Office, assign Union-wide marketing rights that are in the nature of patents. In this sense, they are clearly regulatory agencies. At the opposite extreme, a substantial number simply gather and disseminate information on particular topics. . . . A large number of agencies engage in 'soft law' making of various sorts. A few administer funding programs. Many engage in indirect regulatory implementation through their relations with Member State bodies. Some, such as the Fisheries Control Agency, do some direct regulation. None of the agencies has 'hard law' making powers, that is, delegated lawmaking powers or the power to issue legally binding rules, a power exercised by many independent and non-dependent US agencies.

[M]ember State administrations implement most EU legislation. In contrast to the US, few EU agencies directly administer regulatory or other programs.

Scalia argued that any act that in large or small part "deprives the President of exclusive control over quintessentially executive activity" was per se unconstitutional.

All EU organs, including the agencies, are subject to a general ‘giving reasons’ requirement specifically contained in the treaties establishing the EU and to a duty of ‘good administration’ which the Court of Justice has read into the treaties. For judicial review purposes, these norms can function like the notice and comment, statement of basis and purpose and arbitrary and capricious provisions of the US Administrative Procedures Act. . . . [H]owever, the prevalence of ‘soft law’ making in the independent agencies, plus the scarcity of direct regulatory implementation by them and their inability to make rules that have the force of law, yield far fewer opportunities for judicial review than in the United States. . . .

In the purely formal legal sense, the independent agencies are not independent at all. They are, unless and until the Court of Justice changes its mind, dependencies of the Commission. It can only be said that they are independent of the permanent staffs of the DGs. Their operations are conducted largely independently of day-to-day Commission operations, but their chairs, who are Commission staffers, exercise considerable control.

[T]he heart of the Commission is its staff, drawn from a competitively recruited, merit-based, career, civil service which defines itself as a set of experts serving Europe, not their states of origin. The Commission is supposed to and generally does serve as a transnational counterweight to the national interests which meet and negotiate in the Council.

In the US, independence is independence from, or, at least, attenuation of, party politics seeking electoral advantage. The politics most feared in the EU is not party politics in the direct sense. There are no EU-wide political parties, and only the Parliament is a product of EU elections. Rather the fear is influence from politicians oriented to their fate in Member State elections.

[L]ike U.S. independent commissions, EU independent agencies employ the commission or multi-headed form as a mode for integrating politics into administration. The EU commission form, however, unlike the American, does not attenuate the most feared political influence; rather the form accentuates it. The EU agency structure is a microcosm of the balance between national and transnational interests struck by the Council-Commission relationship. The agency executive boards are mini-Councils and the working staff a mini-Commission. . . .

So why this problematic form of independence? Like US independent agencies, EU agencies emphasize their specialized expertise. Like US agencies as well, however, the many sub-units of non-independent departments under the DGs claim the [same] level of expertise. The difference from the US is that, in

theory at least, EU independent agencies are even more subject to, rather than less subject to, electorally oriented politics than the sub-units of the line departments. So the reason for independence is not essentially about privileging either expertise or efficiency. . . .

The traditional political neutrality of ministry-based administration has been undercut in many EU Member States by increased political influence over appointments to high-level ministry positions. As ministry career staffs appear less independent or neutral, the appeal of independent agencies no doubt increases. Interests that were not well represented in the ministries were likely to find independent, clientele-oriented agencies a particularly attractive option. . . .

Two other problems are the same as those that arise in comparable US agencies: policy coordination and transparency-participation-democratic accountability. A third is judicial review, although that may be viewed as an aspect of the second.

The [EU] Commission structure is essentially Weberian, with the usual potential for coordination presented by such structures. As in the US, the multiplication of independent agencies outside that structure of ministries subordinate to a cabinet and chief executive creates problems of both policy and implementation coordination. . . .

The second problem, that of transparency, participation and electoral accountability, is a complex one. On the one hand, the agencies are at least more transparent and open to outside participation than the [informal] committees because they are more formally institutionalized. We know which ones exist, where they are, who staffs them, and that all this will be the same tomorrow as yesterday. On the other hand, the agencies present still another layer of institutional complexity in a governing system that most Europeans understand poorly. . . .

[B]oth US and EU independent agencies are independent in the narrowest sense, that is, they fall outside any cabinet department or ministry organization chart. Both are designed to strike a balance between democracy and technocracy on the technocratic side. Both seek to do so by attenuating the influence of electorally oriented politics. Here, however, there is a major difference. In the US the political influence of party politics is attenuated by a commission form calculated to balance the political clout of the two parties. In Europe, the political influence of Member State governments is fully admitted through the independent agencies' boards but is then attenuated through the shared, specialized, technical expertise of board members staff and participating national bureaucracies. . . .

Both US and EU independent agencies generate serious problems of policy coordination, but ones that tend to become salient long after the creation of the agencies. In both, the agencies arise out of a curious paradox. The distrust of government administration leads to the creation of more, and more fragmented, administration. In the final analysis, however, US independent agencies were created to reduce the evils of partisan, party politics while EU independent agencies were created to increase EU administrative resources without obviously expanding the size and resources of the ‘Brussels Eurocracy’ that is the Commission.

The next excerpts discuss Brazil, a presidential system, and Canada, a parliamentary one. In Brazil’s strong presidential system limitations on the President’s control over key regulatory officials could provoke serious constitutional confrontations. Under Canada’s parliamentary constitution, the independence of administrative officials raises important challenges. Does parliamentary supremacy render administrative independence anathema? Or does parliamentary supremacy make administrative independence that much more necessary—as a counterweight to an otherwise largely unconstrained government.

Mariana Mota Prado

*Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil**

... In the last two decades, independent agencies have become the primary means of regulating infrastructure industries worldwide. This is especially true in Latin America. The United States independent agency model served as a blueprint in most cases. Despite these institutional similarities, there is one important difference: Latin American agencies operate within presidential systems that differ significantly from the US system. For example, the Brazilian President is substantially more powerful vis-à-vis the Brazilian Congress than is the White House vis-à-vis the American Congress. . . .

* Excerpted from Mariana Mota Prado, *Presidential Dominance from a Comparative Perspective: The Relationship Between the Executive Branch and Regulatory Agencies in Brazil*, in *COMPARATIVE ADMINISTRATIVE LAW 225* (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

Between 1996 and 2002, the Brazilian government established [Independent Regulatory Agencies, IRAs] for electricity, telecommunications, oil and gas, transportation, and other infrastructure sectors. Following the formulas [for independent agencies], Brazilian IRAs were designed to have fixed terms of office for commissioners, congressional approval of presidential nominations, and alternative sources of funds to ensure their financial autonomy. These and other institutional features sought to guarantee that these agencies were not subordinated to any branch of government, thereby providing them with a high level of independence. . . .

Lack of removal power (neither the President nor any other executive official have the power to remove these agencies' commissioners at will once they are appointed) is a central institutional guarantee of independence. Many US IRAs protect commissioners against dismissal at will, and Brazilian agencies also adopted this feature. . . .

In addition, requiring senatorial approval of presidential nominees constrains the President's choices, giving the Senate veto power over nominations. Following the U.S. design, almost all constitutive statutes in Brazil require this approval. Brazilian IRAs also have alternative sources of funding that are separate from the executive's fiscal accounts. . . . [Thus, Brazilian IRAs would seem to be just as independent at their U.S. counterparts.]

The 1988 [Brazilian] Constitution granted the President strong proactive and reactive powers, which include legislative decree powers and veto power that cannot be easily overridden by Congress. Indeed, the 1988 Brazilian Constitution was ranked as granting the second most legislative powers to the President, among 43 constitutions. . . .

[In both the United States and Brazil, those who prize presidential control disfavor insulated, independent agencies. Concomitantly, those who prize administrative expertise and rational policymaking are more supportive of independent agencies.] . . .

In Brazil . . . delegation of powers to independent agencies is often interpreted as a sign of credible commitment. The government is predicting the possibility of acting opportunistically once reforms have been implemented and elects to tie its hands in order to avoid doing so. . . . On the other hand, those in favor of greater presidential control argue that democratically elected Presidents are more likely than agencies to promote the general welfare. . . .

A careful analysis of the particularities of the Brazilian political system shows that the three mechanisms of control over agencies—budgetary control, control over appointments, and threats of new legislations—are in the hands of the President, not Congress. Thus, . . . a theory of presidential dominance is more appropriate in the Brazilian case. . . .

* * *

The Brazilian Supreme Court has struggled with the issue of the agencies' degree of independence of the President. The following excerpt from a forthcoming casebook captures the contrasting views on the court, as evidenced in a 1999 case dealing with removal powers.

Mariana Prado & Rene Urueña
*Economic Regulation and Judicial Review**

. . . Privatization reforms have introduced a new actor into the structure of administrative states in Latin America, the regulatory agencies. . . . In Brazil . . . regulatory agencies have institutional guarantees of independence . . . designed to prevent an elected government from opportunistically modifying the regulatory framework after privatization had taken place. They were, therefore, an instrument used by Latin American governments to signal to investors a credible commitment to the reforms.

While these guarantees of independence may be necessary to protect investors, they raise some interesting questions regarding the accountability of regulatory agencies. In a democratic system, where the government derives its legitimacy from regular elections, to whom would such “independent” agencies be responding? What is the constitutional status of regulatory agencies, considering the separation of powers principle? Are they part of the Executive branch and therefore should be subordinated to the President? If not, to which branch of the government do they belong, and which branch are they controlled by? . . .

[I]n a case decided in 1999, the Brazilian Supreme Court addressed a challenge against two mechanisms designed to guarantee the independence of regulatory agencies. The Governor of the State of Rio Grande do Sul challenged

* Excerpted from Mariana Prado & Rene Urueña, *Economic Regulation and Judicial Review*, in CASEBOOK IN LATIN AMERICAN CONSTITUTIONAL ADJUDICATION (Roberto Gargarella, Paola Bergallo & Juan Gonzalez Bertomeu eds., forthcoming 2013).

the constitutionality of two provisions governing the state's regulatory agency (AGERGS), which stated that: (i) appointments of AGERGS' commissioners should be approved by the legislative assembly of the state of Rio Grande do Sul; and (ii) the appointed commissioners of such agency could only be dismissed before the end of their term in office by the same assembly.

In the petition to the Supreme Court, the Governor argued that these provisions challenged article 84, II of the 1988 Constitution, which established that the President has the exclusive power to execute statutes by enacting decrees and regulation. Also, these provisions challenged article 37, II of the Constitution, which supposedly indicated that appointed civil servants could be appointed and dismissed at will . . . by the President. The governor claimed that the same powers applied to him, as chief of the executive branch at the state level, i.e. to enact regulation, or to delegate this function to civil servants . . . appointed and dismissed by him. If the challenged mechanisms were declared unconstitutional, the decision would also be applicable to federal regulatory agencies. Thus, the decision could potentially rever[se] a great deal of the regulatory reforms implemented in the 1990s.

The Brazilian Supreme Court quickly dismissed the constitutional challenge to the first provision, arguing that the jurisprudence of the court has consistently affirmed the constitutionality of such requirement (legislative approval of appointments by the chief of the executive) in other cases. . . . In contrast, the second provision, which established the legislature's exclusive power of dismissal of AGERGS' commissioners, generated a heated debate

On one side of the debate, there was Justice Sepulveda Pertence, who voted in favor of declaring . . . [the] provision unconstitutional [He] cited the vast jurisprudence of the court . . . which established that "appointments for term for commissioners in *autarquias*¹⁴ do not impede dismissal at will by the President of the Republic." He argued:

[exceptions to dismissal at will] are related to sectors—Universities and the Prosecutor's Office—that are constitutionally placed outside the vertical hierarchy of the executive branch. This is obviously not the case of the regulatory agencies.

¹⁴ [T]he Brazilian bureaucracy can be divided into bodies of the direct administration (*administração direta*) and bodies of the indirect administration (*administração indireta*). *Autarquia* refers to some bodies of the indirect administration that have a higher degree of autonomy, such as public universities. However, regular *autarquias* are not equivalent to Independent Regulatory Agencies, which are classified as special *autarquias*, as they have particularly strong guarantees of independence.

[I]f appointees from the previous government were allowed to stay in power . . . this would create significant obstacles for a newly elected government to pursue its agenda.

On the other side of the debate, Justice Nelson Jobim argued that the provision was constitutional . . . quoting . . . Justice Vitor Nunes Leal . . . [that]:

the appointment of a public official for a fixed term is a natural component of the system of administrative autonomy that is granted by law to certain bodies. This fixed term in office aims at guaranteeing policy continuity and the independence of these autonomous entities. . . . In the current political system in our country, it is the legislature that should determine the economic and administrative policies of the country.

After citing U.S. precedents, [*Humphrey's Executor v. United States* (1935) and *Wiener v. United States* (1958)], Nunes concludes that one needs to distinguish between:

officials that belong to the direct administration (*administração direta* in Portuguese, and executive establishment in English) and therefore can be dismissed at will; and those that belong to an entity created to exercise its judgment independently of any authorization or obstacle by any other official or any other governmental department, which can only be dismissed if Congress grant[s] the power to do so. This distinction stems from the different functions performed by bodies of the direct administration and those whose responsibilities require complete independence from the executive branch.

Turning to the problem of the democratic deficit, Nunes states:

There was also an argument that appointments from the previous government will not be aligned with the policies of the new government. . . . The legislature certainly weighed the costs of a possible misalignment against the benefit, regarded more relevant, of guaranteeing the independence of this body and securing the continuity in the performance of its functions. The branch that should be evaluating the advantages and drawbacks of each of these two arrangements is not the judiciary, because we do not create law, but it is the legislature. . . .

Justice Jobim [concluded that] . . . [t]he objective of AGERGS is to guarantee the efficacy of the policy of the law. . . . The agency is not supposed to implement the policies of the government.

Justice Pertence then responds to Justice Jobim, sustaining his initial vote for the unconstitutionality of the provision:

The statute in the state of Rio Grande do Sul denies the President even the power to keep an official with fixed-term in office, given that the legislative assembly can dismiss the official—and this is explicitly the rule stated in this statute—without any request from the Governor. This is more than a violation [of] the principle of separation of powers. This is a mechanism that belongs to parliamentary systems.

In light of this, Justice Jobim then decides to revise his opinion, but sustains his concern regarding the guarantees of independence of regulatory agencies:

In this case, the statute of the state of Rio Grande do Sul ascribed a unilateral decision [to the legislative assembly], which I did not notice previously. . . . I will follow [Justice Sepulveda Pertence's] opinion, in principle But one should not conclude from his opinion or the decision of this Court, that we are authorizing Governors or the President to dismiss at will commissioners in any of these agencies

In the end, the Court decided to declare the second provision [which did not permit the governor to dismiss commissioners] unconstitutional

Canada is a unitary parliamentary system. There, despite strong functional arguments for independence, the notion of independent bodies, possessing policymaking responsibilities can seem deeply problematic.

Lorne Sossin

*The Puzzle of Administrative Independence and Parliamentary Democracy in the Common Law World: A Canadian Perspective**

. . . Independent administrative bodies do not fit easily into the political, constitutional or legal landscape of parliamentary democracy. . . . These bodies are generally established to fulfil policy mandates but without the usual forms of hierarchical accountability to the government that prevailing conceptions of parliamentary democracy normally demand. Independent administrative bodies are not courts and not [the elected] government but have significant impact on the rights and interests of both individuals and groups. This hybrid status creates what I term the ‘puzzle’ of independence. . . .

Recent allegations in Canada of political interference by the federal government with the Canadian Military [Police] Complaints Commission and the Canadian Nuclear Safety Commission have brought these concerns . . . into stark relief. The recent allegations suggest that the independence of an administrative body may only be respected if the policy aims of the body do not conflict with the government’s political priorities. . . .

By far the most contentious and noteworthy incident of the Conservative Government’s interference in the decision-making of an independent body occurred in January 2008 when Natural Resources Minister Gary Lunn removed Linda Keen as head of the Canadian Nuclear Safety Commission (CNSC), Canada’s nuclear safety watchdog. Lunn justified Keen’s removal on the basis that she had lost the government’s confidence over the way she handled the shutdown of the medical isotope-producing nuclear reactor in Chalk River, Ontario.

The CNSC ordered the reactor to close on November 18, 2007 over safety concerns about the emergency power system not being connected to cooling pumps, as required to prevent a meltdown during disasters. . . . The closure . . . resulted in a worldwide shortage of the crucial medical material. . . . [On December 11 and 12, 2007, the House of Commons and the Senate, respectively, passed legislation overriding the CNSC’s ruling. The reactor was restarted on December 16, 2007, and medical isotope production resumed within days.]

* Excerpted from Lorne Sossin, *The Puzzle of Administrative Independence and Parliamentary Democracy in the Common Law World: a Canadian Perspective*, in *COMPARATIVE ADMINISTRATIVE LAW 205* (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

Keen was removed as President of the CNSC on January 15, 2008, the day before she was scheduled to appear before the House of Commons' natural Resources Committee . . . to offer her version of the events leading up to the shutdown of the reactor. Critics were quick to condemn [Keen's removal] as a blatant political maneuver aimed at silencing a federal employee's criticism of a controversial Government decision. . . .

While Keen remained a CNSC commissioner following her termination as President of the CNSC . . . , she challenged the Government's action in court. In April 2009, the Federal Court dismissed her claim . . . [holding, on the basis of the authorizing statute and in light of no overriding constitutional imperative to insist upon administrative independence] that the position of President of the CNSC is an 'at pleasure' appointment.⁸ . . . While the Court addressed the issue of whether the Government has the *right* to dismiss Keen, it sidestepped the broader and deeper question of whether the Government was *right* to exercise this power, whether or not they possessed it. . . .

There is no inconsistency between the independence of the CNSC and the government using Parliament to trump one of its regulatory decisions based on an overriding public concern. . . . Because administrative agencies are created by statute, and can be eliminated by statute, it follows that the authors of a statute can also rewrite any of its decisions. . . .

The recent confrontation[] show[s] that there is little to compel Canadian governments to respect the independence of administrative agencies if they do not want to do so. These controversies reveal the hard but important truth about independence in administrative decision-making in a parliamentary democracy: while the rule of law and principles fairness and impartiality may require independence, only political leadership can sustain it. . . . As the experience of other common law jurisdictions makes clear, it takes political leadership and a systemic approach to administrative justice to safeguard the boundaries of partisanship and ensure that administrative bodies are free to operate without fear of political repercussions for decisions that do not accord with the policies of particular governments.

⁸ See Keen v. Canada (Attorney General) (Can. 2009).

Protecting Agencies' Independence

Under EU law, data protection must be managed by entities independent from the political leadership of any Member State. The EU's commitment to ensuring that Member States' privacy commissions are independent from governments is reflected in a case involving Austrian data protection. The European Data Protection Supervisor (EDPS) alleged that Austria placed its data protection responsibilities under the supervision of political leaders in violation of EU law. The European Court of Justice (ECJ) agreed.

The legal question was whether Austria had complied with an EU directive (article 28(1) paragraph 2 of Directive 95/46/EC) on the protection of individuals' personal data. Austria argued that it was in compliance with this directive as well as with Article 6(1) of the European Convention on Human Rights, which guarantees a "fair and public hearing" by an "independent and impartial tribunal." (See the discussion of the *Mérigaud* case below for more on Article 6) Europe's regime for data protection raises the possibility of insulating agencies from democratically elected governments as a method of protecting individual rights.

European Commission v. Republic of Austria European Court of Justice (Grand Chamber) Case C-614/10 (2012)

1. . . . [T]he European Commission asks the Court to declare that, by failing to take all of the measures necessary to ensure that the legislation in force in Austria meets the requirement of independence with regard to the Datenschutzkommission (Data Protection Commission; 'the DSK'), which was established as a supervisory authority for the protection of personal data, the Republic of Austria has failed to fulfill its obligations under . . . Article 28(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995* on the protection of individuals with regard to the processing of personal data and on the free movement of such data. . . .

* Editors' Note: Paragraph 1 of Article 28 of Directive 95/46 of the European Parliament, which is entitled "Supervisory authority," provides:

Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

25. The Commission and the EDPS [European Data Protection Supervisor] claim that the Republic of Austria . . . does not allow the DSK to exercise its functions 'with complete independence.' . . . [First,] the managing member of the DSK must always be an official of the Federal Chancellery. All day-to-day business of the DSK is thus *de facto* managed by a federal official, who remains bound by the instructions issued by his employer and is subject to supervision

26. Second, . . . the office of the DSK is structurally integrated with the departments of the Federal Chancellery. As a result . . . , the DSK is not independent in either organic or substantive terms. All DSK staff members are . . . under the authority of the Federal Chancellery and are thus subject to its supervision.

27. Third, the Commission and the EDPS refer to the Federal Chancellor's right to be informed [under Austrian law]

29. [Austria and Germany argue that] the DSK is a 'collegiate authority with judicial functions' . . . [that] constitutes an independent court or tribunal within the terms of . . . the European Convention for the Protection of Human Rights and Fundamental Freedoms

30. According to the Republic of Austria, the . . . DSK has such independence since . . . its members . . . are not bound by instructions of any kind in the performance of their duties.

32. First, the managing member of the DSK need not necessarily be an official of the Federal Chancellery. . . .

33. Second, as regards the integration of the office of the DSK with the departments of the Federal Chancellery, the Republic of Austria claims that all bodies of the federal public administration come, from the point of view of budgetary law, under a ministerial department. It is for the Government, in conjunction with the Parliament, to ensure that the various executive bodies have adequate equipment and staff. . . .

34. Third, . . . the Republic of Austria notes that that [Chancellery's] right [to information] seeks to ensure a certain democratic link between the autonomous bodies and the Parliament. The right to information provides no

These authorities shall act with complete independence in exercising the functions entrusted to them.

scope for the exercise of influence over the DSK's functioning. In addition, a right to information is not contrary to the requirements of independence applicable to a court or tribunal. . . .

36. [The Court finds that EU law] requires Member States to set up one or more supervisory authorities for the protection of personal data which have complete independence in exercising the functions entrusted to them. . . .

42. [T]he fact that the DSK has functional independence in so far as, in accordance with the [2000 Law on data protection], its members are 'independent and [are not] bound by instructions of any kind in the performance of their duties' is, admittedly, an essential condition . . . to satisfy the criterion of independence. . . . However, . . . such functional independence is not by itself sufficient to protect that supervisory authority from all external influence.

43. The independence required . . . is intended to preclude not only direct influence, in the form of instructions, but also . . . any indirect influence which is liable to have an effect on the supervisory authority's decisions. . . .

46. [A] federal official manages the day-to-day business of the DSK. . . .

50. In the light of the position that the managing member holds within the DSK, [EU law] precludes the supervision to which the managing member is subject. . . . Even if [the Austrian law] is designed to prevent the hierarchical superior from issuing instructions to the managing member, the fact remains that [the Austrian law] confers on the hierarchical superior a power of supervision that is liable to hinder the DSK's operational independence. . . .

Efficient Public Utility Mandates and Universal Service Requirements: The Role of Independent Regulatory Agencies

Public utility regulation is concerned first and foremost with the efficient operation of an industry with natural monopoly characteristics where competitive market pressures will not produce efficient results. Given this justification for state intervention, other goals vie with efficiency for the attention of regulators—in particular, demands for universal service and consumer protection that, in some polities, may have constitutional status. Here we consider tensions between these goals as the EU presses Member States to privatize and to regulate electricity and telecommunication.

**Directive 2009/72/EC Concerning Common Rules for the Internal
Market in Electricity**

European Parliament and Council of the European Union
2009 O.J. (L 211) 55

Article 1: Subject matter and scope

... This Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements. . . .

Article 3: Public service obligations and customer protection

1. Member States shall ensure . . . that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

2. [M]ember States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers. . . .

3. Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises . . . enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices. . . .

7. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. . . .

10. Member States shall implement measures to achieve the objectives of social and economic cohesion and environmental protection, which shall include energy efficiency/demand-side management measures and means to combat climate change, and security of supply, where appropriate. . . .

Article 35: Designation and independence of regulatory authorities

1. Each Member State shall designate a single national regulatory authority at national level. . . .

4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. . . . Member State shall ensure that . . . the regulatory authority:

(a) is legally distinct and functionally independent from any other public or private entity;

(b) ensures that its staff and the persons responsible for its management:

(i) act independently from any market interest; and

(ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. . . .

5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

(a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and

(b) the members of the board of the regulatory authority or, in the absence of the board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

[T]he members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no

longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law. . . .

A similar EU directive covers telecoms regulation. The excerpt below captures the tensions in telecom regulation between certain national principles, some with constitutional status, and the EU's priority of creating efficient markets in the Union.

Dorit Rubinstein Reiss

No Innocents Here: Using Litigation to Fight Against the Costs of Universal Service in France^{*}

. . . European Union law requires all member states to open their telecommunications market to competition. . . . [T]he invisible hand of the market should rule the sector, rather than the former state monopolies. However, alongside the impetus for reform, concerns were raised about the effect such reform might have on values important to the people of the member states, such as universal service. Universal service in this context refers to providing access to telecommunications in ways a "pure" free market would not. . . .

In the telecommunications context the European Union has officially decreed that access (though not free access) to telecommunications is an important and basic right. The Universal Service Directive states that liberalization goes hand in hand with securing the delivery of universal service. . . .

[T]his Article . . . [tells] the story of how French operators attempted to avoid their universal service obligations through European and then French litigation. In 2001, the European Court of Justice (ECJ) found the French system of funding universal service in telecommunications to be in violation of EU law . . . [France continued to resist and thus subsequent French] funding decisions were repeatedly attacked by [new entrants seeking to compete with France Télécom]

^{*} Excerpted from Dorit Rubinstein Reiss, *No Innocents Here: Using Litigation To Fight Against the Costs of Universal Service in France*, 1 CREIGHTON INT'L & COMP. L.J. 5 (2011). The ordering of the text's paragraphs has been altered.

The [2001] decision and its aftermath can be seen—as the ECJ clearly saw it—as another attempt by France to put obstacles in the path of new entrants. Under this view, France does not share the ideology of free competition and unregulated markets and is anxious to protect its national champion, France Télécom, from competition through all means fair or foul. However, the battle around funding universal service can also be seen in another light—as a carefully thought out attack by sophisticated [albeit new] competitors on a regulatory scheme protecting a value they had no wish to pay for, universal service

Three general lessons emerge from this different reading of the battle around French Universal Service Funding. First, . . . the incumbent may not be the only actor with an incentive to combat or subvert the post-liberalization regulatory framework, and that regulators and courts should be wary of abuses of the system by new entrants too. Second, there is a real tension between the need to provide private actors a forum in which to defend themselves against excessive regulation and to protect their rights and the need to prevent use of the court system to cause delays and torpedo regulation. . . . Finally, France’s universal service experience emphasizes the importance of designing regulatory systems to prevent potential problems (or create procedural safeguards in the right places). . . .

[T]he costs of universal service are mostly spread between France’s fixed and mobile operators. . . . The main provider of universal service is the French incumbent, France Télécom . . . currently only partly owned by government (45.3%), but strongly influenced by it. . . . The head of the firm was usually a figure with substantial political connections In addition, many agency members have worked for France Télécom. However, France Télécom did not just receive funding for universal service, it also paid into the fund

To read the ECJ’s decision and the very few relevant scholarly references to the decision, universal service is the story of French resistance to the European Union’s desire to create real competition in the market. France . . . skewed the funding system to benefit France Télécom at the expense of new operators. . . .

On December 6, 2001[, in case C-146/00,] the ECJ justified the [C]ommission’s misgivings and ruled against France [The Court found that France inflated] the costs of universal service, thereby benefiting France Télécom at the expense of new entrants. . . . [The Commission also] strongly criticized several methodological “shortcuts” used by France to calculate the costs of the first [year’s universal service]. . . .

Finding against the French system, the ECJ, under this version of the story, bravely forced the rogue state to correct its problematic practices. . . . However, even with the ECJ's brave interference, the French system was not completely fixed, and constant vigilance was required. Luckily, the operators competing with France Télécom took the burden on themselves. Accordingly, when the French regulator continued to be recalcitrant, the association of French operators—AFORST—filed another complaint with the [C]ommission. Similarly, operators brought several suits in the French courts against France, demanding that the system be corrected. . . . Universal service is important to the French. The [C]ommission, on the other hand, has been promoting and supporting liberalization for years. . . . However, this is not the only possible story. . . .

[F]rance Télécom pays the largest share of universal service costs. The legal framework allows other operators to provide certain parts of the universal service too. In particular, companies can offer social tariffs—reduced tariffs to individual groups—and be reimbursed for their loss from the universal service funds. . . . Therefore, increasing universal service funding is not a dramatic help for France Télécom. The French government's interest in inflating the costs of universal service to support the incumbent is not as great as it might appear at first blush. But . . . [t]he heavy use of the domestic courts after the ECJ decision—especially bringing cases doomed to failure—suggests reluctance to pay the contribution, whatever the amount. Even winning regularly, the need to constantly defend its behavior in court adds to the agency's burden and may lead it to be very cautious in its decision-making.

France's difficulties with its universal funding mechanism support funding the universal service through some means other than a special fund. One way would be a direct addition to customers' bills—in which case the costs would be directly passed on to consumers, as is done by the French electric utilities; transaction costs might be reduced in this case. Another is adding additional charges through one of the other funding schemes, such as interconnection prices. A fund, where the operators are directly charged large concentrated sums once a year, makes them feel the loss much more. Since it is a direct cost and is strongly felt, the operators are likely to mobilize to fight it. . . .

[S]urprisingly—or unsurprisingly—the French experience in these cases mirrors developments in the United States where sophisticated companies use courts to limit regulation. However, the European institutions, accustomed to viewing the French system as a “dirigist” institution willing to bend and avoid the law to support its national champions, are not sensitive to the other side of the equation, new entrants' struggle to avoid [paying for universal service obligations]. . . .

OUTSOURCING LEGISLATION AND RULEMAKING: PRIVATE ENTITIES SETTING PUBLIC STANDARDS

Governments rely on private standard-setting and accreditation organizations. Often, they piggyback on an existing body of privately generated standards, incorporating them into law. In this section, we consider the extent to which these private bodies take on the tasks of legislative and executive branch regulators, and if so, whether they must abide by constitutional and statutory obligations that in many jurisdictions, attach only to governmental entities.

Incorporating Private Standards into Statutory Law

Private standard-setting organizations develop intellectual property in the formulation of standards. They then may publish—and sell—compendia of standards, sometimes incorporated by reference into law. Once incorporated, do constitutions provide answers to their ownership? Do those standards remain subject to copyright protection?

Peter L. Strauss

Private Standards Organizations and Public Law^{*}

. . . Standards, once adopted, are copyrights as the intellectual property of the developing [Standard Development Organization (SDO)], and offered for sale. . . . [F]ulfilling the required procedures imposes administrative costs that must somehow be financed. . . . [T]hese costs are substantially financed through membership dues paid to participate in their processes and through the sale of their copyrighted standards.

Increasingly, American governments—federal, state, and local—have been adopting part or all of some of these standards . . . as regulatory requirements. Incorporation by reference . . . greatly eases the work of governments. . . .

^{*} Excerpted from Peter Strauss, *Private Standards Organizations and Public Law* (Columbia Pub. Law Research Paper No. 13-1334, 2012), available at <http://ssrn.com/abstract=2194210>.

[OMB] Circular A-119 specifically calls on agencies to respect SDO copyrights Rather than publishing the standards' texts in their regulations, [agencies] simply refer the readers of their regulations to the standards which they have "incorporated by reference." Although the Office of the Federal Register has required one physical copy of each incorporated standard to be provided to it and another to be held in an agency library, thus permitting free inspection of what are now legal requirements for action, visiting Washington D.C. . . . to do so seems unlikely to mean much to someone in Minnesota, California, or Alabama. Persons . . . must usually learn the standard from the SDO whose intellectual property it is, at whatever price that organization chooses to set.

[I]f standards have been made into law, don't they have to be public? Don't American citizens and companies have a right to read laws governing their conduct without having to pay the monopoly price a valid copyright would permit a private organization "owning" that legal obligation to charge for permitting access to it, on such terms as it chose to require? As the United States Copyright Office well knows, "law is not subject to copyright."

[That said, were law] to impair the SDOs' markets for their standards, how would they support their undeniably beneficial work? With good reason, moreover, many SDOs will assert that those directly governed by a particular standard should find the cost of obtaining it . . . trivial in relation to their other costs [This] however, overlook[s] two important countervailing considerations: the interests many who are not affected businesses may have in knowing what the standards are, and the way in which conversion of a voluntary standard into a legal requirement can distort the market for that standard. . . .

Peter Veeck, the operator of a non-commercial website, posted municipal building codes—codes adopted (and incorporated by reference) from those written by the Southern Building Code Congress International (SBCCI), a non-profit organization dedicated to developing model building codes. SBCCI brought suit, alleging copyright violation, unfair competition, and breach of contract. The question before the court was: to what extent can a private organization assert copyright protection for its model codes after a legislative body has adopted them?

Veeck v. Southern Building Code Congress International, Inc.

United States Court of Appeals, Fifth Circuit

293 F.3d 791 (5th Cir. 2002) (en banc)

EDITH H. JONES, Judge, Fifth Circuit:

. . . Excluding “the law” from the purview of the copyright statutes dates back to this nation’s earliest period. In 1834, the . . . Court’s rejection of copyright for judicial opinions paralleled the principle . . . that “[s]tatutes were never copyrighted.”

[T]he complexities of modern life and the breadth of problems addressed by government entities necessitate continuous participation by private experts and interest groups in all aspects of statutory and regulatory lawmaking. . . .

Not only is the question of authorship of “the law” exceedingly complicated . . . but in the end, the “authorship” question ignores the democratic process. Lawmaking bodies in this country enact rules and regulations only with the consent of the governed. The very process of lawmaking demands and incorporates contributions by “the people,” in an infinite variety of individual and organizational capacities. . . .

[T]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process. . . .

[P]ublic ownership of the law means precisely that “the law” is in the “public domain” for whatever use the citizens choose to make of it. . . .

[I]t is difficult to reconcile the public’s right to know the law with the statutory right of a copyright holder to exclude his work from any publication or dissemination. SBCCI responds that due process must be balanced against its proprietary rights and that the fair use doctrine as well as its honorable intentions will prevent abuse. Free availability of the law, by this logic, has degenerated into availability as long as SBCCI chooses not to file suit. . . .

“[T]he law,” whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.

[W]e hold that when Veeck copied *only* “the law” of [two municipalities], which he obtained from SBCCI’s publication, and when he reprinted only “the

law” of those municipalities, he did not infringe SBCCI’s copyrights in its model building codes. The basic proposition was stated by Justice Harlan . . . : “any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book”

PATRICK E. HIGGINBOTHAM, Circuit Judge, joined by KING, Chief Judge, and W. EUGENE DAVIS and CARL E. STEWART, Circuit Judges, dissenting:

. . . The copyrights at issue here were concededly valid before the cities adopted them as codes. The proper question is whether we should invalidate an otherwise valid copyright as well as the solemn contract between the governmental body and SBCCI. That aggressive contention must find stronger legs than the rhetoric it comes clothed in here. The contention comes with no constitutional or statutory text This is federal common law adjudication. Its hallmark must be case-by-case accretion and measured decision making, even if the case-by-case explanation of the permissible restraint upon the copying of an enacted code leads to the conclusion that Veeck urges today—and I am not yet willing to embrace—that invalidity of the copyright is the inevitable consequence of code adoption. Rather, I conclude that Veeck violated the explicit terms of the license he agreed to when he copied model codes for the internet and posted them. I decide no more.

WIENER, Circuit Judge, filed a dissenting opinion joined by KING, Chief Judge, and PATRICK E. HIGGINBOTHAM, W. EUGENE DAVIS, CARL E. STEWART, and DENNIS, Circuit Judges, dissenting:

Technical codes and standards have become necessary, pervasive, and indispensable ingredients of Twenty-First Century life in this country; regrettably, today’s majority opinion has a real potential of drastically changing the societal landscape through that opinion’s predictably deleterious effects on these codes and standards, their authors, and the public and private entities that daily use and depend on them. . . . [T]he majority had to (and did) adopt a *per se* rule that a single municipality’s enactment of a copyrighted model code into law by reference strips the work of all copyright protection, *ipso facto*. Firmly believing that for this court to be the first federal appellate court to go that far is imprudent, I respectfully dissent. . . .

[T]his would be an entirely different case if Veeck’s (or anyone’s) access to the law had been denied or obstructed; instead, we deal here only with Veeck’s bald pronouncement . . . that, once a code is enacted into law, due process does not merely afford him access, but also gives him unfettered copying and

dissemination rights. The majority's acceptance of Veeck's position is truly a novel extension of any prior judicial recognition of a due process right. . . .

[T]he privately created model codes enacted into law in this case are easily distinguishable from judicial opinions or statutes in several important respects. First and most obviously, model codes are not created by elected or appointed officials paid from public fisc, rendering inapt the mythical concept of citizen *authorship*. . . .

Second, these narrowly focused codes are detailed and complex, requiring technical expertise on the part of the author. Third, they are of limited, highly specialized effect as to who has a real interest and is actually affected, unlike judicial opinions and statutes, which generally have broad if not universal application. . . .

Today, the trend toward adoption of privately promulgated codes is widespread and growing, and the social benefit from this trend cannot be seriously questioned. The necessary balancing of the countervailing policy concerns presented by this case should have led us to hold that, *on these facts*, the copyright protection of SBCCI's privately authored model codes did not simply evanesce *ipso facto*, when the codes were adopted by local governments; rather, they remain enforceable, even as to non-commercial copying, as long as the citizenry has reasonable access to such publications cum law

Delegation of Standard Setting to Private Bodies

The United States

An early U.S. case involving congressional reliance on private standard setting is *A.L.A. Schechter Poultry Corporation v. United States*, excerpted below. At issue in *Schechter* was a provision of the National Industrial Recovery Act authorizing private trade associations to establish, subject to presidential approval, codes of fair competition. Petitioners, slaughterhouse operators in New York City, were charged with and convicted of violating the code. The Court of Appeals affirmed most of the convictions. The Supreme Court reversed on Non-Delegation and Commerce Clause grounds. *Schechter* represents the high-water mark of constitutional intolerance of such delegations. As the judicial and scholarly excerpts that follow make clear, subsequent court decisions have

generally not found constitutional infirmities when the political branches delegate administrative responsibilities to private actors.

A.L.A. Schechter Poultry Corporation v. United States
Supreme Court of the United States
295 U.S. 495 (1935)

Mr. Chief Justice HUGHES delivered the opinion of the Court.

. . . The Constitution provides that ‘All legislative powers herein granted shall be vested in a Congress of the United States. . . .’ U.S. Const. art. 1, § 1. . . . [T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts. . . . But. . . the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate [essential legislative functions], if our constitutional system is to be maintained.

The Government urges that the [privately developed] codes will “consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.” . . . But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

[Justice Cardozo concurred, writing on issues ancillary to private delegations.]

Harold J. Krent

*Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund**

... No delegation to private parties after ... *Schechter* ... has been invalidated. Courts subsequently have upheld powers delegated to producer groups under the Agricultural Marketing agreement Act of 1937 and similar statutes. [Their decisions] suggest a wide ambit for the private exercise of delegated authority. Private parties can exercise authority, backed by the coercive power of the state, as long as the authority is confined to a relatively narrow scope ... or is subject to review by executive branch officials ...

[I]n *Cospito v. Heckler* [excerpted below] ... , the question raised was whether Congress could delegate to a private group, the Joint Commission on Accreditation of Hospitals (JCAH), the power to determine whether a hospital was eligible for Medicaid and Medicare reimbursement [which are federally-funded program providing reimbursements for the care of eligible patients]. ... One pertinent provision ... provided that [psychiatric] hospitals could be certified if they met “requirements equivalent to such [JCAH] accreditation requirements as determined by the Secretary.” ...

Cospito v. Heckler

United States Court of Appeals, Third Circuit
742 F.2d 72 (3d Cir. 1984), *cert. denied* 471 U.S. 1131 (1985)

GARTH, Circuit Judge:

... Modern cases have held that, if delegation to an administrative agency is accompanied by an articulation of congressional policy sufficient to safeguard against unbridled administrative discretion, such an assignment of responsibility is constitutional. ...

As we understand the [constitutional challenge], it is that the Medicare and Medicaid provisions delegate the ultimate responsibility for formulating and applying policy regarding decertification of psychiatric institutions not to the

* Excerpted from Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 FORDHAM L. REV. 2425, 2429-31 (2011).

Secretary, but rather to [JCAH] . . . a private organization made up of industry representatives. We need not reach the question of whether delegation of such authority to a private entity breaches the constitutional barrier, since our reading of the [statute] convinces us that the Secretary retains ultimate authority over decertification decisions, through the ability to engage in a “distinct part” survey. . . .

[S]ince, in effect, all actions of JCAH are subject to full review by a public official who is responsible and responsive to the political process, we find that there has been no real delegation of [state] authority to JCAH. . . .

BECKER, Circuit Judge, dissenting:

. . . First, I believe that the statutory and regulatory scheme . . . amounted to an unconstitutional delegation of legislative and adjudicatory power to a private body. Second, I believe that the statutory and regulatory scheme violates the due process clause of the fifth amendment . . . [because it] irrationally denies SSI benefits to those helpless souls, confined through no fault of their own in psychiatric hospitals deemed inadequate

Under the statute . . . the JCAH was not accountable to either the government or the individuals most affected by its decisions. It might “define” a “psychiatric hospital” however it chose, and might use whatever procedures it wished in developing that definition. Nothing required the members of the JCAH (or those to whom it in turn delegated responsibility) to listen to opposing viewpoints, and the JCAH regulations were not subject to judicial or administrative review to uncover substantive or procedural shortcomings. The JCAH’s freedom to apply its regulations to individual hospitals was also unfettered; the JCAH was not required to use any specific procedures in its evaluation of individual hospitals, nor was there any provision for administrative or judicial review of those “adjudicatory” procedures. . . .

In many areas, the courts have historically allowed private bodies to exercise authority which could be characterized as amounting to a deprivation of a property or liberty interest. . . . And it is also true that, even in areas traditionally thought of as belonging in the realm of public rather than private decision-making, courts have tolerated broad delegation of law-making power to private bodies. There comes a point, however, where concerns about the fairness of decision-making that affects the interests of individuals in public benefits must outweigh the need for uncanalized exercises of “expertise.”⁶ Absent exigent

⁶ It is, of course, true that, if the private body goes too far beyond the pale or behaves improperly in the exercise of its delegated authority, Congress can—just as it has done here—withdraw the

circumstances not present here, courts should not permit Congress to delegate to private bodies, that are not required by statute to listen to affected parties in making their regulations, and whose regulations are not subject to review under the Administrative Procedure Act or any other federal or state statute, the right to take actions in areas of traditional public law that seriously affect individuals' rights, especially those of perhaps the most powerless group in this nation: the elderly handicapped. In my opinion, the delegation of authority in this case to the JCAH reached that impermissible point. . . .

The following excerpt describes one type of privatized regulatory enforcement. Does this practice raise any constitutional issues in the U.S. or elsewhere?

Miriam Seifter

*Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking**

. . . The model, which I nickname “rent-a-regulator,” transfers regulatory decisionmaking to licensed professionals who directly serve regulated “clients.”

[R]ecent efforts in the governance of hazardous waste remediation provide a revealing case study of the rent-a-regulator model. Hazardous waste law, and more prolifically, brownfields law, has increasingly embraced privatization as part of a shift away from heavy-handed, command-and-control regulation. . . .

[Today there are private alternatives to t]he rigid, lengthy process of state-administered hazardous waste cleanups [One such alternative] . . . requires regulated entities to hire private consultants—licensed site professionals (LSPs)—and receive their approval before mandatory remediation can be considered complete. . . . Unlike typical [government] regulators . . . LSPs often design and carry out a cleanup in addition to approving it. And unlike most private delegates, LSPs are not government contractors; once licensed, they are selected and hired

delegation. This theory would allow all delegations, as consistent with a theory of a government responsible to the people, because the people's representatives retain ultimate control. The problems with the theory are also obvious.

* Excerpted from Miriam Seifter, Comment, *Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 *ECOLOGY L.Q.* 1091 (2006).

by regulated parties. Free of a government contract and seeking to edge out competitors, LSPs strive to represent the best interests of their regulated clients and minimize the cost of cleanups while performing their regulatory function. . . .

[A]udits indicate that LSPs routinely permit—or execute—deviations from state regulations governing hazardous waste site cleanups, sometimes creating serious risks to human health and the environment. . . .

[T]wo main structural pitfalls may impede achievement of [better LSP performance]. First, conflicts of interest—both within workplaces and with respect to clients—may prompt private regulators to cut corners. Second, a dearth of management procedures and avenues for discipline may prevent detection and remedy of malpractice and, in turn, fail to incentivize good behavior. . . .

Germany

Harm Schepel

*Standards in the European Union: Germany**

. . . [The *Deutsche Institut für Normung* (DIN)] is a non-profit association which publishes . . . more than 2000 standards a year

The association's statutory aim is to produce German standards in the public interest

[R]elations between DIN and the Government were left unregulated until 1975 when . . . [t]he Government recognize[d] DIN as the 'competent standards body' for Germany and as 'the national standards body in international private standards bodies.' DIN, for its part, takes . . . the general interest into account for its standards work, and . . . ensure[s] that standards can be used as descriptions of technical requirements in legislation, public administration and private law instruments. . . .

[I]n terms of sheer numbers and their pervasiveness in socio-economic life, German standards have been described as a parallel universe to law . . .

* Excerpted from HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* 112-18 (2005).

In a 1996 decision, the federal administrative court held that:

[DIN] rules . . . do not constitute legal norms. The [DIN] has no legislative powers. It is an association that has made it its statutory objective to produce standards in the general interest through the collective effort of interested circles with a view to rationalisation, quality assurance, safety and compatibility. Whether it reaches that objective in specific cases is not a legal matter, but a question of the practical usefulness of the standard for its stated purpose. Standards published by DIN obtain legal relevance not because of their autonomous normative strength . . . but only because and in so far as they fulfil the constitutive conditions . . . of acknowledged rules of technology which the legislator incorporates as such in its regulatory will. When the legislator refers to standards, they have a normative function in the sense that they substantiate the material legal norm

[T]he important thing to realize, then, is that standards derive their legitimacy not from being the results of objective expertise, nor as the results of a procedurally legitimate para-statal political process of interest balancing. . . .

Legal recognition, instead, is conditional upon a) the ability of the legal system to differentiate between ‘technical’ and legally autonomous ‘normative’ requirements, and b) the ability of standards bodies to build a consensus among all interested circles as regards technically, politically, socially and economically acceptable solutions to technical problems. . . . Both these conditions can only be fulfilled within a framework of shared cultural understandings and institutions which, in turn, are largely constituted by flanking legal and social frameworks, from the recognized and nurtured public calling of the engineering profession to the institutions of the social market democracy. . . .



Susan Rose-Ackerman

*Controlling Environmental Policy: The Limits of Public Law in
Germany and the United States**

. . . [In Germany], private norm-setting organizations play a key role in the self-regulation of economic activity outside the environmental area. There are 170 such bodies in Germany that act as industrial standard-setters. Regulators routinely consult these private associations of technical experts, and these groups now help set standards in the environmental field. . . .

The administrative courts [review administrative acts for conformity with statute. They] refuse to defer automatically to guidelines that have simply been lifted from the professional societies, but the judges' lack of expertise means that the private engineering norms will have almost the same binding effect as regulations and guidelines. German judges can call on their own experts if they are uncertain about how to interpret a technical rule, but they are likely to consult the same people who wrote the guideline in the first place. In other cases the standards are incorporated with little or no change into formal administrative guidelines. . . .

The norms generated by private technical groups may introduce biases into the policy process. . . .

[T]he role of private societies in the regulatory process has been criticized on the ground that industrial interests are overrepresented. Defenders respond that professional scientific and engineering norms dominate the standard-setting process. Critics and defenders could both be right, but the balance is impossible to determine, given statutes with little focus on means/end rationality and with no possibility for external review of the groups' methods. Several German administrative law scholars have recognized this problem and have urged more transparent processes within the private groups and less reliance on their recommendations in setting standards. . . .

The influence of the private norm-setting organizations goes beyond concerns for objectivity. The problem is not just that the engineering standards may be biased but that the policy problem should not be framed in terms of engineering standards. Even highly competent engineers acting according to professional norms are unlikely to be sensitive to the broader social implications

* Excerpted from SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* (1995).

of their technical recommendations. . . . Engineers do not necessarily make good policy analysts. . . .

International Bodies

Private institutions are growing in number, scope, and influence in global governance. Transnational private bodies are engaging in rulemaking and standard setting, but they do not always employ the minimal accountability safeguards that exist within many domestic jurisdictions. Are there distinct issues that arise if the delegate is transnational? Ought regional or transnational Courts be the venues for oversight, and should they review levels of disclosure, participation, and judicial review?

Harm Schepel

*Embedding Standardisation in European Governance: Subsidiarity and Governance**

. . . The 2001 [EU] White Paper on Governance . . . [called] for a wider use of ‘frameworks of co-regulation,’ drawing on the ‘practical expertise’ of the actors most concerned, which should result in ‘wider ownership of the policies in question by involving those most affected.’ In the 2003 Guidelines for co-operation, it is noted that ‘standardization has acquired a high political profile,’ which ‘creates a correspondingly enhanced obligation to observe the principles of transparency, openness, consensus, independence, efficiency, and coherence.’ The . . . European standards bodies are under an expectation

[t]o provide a mechanism for economic and social partners in Europe and other relevant interest groups, namely NGOs, that might not otherwise be involved but who have a legitimate interest in the outcome, to be involved in the process of standardization. . . . [They should] play an active role in relation to public interests such as protection of the environment, workers, and consumers. It allows them to contribute to sustainable development and to safeguard the public interest in areas where co-

* Excerpted from HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* 70 (2005).

regulation or self-regulation is considered preferable to outright regulation.

In this climate, standardization takes on a new significance. Instead of either the obvious way of removing barriers to trade represented by national standards or replacing political supranationalism with technical private transnationalism, European standards now take on an autonomous value in the project of European integration. . . . [T]he idea of European-wide industry self-regulation disarms both sides by introducing the notion that bottom-up integration generates its own normative frameworks. . . .

Eran Shamir-Borer

*Legitimacy Without Authority in Global Standardization Governance:
The Case of the International Organization for Standardization**

. . . The International Organization for Standardization (ISO) was formally established in 1947

ISO's objectives, as defined in the organization's Statutes, are "to promote the development of standardization and related activities in the world," with a view "to facilitating international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity." The primary means available to promote these objectives are the harmonization of standards and the development of international standards

ISO standards are formally voluntary, and constitute "recommendations" to ISO members. Nonetheless, many ISO standards are widely adopted by NSBs [National Standard-setting Bodies] (as national standards), by governments by intergovernmental organizations . . . and by industry and businesses. . . .

[W]hile ISO standards constitute only "recommendations" . . . they have become somewhat less voluntary for states member[s] of the WTO and their respective NSBs by virtue of the WTO Agreement on Technical Barriers to Trade [(WTO TBT)] This Agreement obliges states to use "international

* Excerpted from Eran Sahmir-Borer, *Legitimacy without Authority in Global Standardization Governance: The Case of the International Organization for Standardization*, in GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK I.C.1 (Sabino Cassese et al. eds., 3d ed. 2012).

standards”—the vast majority of ISO standards falling within the ambit of this term—or draft “international standards” whose completion is imminent, “as a basis” for their technical regulation and national standards, related to products or their processes and production methods (PPMs).

The WTO TBT Committee has . . . expressed its concern about the under-representation of developing countries in the standardization process. In 2000 it adopted . . . a set of principles that it considered important for international standard development, dealing, *inter alia*, with the transparency, openness, impartiality, and development dimension of the standardization process. . . . Time will tell whether national standards or technical regulation based on an ISO standard will be susceptible to challenge before the WTO as constituting technical barriers to trade, where the standardization process of the ISO standard relied upon had not followed the principles as prescribed by the WTO TBT Committee in the above-mentioned decision.

[The] ISO has been widely criticized for the fact that the actual participation of civil society NGOs in the standardization process is far from satisfactory. . . .

[As] ISO began to [issue standards that] may have social policy implications or affect the public interest in one way or another, consumers, environmentalists, fair trade activists and other segments of international civil society responded by presenting it with various legitimacy demands. . . .

How does ISO manage these legitimacy demands? . . . [A]t least for the time being, ISO insists on upholding the principle of “national representation;” namely, NGO participation remains short of full, direct participation, which is still reserved for Member Bodies [of the ISO], and NGOs are expected to channel the interests that they advocate through them.

OUTSOURCING JUDGING: PUBLIC/PRIVATE LINKS

Disputing the Self-Regulation of Professionals: A French Example

If a profession regulates itself through its own association under a government mandate, should the courts be able to intervene? The example below comes from the European Court of Human Rights, which reviewed the procedures

used by the professional, self-regulatory body for surveyors under the Convention's fair hearing requirements in Article 6. The association's decision was appealed to the *Conseil d'Etat*, which rejected the case as outside its jurisdiction. The ECtHR accepted jurisdiction because the plaintiff's procedural complaints had not been heard in the French Court. The excerpt includes the opinion's discussion of the objective impartiality of the "regional council" and of the appellate body that oversee the surveyors' profession.

Mérigaud v. France
European Court of Human Rights
App. No. 32976/04 (2009)

[The Fifth Section, composed of Peer Lorenzen, Renate Jaeger, Jean-Paul Costa, Rait Maruste, Mark Villiger, Isabelle Berro-Lefèvre, Zdravka Kalaydjieva, delivered the following unanimous judgment.]

. . . 17. On 3 December 1999 the Surveyors' Union of Corsica lodged a complaint against [Mr Mérigaud, a self-employed chartered surveyor from Brieve] with the Marseilles Regional Council of the Order of Chartered Surveyors ("the regional council") for encouraging the unlawful practice of the profession of chartered surveyor by farming out work to D., a topographer. A hearing of the disciplinary section of the regional council . . . [found against Mr Mérigaud].

[The regional council suspended Mr Mérigaud for a year. Mr. Mérigaud appealed and the case was examined by the five-member investigation panel of the High Council of the Order of Chartered Surveyors. Deliberating on 29 May 2002, 20 members of the High Council—including four members of the investigation panel—meted out substantially the same suspension for having unlawfully sub-contracted work to D. that should have been done by a registered chartered surveyor. On 3 March 2003 the Conseil d'Etat decided not to admit Mr Mérigaud's appeal.]

51. Relying on Article 6 § 1 (right to a fair hearing),* Mr Mérigaud complained of a lack of impartiality on the part of the judicial bodies of the Order of Chartered Surveyors. . . .

* Editors' Note: Article 6 § 1 reads in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . ."

67. The Court considers—and this point was not disputed—that article 6 § 1 ECHR is applicable to the disciplinary proceedings in question, whose issue is the right to continue to practice the occupation of chartered surveyor on a purely independent basis.

68. The applicant challenges the impartiality of the regional council and of the superior council of expert surveyors. The Court points out that . . . permitting professional tribunals to sanction members for infringements of their responsibilities does not breach the Convention provided either that the tribunal meets the requirements of article 6 § 1, or if it does not, that its decisions must be reviewed by a judicial body with full jurisdiction and that fully respects article 6.

69. The Court has already established that when the Council of State reviews the decisions of professional disciplinary bodies, this review does not amount to a decision by a “judicial body with full jurisdiction,” in particular because it does not have the power to assess the proportionality between the fault and the sanction. [Review is only “in cassation” and could not have reached the plaintiff’s procedural complaints.]

70. [T]he Court must thus check if the regional council was “impartial” for the purpose of article 6 § 1 and, if not, if the disciplinary section of the superior council meets the requirements of article 6.

71. The Court points out that impartiality for the purpose of article 6 § 1 ECHR is tested using to a double approach. The first approach consists in trying to determine the personal belief of the judge during the trial. . . . The second approach consists in making sure that the court offered sufficient guarantees to exclude any legitimate doubt of bias.

[The Court held against Mr Mérigaud on the first approach.]

74. It remains to examine the objective impartiality of the regional council. . . . In this matter, even appearances can be of importance. . . . [T]he perception of the party is to be taken into account here but does not play a decisive role. The crucial factor is to determine if this perception can be objectively justified. . . .

80. [The Court concluded that the regional council was not impartial.] Thus it remains to be seen if the procedure on appeal respected article 6 ECHR.

81. [Mr Mérigaud] contends that the appeal tribunal could not be regarded as an impartial court, insofar as members of the investigating commission took part in the judgment committee. . . .

86. [The report written by the investigating commission] does not show any bias. So, even if the members of the investigating commission took part in the final deliberations, the fact that they had a precise knowledge of the case during the investigation does not contravene in any way the principle of impartiality.

87. The Court must then check if the preliminary conclusions made by the members of the investigating commission could have prejudiced their final evaluation. . . . The Court arrives at [the conclusion that] nothing makes it possible to believe that [the members of the investigating commission were not impartial].

89. Consequently, the Court thinks that the doubts of the applicant were not objectively justified . . . insofar as the superior council which judged his cause presented the guarantees of impartiality required by article 6 § 1. . . . The Court concludes that there has been [no] violation of article 6 § 1 of Convention.

International Bodies Reviewing National Decisions: Doping in Sport

Lorenzo Casini & Giulia Mannucci

*Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA)**

. . . Acting in concert, States, sporting institutions and the international community more generally have created a body that is emblematic of the emergence of new forms of hybrid public-private governance in the global sphere: the World Anti-Doping Agency (WADA).

[W]ADA is a private foundation governed by its Constitutive Instrument, and by Articles 80 et seq. of the Swiss Civil Code. It has been set up under the initiative of the [International Olympic Committee (IOC)], with the support and participation of intergovernmental organizations, governments, public authorities, and other public and private bodies fighting against doping in sport. . . .

* Excerpted from Lorenzo Casini & Giulia Mannucci, *Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA)*, in *GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK* (Sabino Cassese et al. eds., 3d ed. 2012).

WADA acts as a global standard setter. In particular, it is charged with carrying out three main tasks: 1) to establish, adapt, modify and update, at least yearly, for all the public and private bodies concerned[,] the list of substances and methods prohibited in the practice of sport; 2) to develop, harmonize and unify scientific, sampling and technical standards and procedures with regard to analyses and equipment, including the homologation of laboratories, and to create a reference laboratory; 3) to promote harmonized rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof, taking into account the rights of the athletes.

The . . . World Anti-Doping Code . . . was adopted in 2003 and entered into force on January 1, 2004. [It has since been revised and reformed, albeit along substantially similar lines.]

[T]he Code . . . provides the framework for the harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities.

[T]he Code establishes procedural requirements and principles, such as the right to a fair hearing, thereby harmonizing the activity of more than 500 bodies, both public and private. . . . The Code is formally a private instrument (after all, WADA is a private foundation), but it is usually regarded as public law.

Alessandro E. Basilico

*Global Review of National Decisions: The Case Carlos Queiroz v.
Autoridade Antidopagem de Portugal**

. . . In May 2010, three anti-doping officers (ADOs) of the *Autoridade Antidopagem de Portugal* (ADoP) carried out tests on some players of the Portuguese National Football Team.

As soon as the ADOs arrived at the hotel where the players were accommodated, Mr. Queiroz [who was one of the team's coaches] approached them uttering some very distasteful and sexually descriptive comments regarding the President of ADoP and his mother.

* Excerpted from Alessandro Basilico, *Global Review of National Decisions: The Case Carlos Queiroz v. Autoridade Antidopagem de Portugal*, in *GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK III.A.5* (Sabino Cassese et al. eds., 3d ed. 2012).

The ADOs reported the coach's behavior. Though Mr. Queiroz did not prevent them from conducting the anti-doping tests, he did not act in an appropriate fashion.

Later, it was observed that one of the ADOs had failed to record one of the samples, so the Disciplinary Council of the Portuguese Football Federation (PFF) opened disciplinary proceedings against Mr. Queiroz, arguing that the mistake was due to the coach's annoying behavior. The Council acquitted him of an anti-doping rule violation, but imposed a 30-day suspension from all sports-related activities

The *Instituto de Deporte de Portugal*, the public body in which the ADoP is incorporated, then revoked the decision of the Disciplinary Council and suspended Mr. Queiroz for six months from all sporting activities.

Pursuant to article 57 of the Law n. 27/2009, the Portuguese coach filed an appeal to the Court of Arbitration for Sport (CAS).*

[The CAS Panel made its decisions based on Portuguese law. It disagreed with the *Instituto's* findings against Mr. Queiroz.]

[T]his case raises [issues of] . . . cooperation between private and public bodies in the fight against doping

[I]n this context a [Portuguese] public body (the ADoP) is entitled to change the decisions of a private body (the PFF Disciplinary Council), and the decisions of a national public body (the ADoP) may be set aside by a supranational private body (the CAS). Moreover, . . . the CAS ruling can be enforced under the provisions of the New York Convention of 10 June 1958.** Pursuant to article V of this Convention, an award can be challenged before the competent authority of the Country where the arbitration took place. As CAS has its seat in Switzerland, its rulings may be appealed before the Swiss Federal Court, but on a very limited number of grounds, such as lack of jurisdiction, violation of the right to a fair trial or incompatibility with public policy. . . .

* Editors' Note: CAS is an arbitral body under the auspices of the International Council for Arbitration for Sport.

** Editors' Note: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The New York Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states.

Contracting for Judges

The growth of alternative dispute resolution mechanisms places private forms of justice at the center of many of today's pressing legal challenges. Special issues arise when private fora are inhospitable to particular types of claims or classes of plaintiffs. The first excerpt discusses a recent U.S. Supreme Court case enforcing as a "contract" provisions included with the sale of cell phones that require consumers to bring all disputes to company-selected private arbitration systems that prevent proceeding as a class, whether in court or in arbitrations. It also considers a somewhat different approach in Europe. The second excerpt sketches the issues raised by the State of California's authorization of so-called rent-a-judges, individuals paid by litigants directly to produce binding legal outcomes.

Judith Resnik

*Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers**

... Two [private] institutions assert their dominance in a global [arbitration] market. The non-profit American Arbitration Association [(AAA)] . . . calls itself "the world's leading provider of conflict management and dispute resolution services." Its roster of 8000 "neutrals" (an umbrella term) deals with 150,000 cases yearly, mostly from contracts naming it as the provider. A small fraction—1500—are consumer arbitrations. The for-profit provider JAMS . . . describes itself as the "largest private alternative dispute resolution (ADR) provider," dealing with about 10,000 cases a year and employing more than 270 full-time experts in "mediating and arbitrating complex, multi-party business/commercial cases."

The work, both domestic and international, is framed by rules and manuals that set forth structures for proceedings in which the ideology of fairness is regularly invoked. For example, the AAA's website offers a "Consumer Due Process Protocol" that it signed (along with several other organizations) in 1998; stated are principles about "a fundamentally-fair ADR process" and parameters, such as competent and independent "neutrals," as well as the qualities of ADR,

* Excerpted from Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

such as privacy and confidentiality. In addition, repeat players have a measure of control by being able to custom-tailor rules to some extent. . . .

Who pays for private courts? . . . Given the lack of public budgets, full accounts are not available, but some information on payment sources is. T-Mobile reported it paid “all filing, administration and arbitrator fees for claims that total less than \$75,000.” Further, while high-end users offer large sums to the private judges they select, the AAA permits consumers to pay no more than \$125 in arbitrator fees for claims under \$10,000 and, in California, provides fee waivers for consumers below the poverty line.

[One issue that has been the subject of recent legal challenges involves mandatory consumer arbitration agreements requiring] that a consumer pursue arbitration only as an “individual,” rather than “as a plaintiff or class member in any purported class or representative proceeding,” and that “the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.”

[In *AT&T v. Conception*, a divided Supreme Court rejected a statutory challenge to a consumer arbitration agreement that precluded class challenges.]

[T]urning to the transnational context . . . , the relationship between fair hearings and ADR has been debated in Europe's courts. The framing is . . . “fairness,” obliged by Article 6 of the European Convention on Human Rights and by Article 47 of the Charter of Fundamental Rights of the European Union, providing that “[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.”

[O]ne example comes from a challenge to an Italian statute imposing mandatory “dispute settlement rules” for disputes between consumers and telecommunication companies and entailing some use of the internet to file claims. . . . Consumers argued that the statute violated Europe’s commitment to providing everyone with a “fair and public hearing.” The European Court of Justice (ECJ) responded and, as in the U.S. context, a utility calculation was offered. The ECJ’s Advocate General concluded that “a mandatory dispute resolution procedure without which judicial proceedings may not be brought does not constitute a disproportionate infringement upon the right to effective judicial protection . . . [but] a minor infringement . . . that is outweighed by the opportunity to end the dispute quickly and inexpensively.” In 2010, the ECJ concurred but, unlike the U.S. Supreme Court, imposed regulatory caveats: that the settlement outcomes were not binding; that the ADR efforts imposed no “substantial delay” in bringing legal proceedings and that the ADR tolled time

bars; that forms of judicial “interim measures” remained available; and that, if settlement procedures were available only electronically, national courts were to assess the burden placed on individuals. In contrast, the Supreme Court’s ruling[] in *AT&T* . . . work[s] at a less fine-grained level, imposing no regulations on ADR, leaving people with fewer avenues to lawyers and courts, limiting the role of lower court judges in joining with other branches of government to puzzle about due process mandates, and reducing public knowledge about transactions. . . .

Anne S. Kim

*Rent-A-Judges and the Cost of Selling Justice**

. . . Private judging—or “rent-a-judging”—has expanded over the past decade in California into a multimillion-dollar industry. Unlike arbitrators or mediators, rent-a-judges are officially part of the state court system, and their judgments have the same effect as judgments of any other state court. Superficially, a rent-a-judge differs from his public court colleagues in only one respect: the source of his paycheck.

From its beginning, rent-a-judging has prompted worries about the propriety of privatized justice. Despite its touted efficiency, the rent-a-judge system is marred by constitutional and policy concerns. Opponents have especially decried the creation of a two-tiered system of justice—one for the wealthy and one for the poor. Rent-a-judge justice, though speedy, is also quite expensive. The most popular, and presumably the best, rent-a-judges command \$5,000 a day. Consequently, only the wealthiest litigants can afford a rent-a-judge-a result that is not only inequitable but quite possibly unconstitutional under California law.

The rent-a-judge system also has raised a number of practical considerations. Critics have condemned the secrecy of rent-a-judge proceedings and the lack of disclosure requirements or other regulations to govern the behavior of rent-a-judges and ensure their impartiality. Moreover, the California courts have yet to unravel the numerous procedural implications of rent-a-judge practice. For example, the preclusive effect of a rent-a-judge’s judgment still is untested, as is its authority as precedent. Also unclear is the scope of a rent-a-

* Excerpted from Anne S. Kim, Note, *Rent-A-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166 (1994).

judge's powers. Despite some limitations, rent-a-judges appear to have broad powers, and the line between private and public judges seems fuzzy at best. Particularly disturbing is the apparent power of rent-a-judges to call juries. . . . Defenders of "rent-a-juries," however, claim that as far as the jurors are concerned, "it's the same function no matter who is presiding."

[A]ttacks on the rent-a-judge system have primarily focused on its constitutionality under the Due Process and Equal Protection Clauses of the Federal Constitution [To date they have proven unsuccessful.]

OUTSOURCING SOVEREIGNTY ACROSS GENERATIONS

Private-public partnerships raise questions about (1) inter-generational sovereignty (insofar as a government enters into long-term partnerships that tie the policymaking hands of successor governments); (2) governments operating through nominally commercial conduits and thereby obscuring their decisions by masquerading as a private entity; and (3) governments entering into informal agreements that effectively deputize private actors to advance public objectives. We close with one of the many illustrations of privatization that effectively disenfranchises future generations.

Jon D. Michaels

*Privatization's Progeny**

. . . Consider . . . the recent spate of transportation-infrastructure leases These leases involve states and cities transferring operational control over [toll] roads, bridges, and parking facilities to private firms. Firms pay the governments for the right to collect and keep user fees. Leases for the likes of the Chicago Skyway and the Indiana Toll Road (both entered into in the mid-2000s) run between 75 and 99 years—and have already netted governments billions of dollars. By design, these lease payments are heavily frontloaded. Such arrangements provide an immediate windfall to fiscally beleaguered governments. . . .

* Excerpted from Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013).

[Leasing state assets departs] from traditional practices. Usually governments direct their civil servants to collect tolls or parking fees and to perform whatever repairs and maintenance are necessary. Alternatively, they hire contractors to perform maintenance and collect fees—fees that are then turned over to the government.

With transportation-infrastructure leases, . . . [the] private party [pays to acquire] a long-term lease. It then works to ensure [that] revenue collection (which it keeps) exceeds the combined costs of the lease payments and maintenance. . . . Successful—and lucky—leaseholders will profit handsomely.

But risks abound. . . .

The more the government is willing to tie its own hands . . . , the less risky (*and more valuable*) the lease becomes to private bidders. Fiscally strapped governments thus have strong incentives to pre-commit to (1) allowing the lessee to set parking and toll rates and (2) refraining from subsequent policy interventions—such as building new roads, bridges, or parking structures—that lessen demand for the lessee’s infrastructure. . . .

Such sovereignty-abdicating provisions are already in operation. This is surprising if only because we traditionally haven’t treated sovereignty as just another bargaining chip. That might have been for good reason. After all, doing so systematically disenfranchises members of the public—both today and into the future. Once policy decisions are signed away, citizens are forced to use market power, rather than the political process, to voice concerns.

But perhaps the historical reluctance to barter sovereignty has greater rhetorical purchase than real-world utility. For all we know, citizens might well prefer a money-for-sovereignty tradeoff. . . .

[Such a tradeoff] might sound jarring to those schooled to reflexively revere the Constitution and cherish democratic engagement. But governments that [enter into] sovereignty-abdicating [arrangements] seemingly [make that very tradeoff]. More to the point, they put a price tag on that reverence, raising normative and legal questions about whether sovereignty should be alienable—and more practical ones such as whether bartering governments are properly pricing it. . . .

INNOVATION IN
PUBLIC LAW REMEDIES

DISCUSSION LEADERS

OWEN FISS AND NICHOLAS PARRILLO

IV. INNOVATION IN PUBLIC LAW REMEDIES

DISCUSSION LEADERS:
OWEN FISS AND NICHOLAS PARRILLO

Remedies for Unconstitutional Statutes: Alternatives to Striking Them Down

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| Vriend v. Alberta (Supreme Court of Canada) (1998) | IV-6 |
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| William N. Eskridge, Jr., <i>Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States</i> (2013) | IV-21 |
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The Structural Injunction

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| Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg and Others (Constitutional Court of South Africa) (2008) | IV-60 |

For every right, there is a remedy. Guided by this maxim, courts have often created new and ambitious remedies such as injunctions requiring the reorganization of bureaucratic agencies or the revision of statutes to bring them into compliance with constitutional requirements. These remedial endeavors have often tested the limits of the judiciary's competence and strained its relationship to the other branches of government. This Chapter presents material exploring these issues to see whether general principles can be articulated for their resolution.

REMEDIES FOR UNCONSTITUTIONAL STATUTES: ALTERNATIVES TO STRIKING THEM DOWN

Assume that a constitution mandates that two groups be treated the same, but a statutory provision treats them differently, benefiting one group but not the other. The statute is therefore inconsistent with the constitution. What is the remedy? Most obviously, the court can strike down the statute, so there are no benefits for either group. They are then treated equally, and the constitution is satisfied.

But is that the end of the story? Often, the judicial effort to remedy constitutional violations takes account not only of the constitutional mandate but also of the preferences of the legislature that enacted the statute.

Judicial concern with legislative preferences plays a key role, for example, in the doctrine of severability. Severability means that, if a statute has some provisions or applications that are constitutional and others that are not, the constitutional parts can survive on their own, even if the unconstitutional ones are inoperative, much as a human being can survive if an infected limb is amputated (severed). The doctrine is informed by legislative preferences in that the court, when deciding whether to salvage the statute partly or strike it down entirely, asks whether the enacting lawmakers *would have wanted* the constitutional portions to be in force had they known that the other portions would not be. Answering this question may require creative judicial guesses about complex and opaque legislative dealmaking, and those guesses may be wrong, but the court at least aspires to discern and honor lawmakers' preferences.

But if a court truly wants to imagine legislative preferences in light of constitutional constraints (and then honor those preferences), why should the court limit its options to partial invalidation and complete invalidation? Might the

legislature, if apprised of the constitutional constraints, have preferred to conform to them by *adding* to the statute instead?

To some, this remedy may seem outside judicial competence in a way that partial and complete invalidation are not. It entails “rewriting the statute” (legislative) instead of merely “invalidating the bad part” (judicial). But in at least some cases, the distinction between rewriting and invalidating is arbitrary. Assume that the population consists of groups A, B, and C. Posit that the constitution mandates that all three groups receive the same benefits, and that a statute confers benefits on “groups A and B.” If the court’s only option is to strike down the whole statute, nobody has benefits. But now imagine a different scenario. The statute has the exact same effect as before, but the drafting style is different: it confers benefits on “the whole population except C.” If the court can only invalidate, it now has two options to remedy the constitutional problem: to strike down the whole statute, so that nobody has benefits, or to strike down the phrase “except C,” so that everybody has benefits. In practical results, the latter option is exactly the same as *reading in* the words “and C” in the first scenario. Thus, if a court’s options are limited to invalidation and prohibit adding words, the outcome of a case may turn on an accident of drafting style.

This is not to say that the additive remedy is always proper. It is only to say that the arguments against it must rest on something other than a formal and categorical objection to adding words. There may be problems of institutional competence or legitimacy that counsel against the additive remedy (either in particular cases, or, if the problems are sufficiently pervasive, in all cases). For one thing, “reading in” an unconstitutionally-excluded term may sometimes require more complex editing than simply adding the phrase “and C.” Courts’ comfort level with “reading in” may diminish as the required editing grows more complex.

In *Vriend v. Alberta*, excerpted below, the Supreme Court of Canada considers the factors that counsel for and against “reading in” as a remedy for a particular unconstitutional omission. The Court’s openness about what it was contemplating—inserting words into the statute—contrasts with the U.S. Supreme Court, which has done effectively the same thing in some cases but without as much candor. For example, in a case on the Social Security Act’s gender-discriminatory grant of benefits to unemployed fathers but not unemployed mothers, Justice Blackmun explained that he would remedy the inequality by “extending” the statute’s benefits to mothers, and he admitted in a tangential passage that the lower-court judge (whose decision was affirmed) had ordered “that ‘father’ be replaced by its gender-neutral equivalent,” by which he meant

parent, that is, the judge had effectively inserted the words *or mother* into the act. See *Califano v. Westcott* (U.S. 1979).

In *Vriend*, an Alberta statute, the Individual Rights Protection Act (IRPA), prohibited discrimination in various settings, including employment, on the basis of certain listed grounds, including race, religious beliefs, color, gender, physical disability, mental disability, age, ancestry, and place of origin. In the 1980s and early 1990s, the Alberta legislature deliberately refused to enact proposals to include sexual orientation as a prohibited ground. In 1991, King's College terminated the employment of laboratory coordinator Delwin Vriend on the ground that he was not complying with the College's policy against homosexual practice. The Alberta Human Rights Commission (HRC), administering the IRPA, rebuffed Vriend's attempt to file a complaint; the HRC's grounds were that the statute did not make sexual orientation a prohibited ground.

Vriend filed a motion for declaratory relief; he contended that the IRPA was inconsistent with the Canadian Charter of Rights and Freedoms, section 15, which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." By the time Vriend's case was before the Supreme Court, *Egan v. Canada* (Can. 1995), had been decided, holding that sexual orientation was a characteristic analogous to those enumerated in section 15. In Vriend's case, the Court held that the exclusion of sexual orientation from each list of prohibited grounds in the IRPA—not only the list pertaining to employment practices but also lists on housing, union membership, etc.—denied gay men and lesbians' right to equal protection under section 15 and that such denial could not be justified.

Vriend v. Alberta
Supreme Court of Canada
[1998] 1 S.C.R. 493

IACOBUCCI, J. [SPEAKING FOR THE COURT]

. . . Before discussing the jurisprudence on remedies, I believe it might be helpful to pause to reflect more broadly on the general issue of the relationship between legislatures and the courts in the age of the *Charter*. . . .

As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue” by some. In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the legislature responds to the courts; hence the dialogue among the branches.

[T]his dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it. . . .

In [*Schachter v. Canada* (1992)], the leading case on constitutional remedies], this Court noted that, depending upon the circumstances, there are several remedial options available to a court in dealing with a *Charter* violation that was not saved by s. 1.* These include striking down the legislation, severance of the offending sections, striking down or severance with a temporary suspension of the declaration of invalidity, reading down, and reading provisions into the legislation.

Because the *Charter* violation in the instant case stems from an omission, the remedy of reading down is simply not available. Further, I note that given the considerable number of sections at issue in this case and the important roles they play in the scheme of the *IRPA* as a whole, severance of these sections from the remainder of the Act would be akin to striking down the entire Act.

* Editors' Note: Section 1 of the Charter reads: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The appellants suggest that the circumstances of this case warrant the reading in of sexual orientation into the offending sections of the *IRPA*. However, [in the decision below] in the Alberta Court of Appeal,^{*} O’Leary J.A. and Hunt J.A. agreed that the appropriate remedy would be to declare the relevant provisions of the *IRPA* unconstitutional and to suspend that declaration for a period of time to allow the Legislature to address the matter. McClung J.A. would have gone further and declared the *IRPA* invalid in its entirety. With respect, for the reasons that follow, I cannot agree with either remedy chosen by the Court of Appeal.

In *Schachter*, Lamer C.J. noted that when determining whether the remedy of reading in is appropriate, courts must have regard to the “twin guiding principles,” namely, respect for the role of the legislature and respect for the purposes of the *Charter*, which I have discussed generally above. Turning first to the role of the legislature, Lamer C.J. stated . . . that reading in is an important tool in “avoiding undue intrusion into the legislative sphere. . . . [T]he purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature.”

[A]s I discussed above, the purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. It seems to me that the remedy of reading in would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the *IRPA* would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the Legislature. . . .

Turning to the second of the twin guiding principles, the respondents suggest that the facts of this case are illustrative of a conflict between two grounds, namely, religion and sexual orientation. If sexual orientation were simply read into the *IRPA*, the respondents contend that this would undermine the ability of the *IRPA* to provide protection against discrimination based on religion, one of the fundamental goals of that legislation. This result is alleged to be “inconsistent with the deeper social purposes of the *Charter*.”

I concluded above that the internal balancing mechanisms of the *IRPA* were an adequate means of disposing of any conflict that might arise between religion and sexual orientation. Thus, I cannot accept the respondents’ assertion

^{*} Editors’ Note: The Alberta Court of Appeal held, by a divided vote, that the *IRPA* did not violate the *Charter*, but each of the judges on that court stated what the remedy ought to have been, had such a violation been found.

that the reading in approach does not respect the purposes of the *Charter*. In fact, as I see the matter, reading sexual orientation into the *IRPA* as a further ground of prohibited discrimination can only enhance those purposes. The *Charter*, like the *IRPA*, is concerned with the promotion and protection of inherent dignity and inalienable rights. Thus, expanding the list of prohibited grounds of discrimination in the *IRPA* allows this Court to act in a manner which, consistent with the purposes of the *Charter*, would augment the scope of the *IRPA*'s protections. In contrast, striking down or severing parts of the *IRPA* would deny all Albertans protection from marketplace discrimination. In my view, this result is clearly antithetical to the purposes of the *Charter*.

In *Schachter*, Lamer C.J. noted that the twin guiding principles can only be fulfilled if due consideration is given to several additional criteria which further inform the determination as to whether the remedy of reading in is appropriate. These include remedial precision, budgetary implications, effects on the thrust of the legislation, and interference with legislative objectives.

As to the first of the above listed criteria, the court must be able to define with a "sufficient degree of precision" how the statute ought to be extended in order to comply with the Constitution. I do not believe that the present case is one in which this Court has been improperly called upon to fill in large gaps in the legislation. Rather, in my view, there is remedial precision insofar as the insertion of the words "sexual orientation" into the prohibited grounds of discrimination listed in the preamble and [in other sections] of the *IRPA* will, without more, ensure the validity of the legislation and remedy the constitutional wrong.

In her reasons in this case [in the lower court], Hunt J.A. concluded that there was insufficient remedial precision to justify the remedy of reading in. She expressed two concerns. Firstly, she held that adequate precision likely would not be possible without a definition of the term "sexual orientation." With respect, I cannot agree. Although the term "sexual orientation" has been defined in the human rights legislation of the Yukon Territory, it appears undefined in the *Canadian Human Rights Act*, the human rights legislation of Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, British Columbia, and s. 718.2(a)(i) of the *Criminal Code*. In addition, "sexual orientation" was not defined when it was recognized by this Court in *Egan* as an analogous ground under s. 15 of the *Charter*. In my opinion, "sexual orientation" is a commonly used term with an easily discernible common sense meaning. . . .

Hunt J.A. was also troubled by the possible impact of reading in upon s. 7(2) of the *IRPA*. This section states that s. 7(1) (employment), as regards age and marital status, "does not affect the operation of any bona fide retirement or

pension plan or the terms or conditions of any bona fide group or employee insurance plan.” As the Court of Appeal heard no argument on this point and as there was no evidence before the court to explain the rationale behind this provision, Hunt J.A. held that, if the protections of the *IRPA* were to be extended to gay men and lesbians, it would be necessary to decide whether this group would be included or excluded from s. 7(2). She found that this was something the court was in no position to do. In light of this difficulty, Hunt J.A. was concerned that the reading in remedy “would engage the court in the kind of ‘filling in of details’ against which Lamer, C.J.C., cautions in *Schachter*.”

In my view, whether gay men and lesbians are included or excluded from s. 7(2) is a peripheral issue which does not deprive the reading in remedy of the requisite precision. I agree with [Professor Kent] Roach who noted that the legislature “can always subsequently intervene on matters of detail that are not dictated by the Constitution.” I therefore conclude on this point that, in the present case, there is sufficient remedial precision to justify the remedy of reading in.

Turning to budgetary repercussions, in the circumstances of the present appeal, such considerations are not sufficiently significant to warrant avoiding the reading in approach. On this issue, the trial judge stated:

There will undoubtedly be some budgetary impact on the Human Rights Commission as a result of the addition of sexual orientation as a prohibited ground of discrimination. But, unlike *Schachter* [in which “reading in” would have required that unemployment benefits granted to adoptive parents also be granted to natural parents], it would not be substantial enough to change the nature of the scheme of the legislation.

Although the scope of this Court’s review of the *IRPA* is considerably broader than that which the trial judge was asked to undertake, as I noted above, having not heard anything persuasive to the contrary, I am not prepared to interfere with the trial judge’s findings on this matter.

As to the effects on the thrust of the legislation, it is difficult to see any deleterious impact. All persons covered under the current scope of the *IRPA* would continue to benefit from the protection provided by the Act in the same manner as they had before the reading in of sexual orientation. Thus, I conclude that it is reasonable to assume that, if the Legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen. As the inclusion of sexual orientation in the *IRPA* does not alter the legislation to any

significant degree, it is reasonable to assume that the Legislature would have enacted it in any event.

In addition, in *Schachter*, Lamer C.J. noted that, in cases where the issue is whether to extend benefits to a group excluded from the legislation, the question of the effects on the thrust of the legislation will sometimes focus on the size of the group to be added as compared to the group originally benefited. He quoted with approval from [*Knodel v. British Columbia (Medical Services Commission)* (1991)], where Rowles J. extended the provision of benefits to spouses to include same-sex spouses. In her view, the remedy of reading in was far less intrusive to the intention of the legislature than striking down the benefits scheme because the group to be added was much smaller than the group already receiving the benefits.

Lamer C.J. went on to note that, “[w]here the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one.” In the present case, gay men and lesbians are clearly a smaller group than those already benefited by the *IRPA*. Thus, in my view, reading in remains the less intrusive option.

The final criterion to examine is interference with the legislative objective. In *Schachter*, Lamer C.J. commented upon this factor as follows:

The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. . . . A second level of legislative intention may be manifest in the means chosen to pursue that objective.

With regard to the first level of legislative intention, as I discussed above, it is clear that reading sexual orientation into the *IRPA* would not interfere with the objective of the legislation. Rather, in my view, it can only enhance that objective. However, at first blush, it appears that reading in might interfere with the second level of legislative intention identified by Lamer C.J.

As the Alberta Legislature has expressly chosen to exclude sexual orientation from the list of prohibited grounds of discrimination in the *IRPA*, the respondents argue that reading in would unduly interfere with the will of the Government. McClung J.A. [in his opinion below] shares this view [that] . . . the remedy of reading in will never be appropriate where a legislative omission reflects a deliberate choice of the legislating body. He states that if a statute is unconstitutional, “the preferred consequence should be its return to the sponsoring

legislature for representative, constitutional overhaul.” However, as I see the matter, by definition, *Charter* scrutiny will always involve some interference with the legislative will.

Where a statute has been found to be unconstitutional, whether the court chooses to read provisions into the legislation or to strike it down, legislative intent is necessarily interfered with to some extent. Therefore, the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional. . . . [A] deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them.

Indeed, as noted by the intervener Canadian Jewish Congress, if reading in is always deemed an inappropriate remedy where a government has expressly chosen a course of action, this amounts to the suggestion that whenever a government violates a *Charter* right, it ought to do so in a deliberate manner so as to avoid the remedy of reading in. In my view, this is a wholly unacceptable result.

In the case at bar, the means chosen by the legislature, namely, the exclusion of sexual orientation from the *IRPA*, can hardly be described as integral to the scheme of that Act. Nor can I accept that this choice was of such centrality to the aims of the legislature that it would prefer to sacrifice the entire *IRPA* rather than include sexual orientation as a prohibited ground of discrimination, particularly for the reasons I will now discuss.

[I]n 1993, the Alberta Legislature appointed the Alberta Human Rights Review Panel to conduct a public review of the *IRPA* and the Alberta Human Rights Commission. The Panel issued a report making several recommendations including the inclusion of sexual orientation as a prohibited ground of discrimination in all areas covered by the Act. The Government responded to this recommendation by deferring the decision to the judiciary: “This recommendation will be dealt with through the current court case [*Vriend v. Alberta*].”

In my opinion, this statement is a clear indication that, in light of the controversy surrounding the protection of gay men and lesbians under the *IRPA*, it was the intention of the Alberta Legislature to defer to the courts on this issue. Indeed, I interpret this statement to be an express invitation for the courts to read sexual orientation into the *IRPA* in the event that its exclusion from the legislation

is found to violate the provisions of the *Charter*. Therefore, primarily because of this[,] . . . I believe that, in these circumstances, the remedy of reading in is entirely consistent with the legislative intention. . . .

McClung J.A. also criticizes the remedy of reading in on a more fundamental level. He views the reading of provisions into a statute as an unacceptable intrusion of the courts into the legislative process. . . . [H]e stated:

To amend and extend it, by reading up to include “sexual orientation” was a sizeable judicial intervention into the affairs of the community and, at a minimum, an undesirable arrogation of legislative power by the court. . . . [T]o me it is an extravagant exercise for any s. 96 judge to use the enormous review power of his or her office in this way in order to wean competent legislatures from their “errors.”

[I] do not accept that extending the legislation in this case is an undemocratic exercise of judicial power. Rather, I concur with the comments of [Professor William] Black, [Vriend, *Rights and Democracy*, 7 CONST. F. 126 (1996)] who states that:

. . . there is no conflict between judicial review and democracy if judges intervene where there are indications that a decision was not reached in accordance with democratic principles. Democracy requires that all citizens be allowed to participate in the democratic process, either directly or through equal consideration by their representatives. Parliamentary sovereignty is a means to this end, not an end in itself.

[T]he concept of democracy means more than majority rule [A] democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly. . . .

McClung J.A. states:

Allowing judicial, and basically final, proclamation of legislative change ignores our adopted British parliamentary safeguards, historic in themselves, and which are the practical bulkheads that

protect representative government. When unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved.

With respect, I do not agree. When a court remedies an unconstitutional statute by reading in provisions, no doubt this constrains the legislative process and therefore should not be done needlessly, but only after considered examination. However, . . . the “parliamentary safeguards” remain. Governments are free to modify the amended legislation by passing exceptions and defenses which they feel can be justified under s. 1 of the *Charter*. Thus, when a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response Moreover, the legislators can always turn to s. 33 of the *Charter*, the override provision, which in my view is the ultimate “parliamentary safeguard.”

On the basis of the foregoing analysis, I conclude that reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation. The appellants suggest that this remedy should have immediate effect. I agree. There is no risk in the present case of harmful unintended consequences upon private parties or public funds. Further, the mechanisms to deal with complaints of discrimination on the basis of sexual orientation are already in place and require no significant adjustment. . . .

MAJOR, J. (dissenting in part)

[Justice Major largely agreed with the majority on the substantive question but disagreed as to the remedy:]

. . . In my opinion, *Schachter* did not contemplate the circumstances that pertain here, that is, where the Legislature’s opposition to including sexual orientation as a prohibited ground of discrimination is abundantly clear on the record. Reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group. That assumption cannot be made in this appeal.

The issue may be that the Legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination, or the issue may be *how* the legislation ought to be amended to bring it into conformity with the *Charter*. That determination is best left to the Legislature. As was stated in *Hunter v. Southam Inc.*, [1984]:

While the courts are guardians of the Constitution and of individuals' rights under it, *it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.* (Emphasis added.)

There are numerous ways in which the legislation could be amended to address the underinclusiveness. Sexual orientation may be added as a prohibited ground of discrimination to each of the impugned provisions. In so doing, the Legislature may choose to define the term "sexual orientation," or it may devise constitutional limitations on the scope of protection provided by the *IRPA*. As an alternative, the Legislature may choose to override the *Charter* breach by invoking s. 33 of the *Charter*, which enables Parliament or a legislature to enact a law that will operate notwithstanding the rights guaranteed in s. 2 and ss. 7 to 15 of the *Charter*. Given the persistent refusal of the Legislature to protect against discrimination on the basis of sexual orientation, it may be that it would choose to invoke s. 33 in these circumstances. . . .

Given the apparent legislative opposition to including sexual orientation in the *IRPA*, I conclude that this is not an appropriate case for reading in. It is preferable to declare the offending sections invalid and provide the Legislature with an opportunity to rectify them. I would restrict the declaration of invalidity to the employment-related provisions of the *IRPA*, that is ss. 7(1), 8(1) and 10. While the same conclusions may apply to the remaining provisions of the *IRPA*, this Court has stated that *Charter* cases should not be considered in a factual vacuum.

The only remaining issue is whether the declaration of invalidity ought to be temporarily suspended. In *Schachter*, Lamer C.J. stated that a declaration of invalidity may be temporarily suspended where the legislation is deemed unconstitutional because of underinclusiveness rather than overbreadth, and striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

There is no intention to deprive individuals in Alberta of the protection afforded by the *IRPA*, but only to ensure that the legislation is brought into conformity with the *Charter* while simultaneously respecting the role of the legislature. I would therefore order that the declaration of invalidity be suspended for one year to allow the Legislature an opportunity to bring the impugned provisions into line with its constitutional obligations. . . .

In *Vriend*, Justice Major argued that the Court ought to have invalidated the entire *IRPA*, rather than “read in” sexual orientation, and that the Court should have headed off the disruption from such invalidation by suspending the force of the ruling for one year. This temporary suspension would have allowed the Alberta legislature to react to the Court’s ruling, either by seeking to override it (through section 33) or by passing a different statute that might meet the Court’s requirements (and presumably maintain a continuity of benefits for all the protected groups besides gays and lesbians).

Temporary suspension of a judgment to allow for legislative action is another alternative remedial tool in constitutional litigation. The next case in this Chapter—the Vermont Supreme Court’s 1999 opinion on same-sex marriage in *Baker v. State*—shows this tool in action. As Justice Major’s dissent in *Vriend* suggests, temporary suspension can serve as a substitute for “reading in.” But as *Baker* suggests, temporary suspension may also be a complement to “reading in.”

Baker arose after several same-sex couples had applied to their respective town clerks for marriage licenses. The clerks refused, citing a Vermont statute that defined marriage as between a man and a woman. The couples sued. The Vermont Supreme Court held that the exclusion of same-sex couples from the practical benefits and protections incident to marriage—such as access to a spouse’s insurance, hospital visitation privileges, intestate succession, etc.—violated the state constitution’s Common Benefits Clause, which states that government is “for the common benefit, protection, and security of the people, . . . and not for the particular emolument or advantage of any single person, family, or set of persons.” The Clause is similar to, but distinct from, the U.S. Constitution’s Equal Protection Clause.

Baker v. State
Supreme Court of Vermont
744 A.2d 864 (1999)

AMESTOY, C.J.

... It is important to state clearly the parameters of today's ruling. Although plaintiffs sought injunctive and declaratory relief designed to secure a marriage license, their claims and arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections, and security incident to marriage under Vermont law. While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.

We hold only that plaintiffs are entitled under [the Common Benefits Clause] to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners. We do not intend specifically to endorse any one or all of the referenced acts, particularly in view of the significant benefits omitted from several of the laws.

Further, while the State's prediction of “destabilization” cannot be a ground for denying relief, it is not altogether irrelevant. A sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences. Absent legislative guidelines defining the status and rights of same-sex couples, consistent with constitutional requirements, uncertainty and confusion could result. Therefore, we hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion.¹⁵ In the event that the benefits and protections in

¹⁵ Contrary to the characterization in the concurring and dissenting opinion, we do not “decline[] to provide plaintiffs with a marriage license” because of uncertainty and confusion that change

question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought [i.e., to grant them marriage licenses].

Our colleague [Justice Johnson, concurring in part and dissenting in part] asserts that granting the relief requested by plaintiffs—an injunction prohibiting defendants from withholding a marriage license—is our “constitutional duty.” We believe the argument is predicated upon a fundamental misinterpretation of our opinion. It appears to assume that we hold plaintiffs are entitled to a marriage license. We do not. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so, and the mandate proposed by our colleague is inconsistent with the Court’s holding.

The dissenting and concurring opinion also invokes the United States Supreme Court’s desegregation decision in *Watson v. City of Memphis* (U.S. 1963) [in which the U.S. Supreme Court decided that racial integration of city recreational facilities must be immediate], suggesting that the circumstances here are comparable, and demand a comparable judicial response. The analogy is flawed. We do not confront in this case the evil that was institutionalized racism, an evil that was widely recognized well before the [Supreme Court’s] decision in *Watson* and its more famous predecessor, *Brown v. Board of Education* (U.S. 1954). Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy. The concurring and dissenting opinion also overlooks the fact that the Supreme Court’s urgency in *Watson* was impelled by the city’s *eight year delay* in implementing its decision extending *Brown* to public recreational facilities, and “the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.” Unlike *Watson*, our decision declares decidedly new doctrine.

The concurring and dissenting opinion further claims that our mandate represents an “abdicat[ion]” of the constitutional duty to decide, and an inexplicable failure to implement “the most straightforward and effective remedy.” Our colleague greatly underestimates what we decide today and greatly overestimates the simplicity and effectiveness of her proposed mandate. First, our

may bring. Rather, it is to avoid the uncertainty that might result during the period when the Legislature is considering potential constitutional remedies that we consider it prudent to suspend the Court’s judgment for a reasonable period.

opinion provides greater recognition of—and protection for—same sex relationships than has been recognized by any court of final jurisdiction in this country with the instructive exception of the Hawaii Supreme Court in *Baehr* (1993). See Hawaii Const., art. I, § 23 (state constitutional amendment overturned same-sex marriage decision in *Baehr* by returning power to legislature “to reserve marriage to opposite-sex couples”). Second, the dissent’s suggestion that her mandate would avoid the “political caldron” of public debate is—even allowing for the welcome lack of political sophistication of the judiciary—significantly insulated from reality.

The concurring and dissenting opinion confuses decisiveness with wisdom and judicial authority with finality. Our mandate is predicated upon a fundamental respect for the ultimate source of constitutional authority, not a fear of decisiveness. No court was ever more decisive than the United States Supreme Court in *Dred Scott v. Sandford* (1857). Nor more wrong. Ironically it was a Vermonter, Stephen Douglas, who in defending the decision said—as the dissent in essence does here—“I never heard before of an appeal being taken from the Supreme Court.” . . . But it was a profound understanding of the law and the “unruliness of the human condition,” . . . that prompted Abraham Lincoln to respond that the Court does not issue Holy Writ. . . . Our colleague may be correct that a mandate intended to provide the Legislature with the opportunity to implement the holding of this Court in an orderly and expeditious fashion will have precisely the opposite effect. Yet it cannot be doubted that judicial authority is not ultimate authority. It is certainly not the only repository of wisdom.

When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation.

Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996).

[T]he judgment of the [lower] court upholding the constitutionality of the Vermont marriage statutes under [the Common Benefits Clause] is reversed. The effect of [this] Court’s decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein.

JOHNSON, J., concurring in part and dissenting in part.

. . . The majority agrees that the Common Benefits Clause of the Vermont Constitution entitles plaintiffs to obtain the same benefits and protections as those bestowed upon married opposite-sex couples, yet it declines to give them any relief other than an exhortation to the Legislature to deal with the problem. I concur with the majority's holding, but I respectfully dissent from its novel and truncated remedy, which in my view abdicates this Court's constitutional duty to redress violations of constitutional rights. I would grant the requested relief and enjoin defendants from denying plaintiffs a marriage license

This case concerns the secular licensing of marriage. The State's interest in licensing marriages is regulatory in nature. The regulatory purpose of the licensing scheme is to create public records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance. Thus, a marriage license merely acts as a trigger for state-conferred benefits. In granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships, but only identifying those persons entitled to the benefits of the marital status.²

Apart from establishing restrictions on age and consanguinity related to public health and safety, see 18 V.S.A. § 5142 (minors and incompetent persons); 15 V.S.A. §§ 1, 2 (consanguinity), the statutory scheme at issue here makes no qualitative judgment about which persons may obtain a marriage license. Hence, the State's interest concerning the challenged licensing statute is a narrow one, and plaintiffs have prevailed on their constitutional claim because the State has failed to raise any legitimate reasons related to public health or safety for denying marital benefits to same-sex couples. In my view, the State's interest in licensing marriages would be undisturbed by this Court enjoining defendants from denying plaintiffs a license.

While the State's interest in licensing marriages is narrow, the judiciary's obligation to remedy constitutional violations is central to our form of

² Although the State's licensing procedures do not signal official approval or recognition of any particular lifestyles or relationships, commentators have noted that denying same-sex couples a marriage license is viewed by many as indicating that same-sex relationships are not entitled to the same status as opposite-sex relationships. . . . Because enjoining defendants from denying plaintiffs a marriage license is the most effective and complete way to remedy the constitutional violation we have found, it is not necessary to reach the issue of whether depriving plaintiffs of the "status" of being able to obtain the same state-conferred marriage license provided to opposite-sex couples violates their civil rights.

government. Indeed, one of the fundamental principles of our tripartite system of government is that the judiciary interprets and gives effect to the constitution in cases and controversies concerning individual rights. . . .

[A]bsent “compelling” reasons that dictate otherwise, it is not only the prerogative but the duty of courts to provide prompt relief for violations of individual civil rights. See *Watson* (defendants have heavy burden of showing that delay in desegregating public parks and recreational facilities is “manifestly compelled by constitutionally cognizable circumstances”). . . .

There may be situations, of course, when legislative action is required before a court-ordered remedy can be fulfilled. For example, in *Brigham v. State*, (1997), this Court declared that Vermont’s system for funding public education unconstitutionally deprived Vermont schoolchildren of a right to an equal educational opportunity, and then retained jurisdiction until the Legislature enacted legislation that satisfied the Court’s holding. Plainly, it was not within the province of this Court to create a new funding system to replace the one that we had declared unconstitutional. The Legislature needed to enact legislation that addressed issues such as the level of state funding for public schools, the sources of additional revenue, and the framework for distributing state funds. In finding a funding source, the Legislature had to consider whether to apply a flat or progressive tax on persons, property, entities, activities or income. These considerations, in turn, required the Legislature to consider what state programs would have to be curtailed to make up for the projected additional school funding. All of these complex political decisions entailed core legislative functions that were a necessary predicate to fulfillment of our holding.

A completely different situation exists here. We have held that the Vermont Constitution entitles plaintiffs “to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.” Given this holding, the most straightforward and effective remedy is simply to enjoin the State from denying plaintiffs a marriage license, which would designate them as persons entitled to those benefits and protections. No legislation is required to redress the constitutional violation that the Court has found. Nor does our paramount interest in vindicating plaintiffs’ constitutional rights interfere in any way with the State’s interest in licensing marriages. Far from intruding upon the State’s narrow interest in its licensing statute, allowing plaintiffs to obtain a license would further the overall goals of marriage, as defined by the majority—to provide stability to individuals, their families, and the broader community by clarifying and protecting the rights of married persons. . . .

During the civil rights movement of the 1960's, state and local governments defended segregation or gradual desegregation on the grounds that mixing the races would lead to interracial disturbances. The Supreme Court's "compelling answer" to that contention was "that constitutional rights may not be denied simply because of hostility to their assertion or exercise." See *Watson*

Today's decision, which is little more than a declaration of rights, abdicates [the Court's] responsibility. The majority declares that plaintiffs have been unconstitutionally deprived of the benefits of marriage, but does not hold that the marriage laws are unconstitutional, does not hold that plaintiffs are entitled to the license that triggers those benefits, and does not provide plaintiffs with any other specific or direct remedy for the constitutional violation that the Court has found to exist. By suspending its judgment and allowing the Legislature to choose a remedy, the majority, in effect, issues an advisory opinion that leaves plaintiffs without redress and sends the matter to an uncertain fate in the Legislature. Ironically, today's mandate will only increase "the uncertainty and confusion" that the majority states it is designed to avoid. . . .

No decision of this Court will abate the moral and political debate over same-sex marriage. My view as to the appropriateness of granting plaintiffs the license they seek is not based on any overestimate (or *any* estimate) of its effectiveness, nor on a miscalculation (or *any* calculation) as to its likely permanence, were it to have received the support of a majority of this Court. Rather, it is based on what I believe are the commands of our Constitution. . . .

William N. Eskridge, Jr.

*Backlash Politics: How Constitutional Litigation Has
Advanced Marriage Equality in the United States*^{*}

. . . [The] creative remedy [in *Baker*] disappointed the plaintiffs and seemed to invite backlash, but [Vermont's] legislators and the governor responded with some sympathy to lesbian and gay couples in early 2000. With the state divided between supporters and opponents of marriage equality, and with the opponents likely in the majority, the Vermont Legislature created a new

^{*} Excerpted from William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 285-301 (2013).

institution for same-sex couples and invested these “civil unions” with all the legal rights and duties of marriage. . . .

[The Vermont] legislative debates regarding the civil unions law were among the most normatively engaged debates I have read, with opponents as well as supporters of the new institution making heartfelt, and usually quite respectful, constitutional claims about the society they wanted for their beloved state. . . . [T]he opponents of the civil unions statute did not give up [after it was enacted]. Supported by a Republican Party capitalizing on a potential wedge issue in a state that was trending toward the Democrats, the “Take Back Vermont” movement sought removal of all officials responsible for the controversial law.

Initially, Take Back Vermont had a fair degree of success, as five Republicans who supported the law were defeated in the [Republican] primary, and the party nominated Take Back Vermont supporter Ruth Dwyer for governor. It is remarkable, however, that the backlash did not have as much bite in [the general election of] November 2000. The Republicans did take over the Vermont House of Representatives but not the Senate, which remained strongly pro-civil union. Governor Howard Dean, a strong civil unions supporter, was reelected, with Dwyer receiving fewer votes in 2000 than she had received when she ran against Dean in 1998. The biggest electoral winner, ironically, was Senator James Jeffords, a pro-civil unions Republican who won an overwhelming reelection and, in May 2001, left the Republican Party, in part because of its intolerant stances on social issues.

[W]hen Governor Dean retired in 2002 and was replaced by a Republican, the new governor, James Douglas, announced that the civil unions law should remain in place. In 2009 the Vermont Legislature passed a marriage equality law [i.e., a statute conferring the same right to marry on same-sex couples as on opposite-sex couples] over Governor Douglas’s veto. . . .

The United Kingdom provides variations on the themes explored so far. First, whereas the courts in *Vriend* and *Baker* had unilateral power to alter the legal status quo (with discretion as to the time at which, and under what conditions, they would do so), the courts of the U.K. do not have such power at all, though they are able to issue a “declaration of incompatibility” (DOI)—a statement, without legal effect, that a statute is inconsistent with the Human Rights Act (HRA) of 1998. The U.K. Parliament’s willingness to respond to such declarations and the nature of its responses help to test whether the efficacy of

judicial review derives from a judicially-provided remedy or simply from the moral force of the merits determination.

Second, the U.K. experience sheds light on the relationship between judicial remedies and political deliberation. The aftermath of *Baker* suggests that a court, by fashioning a remedy that aims to open up space for legislative action, can play a positive role in fostering democratic deliberation. But the nature of Parliament's responses to courts in the U.K. may suggest that open remedies will not always produce legislative deliberation—indeed, that legislative deliberative processes may provide politicians with a means to avoid acting on judicial determinations.

Aruna Sathanapally

*Beyond Disagreement: Open Remedies in Human Rights
Adjudication*^{*}

. . . So far [I] have identified two reasons why the political branches did not use their power to refuse to respond to a DOI from 2000 to 2010. The first was the [Labour] government policy of responding to all DOIs in the same way, in the interests of establishing DOIs as an effective remedy before the [European Court of Human Rights]. The second was that the dominant dynamic over the early phase of the Act was one in which DOIs were uncontroversial and were not seen to endanger the pursuit of policy.

In this section, I suggest a third reason why the government did not refuse to address any of the DOIs made. Since the DOI mechanism is so permissive, it allows for more passive methods to resist judicial findings that are controversial, rather than open defiance. Two such methods, which have tended to be employed together, are: first, to delay making a response; and second, to make minor adjustments to the impugned law and argue that the law now meets human rights standards. . . . It is also possible to pursue the policy animating the impugned law, but through a *new* means unaddressed by the immediate judicial decision on human rights. . . .

[T]he UK's experience over this period is a clear illustration of how the courts and the legislature can develop a working relationship playing distinct roles under a system of open remedies, with courts identifying that legislation infringes

^{*} Excerpted from ARUNA SATHANAPALLY, BEYOND DISAGREEMENT: OPEN REMEDIES IN HUMAN RIGHTS ADJUDICATION 148, 163, 183-84 (2012).

human rights in specific circumstances and the legislature deciding how to revise the general position of the law. In the early phase of the HRA, the vast majority of DOIs were not controversial, so this type of specialized functioning did not involve courts overriding or thwarting the policy objectives of the legislature. . . .

But even after this phase, when DOIs became increasingly controversial, this type of interaction—in which the role of the political branches of government was to decide *how* not whether to respond to a DOI—continued. The executive did not choose to express its reservations about, or disagreement with, judicial findings of incompatibility by openly refusing to provide a legislative remedy. I have argued that one explanation is the significant discretion that attaches to the task of devising remedial action

I raised the importance of examining . . . the extent to which DOIs drive the legislature toward reflective, principled deliberation, whether that is deliberation on how the law should change or on whether the judicial conclusion was the correct one. Across the entire body of DOIs, only a few legislative responses generated debate in the Houses of Parliament. The provisions of the HRA imposed very little discipline on political institutions in the aftermath of a DOI. . . . By giving the political branches such a free hand in deciding whether, when, and how to respond to a DOI, the HRA did little to rein in the government's control of the legislative agenda, even though the [parliamentary Joint Committee on Human Rights] over time secured some accountability for remedial action or lack thereof. . . .

[Though this “pattern of limited legislative engagement” had some exceptions that would please the proponents of deliberative democracy, there was also, at the opposite end of the spectrum, at least one conspicuous example of “deliberative failure.” This occurred in the aftermath of a 2007 DOI stating that the UK's disfranchisement of prisoners violated the Convention. The Labour government refrained from proposing a remedy, and though it solicited public comment on the matter, it drew out the solicitation's timetable, refrained from publishing the comments, and ultimately did not respond to them.]

[T]he message [from the Labour government], in effect, was that legislation to introduce voting rights for prisoners was expected to be deeply unpopular within Parliament and in the media. The government's reluctance to be the responsible party for legislative changes can be understood in light of this. Ultimately, the government was able to pass this political ‘hot potato’ on to its successors

It is worth considering whether, in this type of situation of popular hostility towards rights claimants, political actors may prefer that changes to the law did not emanate from them, but came from the courts. If the ban [on prisoner voting] had somehow been removed by the court, rather than having to initiate the remedy of its own accord, the government could have introduced measures to Parliament reinstating partial restrictions on prisoner voting, and not face the same public hostility as if it were removing the ban. . . .

THE STRUCTURAL INJUNCTION

Traditionally, the injunction seeks to prevent a discrete act and is the product of a legal process governed by a binary opposition between two individuals. The judge acts as a passive umpire, primarily dedicated to the task of determining who is in the right.

In contrast, the structural injunction seeks not to prevent a discrete act, but rather to restructure a bureaucratic organization in order to eradicate the threat the operation of the organization poses to constitutional values. The plaintiffs act not just for themselves, but also as trustees for all those who are or will be enmeshed in the operations of the organization. The defendants are officers of the state, some of whom may be at odds with one another, and their actions will bind their successors. As in the traditional model, the judge is in charge of the proceeding, but he or she is not a passive umpire. Judges see themselves committed to the actualization of the Constitution and the values it embodies and for that reason are prepared to manage the reconstructive enterprise.

In the traditional equitable proceeding, the process of fashioning the remedy—stopping an act that would violate the plaintiff's right—is not a great moment. It follows ineluctably from the definition of the right. In the structural case, however, the remedial dimension of the lawsuit—requiring structural changes to an on-going bureaucratic organization—is especially challenging. It requires the kind of instrumental judgments for which the judge can claim no special authority, although they are justified by his obligation to provide a fair and effective remedy.

In the structural context, the judge provides ample opportunity to the defendants to make proposals for the remedy and draws on the expertise of others to help fashion or implement the decree. Sometimes a judge may appoint

auxiliary personnel, like a special master, to help fashion or implement the decree. All structural remedies have an experiential component—they are often revised in light of how they work out. As a result, jurisdiction is maintained for long periods of time, years on end, as long as the dynamic that gave rise to the threat to the Constitution persists. A motion for supplemental relief, rather than contempt, is the primary mechanism for implementation.

The structural injunction emerged during the mid to late-1960s, out of the effort to implement the U.S. Supreme Court's 1954 decision in *Brown v. Board of Education*. At first, *Brown's* condemnation of the dual school system provoked outright defiance, and it was necessary for the Court in 1958, in response to the Little Rock crisis, to reaffirm its commitment to *Brown*. Then the Supreme Court stepped back and left it to the lower federal courts to begin the process of transforming the dual school systems into unitary, non-racial systems. It was out of this effort that the structural injunction emerged, though some observers pointed to antecedents in antitrust or even railroad reorganizations.

As the process of desegregating the public schools of the South deepened, and desegregation picked up steam in the North and West, the forces of resistance grew. In 1974, in the famous case of *Milliken v. Bradley*, the Court qualified its commitment to *Brown* and set forth an approach to school desegregation that would govern the next forty years. The retreat from *Brown* reached something of a crescendo in 2010 in the Seattle/Louisville school desegregation cases, which cast doubt even on so-called voluntary desegregation efforts of local school boards. Once the substantive claim underlying *Brown* had been put in doubt or drained of its vitality or generative capacity, the remedy born of the right proclaimed in that case also came under attack. It became apparent that substance had been driving procedure.

The structural injunction has not been confined to school desegregation cases. Although it first emerged in that context, it was soon extended—sometimes, as in the case of Judge Frank Johnson of Alabama, by the very judge who spearheaded judicially mandated school desegregation—to all branches of the state, including public housing, the police, mental hospitals, and most notably prisons—the subject matter of the 2011 Supreme Court decision presented in this section, *Brown v. Plata*. When prison litigation began in the early 1970s, the federal judges in charge of these suits drew, sometimes explicitly, on the remedial lessons of the school cases. The governing provision in these prison reform cases was not equal protection (as it was with the school cases), but rather the ban on cruel and unusual punishments; however, the remedy chosen to vindicate that value was the same as that crafted in school desegregation cases: the structural injunction.

In the late 1970s, a prison case reached the Supreme Court, and in that case (*Hutto v. Finney*), the Court endorsed the substantive claim underlying that litigation, namely that quotidian operation of a state prison system can be so horrendous as to offend the Eighth Amendment ban on cruel and unusual punishments. This substantive commitment has persisted to this day. It was forcefully proclaimed by Justice Kennedy in his opinion for the Court in *Brown v. Plata*. Justice Scalia, joined by Justice Thomas, would have repudiated it—no wonder he finds the structural injunction so problematic. But Justice Alito, joined by Chief Justice Roberts, did not join Justice Scalia in this respect and thus presumably starts from the same substantive premise as Justice Kennedy. In the *Plata* case, Justice Alito objected not to the structural injunction as an abstract idea, but rather as it had been applied in the case, particularly the provision imposing a population ceiling, which may have the consequence of prematurely releasing a large number of prisoners. The structural injunction has not been confined to the United States; in recent decades, this remedy has found forceful expression abroad, for example, in Colombia and South Africa. Underlying these remedial ventures one can find the same robust substantive commitments that today animate *Plata* and, a half-century ago, *Brown v. Board of Education*.

To understand the remedial dimensions of *Plata*, reference has to be made to the Texas prison litigation and to a federal statute that it initially had provoked—the Prison Litigation Reform Act of 1995 (PLRA). The Texas litigation began in the early 1970s. A judgment was announced in December 1979 that detailed terrible violence, the lack of medical care, overcrowding, and the control that prisoners (“trustees”) had over other prisoners. The opinion setting forth that judgment was released in March 1980, and then the long arduous process of structural reform began. The federal district judge in charge of that process was William Wayne Justice; his hundreds of factual findings were never reversed on appeal, and his remedial orders were for the most part affirmed by the Fifth Circuit Court of Appeals. Now and then, the state directors of the Texas prison system, and the governors embraced Judge Justice’s orders, but for the most part they resisted, and the litigation became the subject of heated political controversy.

In time, the congressional delegation from Texas introduced legislation specifically aimed at curbing the exercise of power by Judge Justice and it eventually became the PLRA. This law was enacted by the so-called Newt Gingrich Congress, which was elected in 1994 and was also responsible for the welfare reform act of 1996 (placing a five-year life-time limit on the receipt of welfare) and the Anti-Terrorism and Effective Death Penalty Act (which placed new limits on habeas corpus)—all of which were signed into law by President Clinton.

The *Plata* case involved two features of the PLRA. One was the general provision for injunctions, which in essence set out a narrow tailoring requirement demanding that the relief extend no further than necessary to correct for the violation of the federal right. This provision was culled by Congress from a number of decisions of the Supreme Court, primarily in school desegregation cases that were handed down in the era governed by *Milliken v. Bradley* and other decisions that limited *Brown* by cutting back on school desegregation. In truth, the narrow tailoring principle was alien to the jurisprudence of the structural injunction, but as Justice Kennedy's opinion indicates, it is something the Court can live with provided that the principle is read, as the Constitution requires, with an eye toward allowing the judiciary to provide an effective remedy for a violation of a federal constitutional right.

The second feature of the PLRA of special interest in *Plata* concerns prisoner release orders and the special restrictions that Congress placed on such orders. Some of these restrictions—such as the need for a three-judge court—pose few constitutional concerns, for it is seen to be well within the discretion of Congress to decide how many judges are necessary to hear a claim. But other restrictions—for example, the requirement that a prisoner release order can be issued only after other remedies have been tried and shown to fail and must be based upon a finding that overcrowding is the primary cause of the violation—may well impinge on the remedial powers of the federal judiciary.

Like the narrow tailoring requirement, the judiciary can live with these restrictions provided that they are read with an eye toward preserving the judiciary's power to provide an effective remedy for a violation of a constitutional right. As Justice Kennedy declares, "A reading of the PLRA that would render population limits unavailable in practice would raise serious constitutional concerns."



Brown v. Plata
Supreme Court of the United States
131 S. Ct. 1910 (2011)

Justice KENNEDY delivered the opinion of the Court.

This case arises from serious constitutional violations in California’s prison system. The violations have persisted for years. They remain uncorrected. The appeal comes to this Court from a three-judge District Court order directing California to remedy two ongoing violations of the Cruel and Unusual Punishments Clause, a guarantee binding on the States by the Due Process Clause of the Fourteenth Amendment. The violations are the subject of two class actions in two Federal District Courts. The first involves the class of prisoners with serious mental disorders. That case is *Coleman v. Brown*. The second involves prisoners with serious medical conditions. That case is *Plata v. Brown*. The order of the three-judge District Court is applicable to both cases. . . .

The appeal presents the question whether the remedial order issued by the three-judge court is consistent with requirements and procedures set forth in a congressional statute, the Prison Litigation Reform Act of 1995 (PLRA). The order leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—the State will be required to release some number of prisoners before their full sentences have been served. High recidivism rates must serve as a warning that mistaken or premature release of even one prisoner can cause injury and harm. The release of prisoners in large numbers—assuming the State finds no other way to comply with the order—is a matter of undoubted, grave concern.

At the time of trial, California’s correctional facilities held some 156,000 persons. This is nearly double the number that California’s prisons were designed to hold, and California has been ordered to reduce its prison population to 137.5% of design capacity. By the three-judge court’s own estimate, the required population reduction could be as high as 46,000 persons. Although the State has reduced the population by at least 9,000 persons during the pendency of this appeal, this means a further reduction of 37,000 persons could be required. As will be noted, the reduction need not be accomplished in an indiscriminate manner or in these substantial numbers if satisfactory, alternate remedies or means for compliance are devised. The State may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order’s impact. The

population reduction potentially required is nevertheless of unprecedented sweep and extent.

Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result. Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the violation have been frustrated by severe overcrowding in California's prison system. Short term gains in the provision of care have been eroded by the long-term effects of severe and pervasive overcrowding.

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the "primary cause of the violation of a Federal right," specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.

This Court now holds that the PLRA does authorize the relief afforded in this case and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights. The order of the three-judge court, subject to the right of the State to seek its modification in appropriate circumstances, must be affirmed. . . .

I

[I]nmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California's prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved "some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable."

Prisoners suffering from physical illness also receive severely deficient care. California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space

needed to treat the current population. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12-by 20-foot cage for up to five hours awaiting treatment. The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with “constant and extreme” chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a “failure of MDs to work up for cancer in a young man with 17 months of testicular pain.” Doctor Ronald Shansky, former medical director of the Illinois state prison system, surveyed death reviews for California prisoners. He concluded that extreme departures from the standard of care were “widespread,” and that the proportion of “possibly preventable or preventable” deaths was “extremely high.” Many more prisoners, suffering from severe but not life-threatening conditions, experience prolonged illness and unnecessary pain.

These conditions are the subject of two federal cases. The first to commence, *Coleman v. Brown*, was filed in 1990. *Coleman* involves the class of seriously mentally ill persons in California prisons. Over 15 years ago, in 1995, after a 39-day trial, the *Coleman* District Court found “overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates” in California prisons. The prisons were “seriously and chronically understaffed,” and had “no effective method for ensuring . . . the competence of their staff.” The prisons had failed to implement necessary suicide-prevention procedures, “due in large measure to the severe understaffing.” Mentally ill inmates “languished for months, or even years, without access to necessary care.” “They suffer from severe hallucinations, [and] they decompensate into catatonic states.” The court appointed a Special Master to oversee development and implementation of a remedial plan of action.

In 2007, 12 years after his appointment, the Special Master in *Coleman* filed a report stating that, after years of slow improvement, the state of mental health care in California’s prisons was deteriorating. The Special Master ascribed this change to increased overcrowding. The rise in population had led to greater demand for care, and existing programming space and staffing levels were inadequate to keep pace. Prisons had retained more mental health staff, but the “growth of the resource [had] not matched the rise in demand.” At the very time the need for space was rising, the need to house the expanding population had also caused a “reduction of programming space now occupied by inmate bunks.” The State was “facing a four to five-year gap in the availability of sufficient beds to meet the treatment needs of many inmates/patients.” “[I]ncreasing numbers of truly psychotic inmate/patients are trapped in [lower levels of treatment] that cannot meet their needs.” The Special Master concluded that many early

“achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair.”

The second action, *Plata v. Brown*, involves the class of state prisoners with serious medical conditions. After this action commenced in 2001, the State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights. The State stipulated to a remedial injunction. The State failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts. The court found that “the California prison medical care system is broken beyond repair,” resulting in an “unconscionable degree of suffering and death.” The court found: “[I]t is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons'] medical delivery system.” . . . Prisons were unable to retain sufficient numbers of competent medical staff, and would “hire any doctor who had ‘a license, a pulse and a pair of shoes.’” Medical facilities lacked “necessary medical equipment” and did “not meet basic sanitation standards.” “Exam tables and counter tops, where prisoners with . . . communicable diseases are treated, [were] not routinely disinfected.”

In 2008, three years after the District Court's decision, the Receiver described continuing deficiencies in the health care provided by California prisons:

“Timely access is not assured. The number of medical personnel has been inadequate, and competence has not been assured Adequate housing for the disabled and aged does not exist. The medical facilities, when they exist at all, are in an abysmal state of disrepair. Basic medical equipment is often not available or used. Medications and other treatment options are too often not available when needed Indeed, it is a misnomer to call the existing chaos a ‘medical delivery system’—it is more an act of desperation than a system.”

A report by the Receiver detailed the impact of overcrowding on efforts to remedy the violation. The Receiver explained that “overcrowding, combined with staffing shortages, has created a culture of cynicism, fear, and despair which makes hiring and retaining competent clinicians extremely difficult.” “[O]vercrowding, and the resulting day to day operational chaos of the [prison system], creates regular ‘crisis’ situations which . . . take time [and] energy . . . away from important remedial programs.” Overcrowding had increased the incidence of infectious disease and had led to rising prison violence and greater

reliance by custodial staff on lockdowns, which “inhibit the delivery of medical care and increase the staffing necessary for such care.” . . . “Every day,” the Receiver reported, “California prison wardens and health care managers make the difficult decision as to which of the class actions, *Coleman* . . . or *Plata* they will fail to comply with because of staff shortages and patient loads.”

[T]he three-judge court heard 14 days of testimony and issued a 184-page opinion, making extensive findings of fact. The court ordered California to reduce its prison population to 137.5% of the prisons’ design capacity within two years. Assuming the State does not increase capacity through new construction, the order requires a population reduction of 38,000 to 46,000 persons. Because it appears all but certain that the State cannot complete sufficient construction to comply fully with the order, the prison population will have to be reduced to at least some extent. The court did not order the State to achieve this reduction in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court. . . .

II

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. . . .

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates “may actually produce physical ‘torture or a lingering death.’” Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. Courts must be sensitive to the State’s interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. Courts nevertheless must not shrink from their obligation to “enforce the constitutional rights of all ‘persons,’ including prisoners.” Courts may not

allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population. By its terms, the PLRA restricts the circumstances in which a court may enter an order "that has the purpose or effect of reducing or limiting the prison population." The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States. Because the order limits the prison population as a percentage of design capacity, it nonetheless has the "effect of reducing or limiting the prison population."

[T]he three-judge court must . . . find by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and that "no other relief will remedy the violation of the Federal right." As with any award of prospective relief under the PLRA, the relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." The three-judge court must therefore find that the relief is "narrowly drawn, extends no further than necessary . . . , and is the least intrusive means necessary to correct the violation of the Federal right." In making this determination, the three-judge court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." Applying these standards, the three-judge court found a population limit appropriate, necessary, and authorized in this case.

This Court's review of the three-judge court's legal determinations is *de novo*, but factual findings are reviewed for clear error. . . . The three-judge court oversaw two weeks of trial and heard at considerable length from California prison officials, as well as experts in the field of correctional administration. The judges had the opportunity to ask relevant questions of those witnesses. Two of the judges had overseen the ongoing remedial efforts of the Receiver and Special Master. The three-judge court was well situated to make the difficult factual judgments necessary to fashion a remedy for this complex and intractable constitutional violation. . . .

Before a three-judge court may be convened to consider whether to enter a population limit, the PLRA requires that the court have "previously entered an order for less intrusive relief that has failed to remedy the deprivation of the

Federal right sought to be remedied.” This provision refers to “an order.” It is satisfied if the court has entered one order, and this single order has “failed to remedy” the constitutional violation. The defendant must also have had “a reasonable amount of time to comply with the previous court orders.” . . . Together, these requirements ensure that the “last resort remedy” of a population limit is not imposed “as a first step.”

The first of these conditions, [that the court have “previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied,”] was satisfied in *Coleman* by appointment of a Special Master in 1995, and it was satisfied in *Plata* by approval of a consent decree and stipulated injunction in 2002. . . . The State does not claim that either order achieved a remedy. . . .

The State claims instead that the second condition, [that a defendant have had “a reasonable amount of time to comply with the previous court orders,”] was not met because other, later remedial efforts should have been given more time to succeed. In 2006, the *Coleman* District Judge approved a revised plan of action calling for construction of new facilities, hiring of new staff, and implementation of new procedures. That same year, the *Plata* District Judge selected and appointed a Receiver to oversee the State’s ongoing remedial efforts. When the three-judge court was convened, the Receiver had filed a preliminary plan of action calling for new construction, hiring of additional staff, and other procedural reforms.

Although both the revised plan of action in *Coleman* and the appointment of the Receiver in *Plata* were new developments in the courts’ remedial efforts, the basic plan to solve the crisis through construction, hiring, and procedural reforms remained unchanged. These efforts had been ongoing for years; the failed consent decree in *Plata* had called for implementation of new procedures and hiring of additional staff; and the *Coleman* Special Master had issued over 70 orders directed at achieving a remedy through construction, hiring, and procedural reforms. The *Coleman* Special Master and *Plata* Receiver were unable to provide assurance that further, substantially similar efforts would yield success absent a population reduction. Instead, the *Coleman* Special Master explained that “many of the clinical advances . . . painfully accomplished over the past decade are slipping away” as a result of overcrowding. And the *Plata* Receiver indicated that, absent a reduction in overcrowding, a successful remedial effort could “all but bankrupt” the State of California.

Having engaged in remedial efforts for 5 years in *Plata* and 12 in *Coleman*, the District Courts were not required to wait to see whether their more

recent efforts would yield equal disappointment. When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this statewide prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court's remedial efforts. A contrary reading of the reasonable time requirement would in effect require district courts to impose a moratorium on new remedial orders before issuing a population limit. This unnecessary period of inaction would delay an eventual remedy and would prolong the courts' involvement, serving neither the State nor the prisoners. Congress did not require this unreasonable result when it used the term "reasonable."

[O]nce a three-judge court has been convened, the court must find additional requirements satisfied before it may impose a population limit. The first of these requirements is that "crowding is the primary cause of the violation of a Federal right."

The three-judge court found the primary cause requirement satisfied by the evidence at trial. The court found that overcrowding strains inadequate medical and mental health facilities; overburdens limited clinical and custodial staff; and creates violent, unsanitary, and chaotic conditions that contribute to the constitutional violations and frustrate efforts to fashion a remedy. The three-judge court also found that "until the problem of overcrowding is overcome it will be impossible to provide constitutionally compliant care to California's prison population."

[T]he three-judge court acknowledged that the violations were caused by factors in addition to overcrowding and that reducing crowding in the prisons would not entirely cure the violations. This is consistent with the reports of the *Coleman* Special Master and *Plata* Receiver, both of whom concluded that even a significant reduction in the prison population would not remedy the violations absent continued efforts to train staff, improve facilities, and reform procedures. The three-judge court nevertheless found that overcrowding was the primary cause in the sense of being the foremost cause of the violation.

This understanding of the primary cause requirement is consistent with the text of the PLRA. The State in fact concedes that it proposed this very definition of primary cause to the three-judge court. . . . Overcrowding need only be the foremost, chief, or principal cause of the violation. If Congress had intended to require that crowding be the only cause, it would have said so, assuming in its judgment that definition would be consistent with constitutional limitations.

As this case illustrates, constitutional violations in conditions of confinement are rarely susceptible of simple or straightforward solutions. In addition to overcrowding the failure of California's prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures. . . . Only a multifaceted approach aimed at many causes, including overcrowding, will yield a solution.

The PLRA should not be interpreted to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations. Congress limited the availability of limits on prison populations, but it did not forbid these measures altogether. . . . Courts should presume that Congress was sensitive to the real-world problems faced by those who would remedy constitutional violations in the prisons and that Congress did not leave prisoners without a remedy for violations of their constitutional rights. A reading of the PLRA that would render population limits unavailable in practice would raise serious constitutional concerns. . . .

The three-judge court was also required to find by clear and convincing evidence that "no other relief will remedy the violation of the Federal right."

The State argues that the violation could have been remedied through a combination of new construction, transfers of prisoners out of State, hiring of medical personnel, and continued efforts by the *Plata* Receiver and *Coleman* Special Master. The order in fact permits the State to comply with the population limit by transferring prisoners to county facilities or facilities in other States, or by constructing new facilities to raise the prisons' design capacity. And the three-judge court's order does not bar the State from undertaking any other remedial efforts. If the State does find an adequate remedy other than a population limit, it may seek modification or termination of the three-judge court's order on that basis. The evidence at trial, however, supports the three-judge court's conclusion that an order limited to other remedies would not provide effective relief.

The State's argument that out-of-state transfers provide a less restrictive alternative to a population limit must fail because requiring out-of-state transfers itself qualifies as a population limit under the PLRA. . . . Transfers provide a means to reduce the prison population in compliance with the three-judge court's order. They are not a less restrictive alternative to that order.

Even if out-of-state transfers could be regarded as a less restrictive alternative, the three-judge court found no evidence of plans for transfers in numbers sufficient to relieve overcrowding. The State complains that the

Coleman District Court slowed the rate of transfer by requiring inspections to assure that the receiving institutions were in compliance with the Eighth Amendment, but the State has made no effort to show that it has the resources and the capacity to transfer significantly larger numbers of prisoners absent that condition.

Construction of new facilities, in theory, could alleviate overcrowding, but the three-judge court found no realistic possibility that California would be able to build itself out of this crisis. At the time of the court's decision the State had plans to build new medical and housing facilities, but funding for some plans had not been secured and funding for other plans had been delayed by the legislature for years. Particularly in light of California's ongoing fiscal crisis, the three-judge court deemed "chimerical" any "remedy that requires significant additional spending by the state." Events subsequent to the three-judge court's decision have confirmed this conclusion. In October 2010, the State notified the *Coleman* District Court that a substantial component of its construction plans had been delayed indefinitely by the legislature. And even if planned construction were to be completed, the *Plata* Receiver found that many so-called "expansion" plans called for cramming more prisoners into existing prisons without expanding administrative and support facilities. . . .

The three-judge court also rejected additional hiring as a realistic means to achieve a remedy. The State for years had been unable to fill positions necessary for the adequate provision of medical and mental health care, and the three-judge court found no reason to expect a change. Although the State points to limited gains in staffing between 2007 and 2008, the record shows that the prison system remained chronically understaffed through trial in 2008. The three-judge court found that violence and other negative conditions caused by crowding made it difficult to hire and retain needed staff. The court also concluded that there would be insufficient space for additional staff to work even if adequate personnel could somehow be retained. Additional staff cannot help to remedy the violation if they have no space in which to see and treat patients.

The three-judge court also did not err, much less commit clear error, when it concluded that, absent a population reduction, continued efforts by the Receiver and Special Master would not achieve a remedy. Both the Receiver and the Special Master filed reports stating that overcrowding posed a significant barrier to their efforts. The *Plata* Receiver stated that he was determined to achieve a remedy even without a population reduction, but he warned that such an effort would "all but bankrupt" the State. The *Coleman* Special Master noted even more serious concerns, stating that previous remedial efforts had "succumbed to the inexorably rising tide of population." Both reports are persuasive evidence that,

absent a reduction in overcrowding, any remedy might prove unattainable and would at the very least require vast expenditures of resources by the State. . . . The State claims that, even if each of these measures were unlikely to remedy the violation, they would succeed in doing so if combined together. Aside from asserting this proposition, the State offers no reason to believe it is so. Attempts to remedy the violations in *Plata* have been ongoing for 9 years. In *Coleman*, remedial efforts have been ongoing for 16. At one time, it may have been possible to hope that these violations would be cured without a reduction in overcrowding. A long history of failed remedial orders, together with substantial evidence of overcrowding's deleterious effects on the provision of care, compels a different conclusion today.

The common thread connecting the State's proposed remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall. As noted above, the legislature recently failed to allocate funds for planned new construction. Without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill in California's prisons.

The PLRA states that no prospective relief shall issue with respect to prison conditions unless it is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation. When determining whether these requirements are met, courts must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system."

The three-judge court acknowledged that its order "is likely to affect inmates without medical conditions or serious mental illness." This is because reducing California's prison population will require reducing the number of prisoners outside the class through steps such as parole reform, sentencing reform, use of good-time credits, or other means to be determined by the State. Reducing overcrowding will also have positive effects beyond facilitating timely and adequate access to medical care, including reducing the incidence of prison violence and ameliorating unsafe living conditions. According to the State, these collateral consequences are evidence that the order sweeps more broadly than necessary.

The population limit imposed by the three-judge court does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class. Narrow tailoring requires a “‘fit’ between the [remedy’s] ends and the means chosen to accomplish those ends.” The scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation. This Court has rejected remedial orders that unnecessarily reach out to improve prison conditions other than those that violate the Constitution. But the precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects.

Nor does anything in the text of the PLRA require that result. The PLRA states that a remedy shall extend no further than necessary to remedy the violation of the rights of a “particular plaintiff or plaintiffs.” This means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court.

This case is unlike cases where courts have impermissibly reached out to control the treatment of persons or institutions beyond the scope of the violation. Even prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care. Prisoners in the general population will become sick, and will become members of the plaintiff classes, with routine frequency; and overcrowding may prevent the timely diagnosis and care necessary to provide effective treatment and to prevent further spread of disease. Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth Amendment, but in no sense are they remote bystanders in California’s medical care system. They are that system’s next potential victims.

A release order limited to prisoners within the plaintiff classes would, if anything, unduly limit the ability of State officials to determine which prisoners should be released. As the State acknowledges in its brief, “release of seriously mentally ill inmates [would be] likely to create special dangers because of their recidivism rates.” The order of the three-judge court gives the State substantial flexibility to determine who should be released. If the State truly believes that a release order limited to sick and mentally ill inmates would be preferable to the order entered by the three-judge court, the State can move the three-judge court for modification of the order on that basis. The State has not requested this relief from this Court.

The order also is not overbroad because it encompasses the entire prison system, rather than separately assessing the need for a population limit at every institution. The *Coleman* court found a systemwide violation when it first afforded relief, and in *Plata* the State stipulated to systemwide relief when it conceded the existence of a violation. Both the *Coleman* Special Master and the *Plata* Receiver have filed numerous reports detailing systemwide deficiencies in medical and mental health care. California's medical care program is run at a systemwide level, and resources are shared among the correctional facilities.

Although the three-judge court's order addresses the entire California prison system, it affords the State flexibility to accommodate differences between institutions. There is no requirement that every facility comply with the 137.5% limit. Assuming no constitutional violation results, some facilities may retain populations in excess of the limit provided other facilities fall sufficiently below it so the system as a whole remains in compliance with the order. This will allow prison officials to shift prisoners to facilities that are better able to accommodate overcrowding, or out of facilities where retaining sufficient medical staff has been difficult. The alternative—a series of institution-specific population limits—would require federal judges to make these choices. Leaving this discretion to state officials does not make the order overbroad.

Nor is the order overbroad because it limits the State's authority to run its prisons, as the State urges in its brief. While the order does in some respects shape or control the State's authority in the realm of prison administration, it does so in a manner that leaves much to the State's discretion. The State may choose how to allocate prisoners between institutions; it may choose whether to increase the prisons' capacity through construction or reduce the population; and, if it does reduce the population, it may decide what steps to take to achieve the necessary reduction. The order's limited scope is necessary to remedy a constitutional violation.

As the State implements the order of the three-judge court, time and experience may reveal targeted and effective remedies that will end the constitutional violations even without a significant decrease in the general prison population. The State will be free to move the three-judge court for modification of its order on that basis, and these motions would be entitled to serious consideration. At this time, the State has not proposed any realistic alternative to the order. The State's desire to avoid a population limit, justified as according respect to state authority, creates a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong. . . .

In reaching its decision, the three-judge court gave “substantial weight” to any potential adverse impact on public safety from its order. The court devoted nearly 10 days of trial to the issue of public safety, and it gave the question extensive attention in its opinion. Ultimately, the court concluded that it would be possible to reduce the prison population “in a manner that preserves public safety and the operation of the criminal justice system.”

The PLRA’s requirement that a court give “substantial weight” to public safety does not require the court to certify that its order has no possible adverse impact on the public. A contrary reading would depart from the statute’s text by replacing the word “substantial” with “conclusive.” Whenever a court issues an order requiring the State to adjust its incarceration and criminal justice policy, there is a risk that the order will have some adverse impact on public safety in some sectors. This is particularly true when the order requires release of prisoners before their sentence has been served. Persons incarcerated for even one offense may have committed many other crimes prior to arrest and conviction, and some number can be expected to commit further crimes upon release. Yet the PLRA contemplates that courts will retain authority to issue orders necessary to remedy constitutional violations, including authority to issue population limits when necessary. A court is required to consider the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation.

This inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. It was proper for the three-judge court to rely on the testimony of prison officials from California and other States. Those experts testified on the basis of empirical evidence and extensive experience in the field of prison administration. . . .

The court found that various available methods of reducing overcrowding would have little or no impact on public safety. Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending. Diverting low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring would likewise lower the prison population without releasing violent convicts. The State now sends large numbers of persons to prison for violating a technical term or

condition of their parole, and it could reduce the prison population by punishing technical parole violations through community-based programs. This last measure would be particularly beneficial as it would reduce crowding in the reception centers, which are especially hard hit by overcrowding. The court's order took account of public safety concerns by giving the State substantial flexibility to select among these and other means of reducing overcrowding.

The State submitted a plan to reduce its prison population in accordance with the three-judge court's order, and it complains that the three-judge court approved that plan without considering whether the specific measures contained within it would substantially threaten public safety. The three-judge court, however, left the choice of how best to comply with its population limit to state prison officials. The court was not required to second-guess the exercise of that discretion. Courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns. The decision to leave details of implementation to the State's discretion protected public safety by leaving sensitive policy decisions to responsible and competent state officials. . . .

III

Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree of judgment. The inquiry involves uncertain predictions regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels. Courts have substantial flexibility when making these judgments. . . .

Nevertheless, the PLRA requires a court to adopt a remedy that is "narrowly tailored" to the constitutional violation and that gives "substantial weight" to public safety. When a court is imposing a population limit, this means the court must set the limit at the highest population consistent with an efficacious remedy. The court must also order the population reduction achieved in the shortest period of time reasonably consistent with public safety.

A

The three-judge court concluded that the population of California's prisons should be capped at 137.5% of design capacity. This conclusion is supported by the record. Indeed, some evidence supported a limit as low as 100% of design capacity. . . . Other evidence supported a limit as low as 130%. The

head of the State's Facilities Strike Team recommended reducing the population to 130% of design capacity as a long-term goal. . . .

According to the State, this testimony expressed the witnesses' policy preferences, rather than their views as to what would cure the constitutional violation. Of course, courts must not confuse professional standards with constitutional requirements. But expert opinion may be relevant when determining what is obtainable and what is acceptable in corrections philosophy. Nothing in the record indicates that the experts in this case imposed their own policy views or lost sight of the underlying violations. To the contrary, the witnesses testified that a 130% population limit would allow the State to remedy the constitutionally inadequate provision of medical and mental health care. When expert opinion is addressed to the question of how to remedy the relevant constitutional violations, as it was here, federal judges can give it considerable weight. . . .

Although the three-judge court concluded that the "evidence in support of a 130% limit is strong," it found that some upward adjustment was warranted in light of "the caution and restraint required by the PLRA." The three-judge court noted evidence supporting a higher limit. In particular, the State's Corrections Independent Review Panel had found that 145% was the maximum "operable capacity" of California's prisons, although the relevance of that determination was undermined by the fact that the panel had not considered the need to provide constitutionally adequate medical and mental health care, as the State itself concedes. After considering, but discounting, this evidence, the three-judge court concluded that the evidence supported a limit lower than 145%, but higher than 130%. It therefore imposed a limit of 137.5%.

This weighing of the evidence was not clearly erroneous. The adversary system afforded the court an opportunity to weigh and evaluate evidence presented by the parties. The plaintiffs' evidentiary showing was intended to justify a limit of 130%, and the State made no attempt to show that any other number would allow for a remedy. There are also no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort. The three-judge court made the most precise determination it could in light of the record before it. The PLRA's narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy. In light of substantial evidence supporting an even more drastic remedy, the three-judge court complied with the requirement of the PLRA in this case.

B

The three-judge court ordered the State to achieve this reduction within two years. At trial and closing argument before the three-judge court, the State did not argue that reductions should occur over a longer period of time. The State later submitted a plan for court approval that would achieve the required reduction within five years, and that would reduce the prison population to 151% of design capacity in two years. The State represented that this plan would “safely reach a population level of 137.5% over time.” The three-judge court rejected this plan because it did not comply with the deadline set by its order.

The State first had notice that it would be required to reduce its prison population in February 2009, when the three-judge court gave notice of its tentative ruling after trial. The 2-year deadline, however, will not begin to run until this Court issues its judgment. When that happens, the State will have already had over two years to begin complying with the order of the three-judge court. The State has used the time productively. At oral argument, the State indicated it had reduced its prison population by approximately 9,000 persons since the decision of the three-judge court. After oral argument, the State filed a supplemental brief indicating that it had begun to implement measures to shift “thousands” of additional prisoners to county facilities.

Particularly in light of the State’s failure to contest the issue at trial, the three-judge court did not err when it established a 2-year deadline for relief. Plaintiffs proposed a 2-year deadline, and the evidence at trial was intended to demonstrate the feasibility of a 2-year deadline. Notably, the State has not asked this Court to extend the 2-year deadline at this time.

The three-judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. . . . A court that invokes equity’s power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order. Experience may teach the necessity for modification or amendment of an earlier decree. To that end, the three-judge court must remain open to a showing or demonstration by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection.

Proper respect for the State and for its governmental processes require that the three-judge court exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt

and effective way consistent with public safety. In order to “give substantial weight to any adverse impact on public safety,” the three-judge court must give due deference to informed opinions as to what public safety requires, including the considered determinations of state officials regarding the time in which a reduction in the prison population can be achieved consistent with public safety. An extension of time may allow the State to consider changing political, economic, and other circumstances and to take advantage of opportunities for more effective remedies that arise as the Special Master, the Receiver, the prison system, and the three-judge court itself evaluate the progress being made to correct unconstitutional conditions. At the same time, both the three-judge court and state officials must bear in mind the need for a timely and efficacious remedy for the ongoing violation of prisoners’ constitutional rights.

The State may wish to move for modification of the three-judge court’s order to extend the deadline for the required reduction to five years from the entry of the judgment of this Court, the deadline proposed in the State’s first population reduction plan. The three-judge court may grant such a request provided that the State satisfies necessary and appropriate preconditions designed to ensure that measures are taken to implement the plan without undue delay. Appropriate preconditions may include a requirement that the State demonstrate that it has the authority and the resources necessary to achieve the required reduction within a 5-year period and to meet reasonable interim directives for population reduction. The three-judge court may also condition an extension of time on the State’s ability to meet interim benchmarks for improvement in provision of medical and mental health care.

The three-judge court, in its discretion, may also consider whether it is appropriate to order the State to begin without delay to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release. Even with an extension of time to construct new facilities and implement other reforms, it may become necessary to release prisoners to comply with the court’s order. To do so safely, the State should devise systems to select those prisoners least likely to jeopardize public safety. An extension of time may provide the State a greater opportunity to refine and elaborate those systems.

The State has already made significant progress toward reducing its prison population, including reforms that will result in shifting “thousands” of prisoners to county jails. As the State makes further progress, the three-judge court should evaluate whether its order remains appropriate. If significant progress is made toward remedying the underlying constitutional violations, that progress may demonstrate that further population reductions are not necessary or are less urgent

than previously believed. Were the State to make this showing, the three-judge court in the exercise of its discretion could consider whether it is appropriate to extend or modify this timeline.

Experience with the three-judge court's order may also lead the State to suggest other modifications. The three-judge court should give any such requests serious consideration. The three-judge court should also formulate its orders to allow the State and its officials the authority necessary to address contingencies that may arise during the remedial process.

These observations reflect the fact that the three-judge court's order, like all continuing equitable decrees, must remain open to appropriate modification. They are not intended to cast doubt on the validity of the basic premise of the existing order. The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay. . . .



Salinas Valley State Prison *

July 29, 2008

Correctional Treatment Center (dry cages/holding cells for people waiting for mental health crisis bed).

* Editors' Note: The Appendix to Justice Kennedy's opinion included three photographs, of which we reprint one as captioned in the original.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

. . . The Court acknowledges that the plaintiffs “do not base their case on deficiencies in care provided on any one occasion”; rather, “[p]laintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to ‘substantial risk of serious harm’ and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society.” But our judge-empowering “evolving standards of decency” jurisprudence (with which, by the way, I heartily disagree) does not prescribe (or at least has not until today prescribed) rules for the “decent” running of schools, prisons, and other government institutions. It forbids “indecent” treatment of individuals—in the context of this case, the *denial of medical care* to those who need it. And the persons who have a constitutional claim for denial of medical care are those who are denied medical care—not all who face a “substantial risk” (whatever that is) of being denied medical care.

The *Coleman* litigation involves “the class of seriously mentally ill persons in California prisons,” and the *Plata* litigation involves “the class of state prisoners with serious medical conditions.” The plaintiffs do not appear to claim—and it would be absurd to suggest—that every single one of those prisoners has personally experienced “torture or a lingering death” as a consequence of that bad medical system. Indeed, it is inconceivable that anything more than a small proportion of prisoners in the plaintiff classes have personally received sufficiently atrocious treatment that their Eighth Amendment right was violated—which, as the Court recognizes, is why the plaintiffs do not premise their claim on “deficiencies in care provided on any one occasion.” Rather, the plaintiffs’ claim is that they are all part of a medical system so defective that some number of prisoners will inevitably be injured by incompetent medical care, and that this number is sufficiently high so as to render the system, as a whole, unconstitutional.

But what procedural principle justifies certifying a class of plaintiffs so they may assert a claim of systemic unconstitutionality? I can think of two possibilities, both of which are untenable. The first is that although some or most plaintiffs in the class do not *individually* have viable Eighth Amendment claims, the class as a whole has collectively suffered an Eighth Amendment violation. That theory is contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable. “A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and

the rules of decision unchanged.” *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* (U.S. 2010) (plurality opinion).

The second possibility is that every member of the plaintiff class *has* suffered an Eighth Amendment violation merely by virtue of being a patient in a poorly-run prison system, and the purpose of the class is merely to aggregate all those individually viable claims. This theory has the virtue of being consistent with procedural principles, but at the cost of a gross substantive departure from our case law. Under this theory, each and every prisoner who happens to be a patient in a system that has systemic weaknesses—such as “hir[ing] any doctor who had a license, a pulse and a pair of shoes”—has suffered cruel or unusual punishment, even if that person cannot make an individualized showing of mistreatment. Such a theory of the Eighth Amendment is preposterous. And we have said as much in the past: “If . . . a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.” *Lewis v. Casey* (U.S. 1996).

Whether procedurally wrong or substantively wrong, the notion that the plaintiff class can allege an Eighth Amendment violation based on “systemwide deficiencies” is assuredly wrong. It follows that the remedy decreed here is also contrary to law, since the theory of systemic unconstitutionality is central to the plaintiffs’ case. The PLRA requires plaintiffs to establish that the systemwide injunction entered by the District Court was “narrowly drawn” and “extends no further than necessary” to correct “the violation of the Federal right of a particular plaintiff or plaintiffs.” If (as is the case) the only viable constitutional claims consist of individual instances of mistreatment, then a remedy reforming the system as a whole goes far beyond what the statute allows.

It is also worth noting the peculiarity that the vast majority of inmates most generously rewarded by the re-lease order—the 46,000 whose incarceration will be ended—do not form part of any aggrieved class even under the Court’s expansive notion of constitutional violation. Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym. . . .

Even if I accepted the implausible premise that the plaintiffs have established a systemwide violation of the Eighth Amendment, I would dissent

from the Court's endorsement of a decrowding order. That order is an example of what has become known as a "structural injunction." . . .

[S]tructural injunctions depart from . . . historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today's decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations. . . .

[T]his case illustrates one of their most pernicious aspects: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take "judicial notice") exclusively upon a closed trial record. That is one reason why a district judge's factual findings are entitled to plain-error review: because having viewed the trial first hand he is in a better position to evaluate the evidence than a judge reviewing a cold record. In a very limited category of cases, judges have also traditionally been called upon to make some predictive judgments: which custody will best serve the interests of the child, for example, or whether a particular one-shot injunction will remedy the plaintiff's grievance. When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.

This feature of structural injunctions is superbly illustrated by the District Court's proceeding concerning the decrowding order's effect on public safety. The PLRA requires that, before granting "[p]rospective relief in [a] civil action with respect to prison conditions," a court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." Here, the District Court discharged that requirement by making the "factual finding" that "the state has available methods by which it could readily reduce the prison population to 137.5% design capacity or less without an adverse impact on public safety or the operation of the criminal justice system." It found the evidence "clear" that prison overcrowding would "perpetuate a criminogenic prison system that itself threatens public safety," and volunteered its opinion that "[t]he population could be reduced even further with the reform of California's antiquated sentencing policies and other related changes to the laws." It "reject[ed] the testimony that inmates released early from prison would commit additional new crimes," finding that "shortening the length

of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism,” and that “slowing the flow of technical parole violators to prison, thereby substantially reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety.” It found that “the diversion of offenders to community correctional programs has significant beneficial effects on public safety,” and that “additional rehabilitative programming would result in a significant population reduction while improving public safety.”

The District Court cast these predictions (and the Court today accepts them) as “factual findings,” made in reliance on the procession of expert witnesses that testified at trial. Because these “findings” have support in the record, it is difficult to reverse them under a plain-error standard of review. And given that the District Court devoted nearly 10 days of trial and 70 pages of its opinion to this issue, it is difficult to dispute that the District Court has discharged its statutory obligation to give “substantial weight to any adverse impact on public safety.”

But the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs about penology and recidivism. And *of course* different district judges, of different policy views, would have “found” that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make “factual findings” without inserting their own policy judgments, when the factual findings *are* policy judgments. What occurred here is no more judicial factfinding in the ordinary sense than would be the factual findings that deficit spending will not lower the unemployment rate, or that the continued occupation of Iraq will decrease the risk of terrorism. Yet, because they have been branded “factual findings” entitled to deferential review, the policy preferences of three District Judges now govern the operation of California’s penal system.

It is important to recognize that the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of institutional-reform litigation. When a district court issues an injunction, it must make a factual assessment of the anticipated consequences of the injunction. And when the injunction undertakes to restructure a social institution, assessing the factual consequences of the injunction is necessarily the sort of predictive judgment that our system of government allocates to other government officials.

But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge *incompetent* policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions. Thus, in the proceeding below the District Court determined that constitutionally adequate medical services could be provided if the prison population was 137.5% of design capacity. This was an empirical finding it was utterly unqualified to make. Admittedly, the court did not generate that number entirely on its own; it heard the numbers 130% and 145% bandied about by various witnesses and decided to split the difference. But the ability of judges to spit back or even average-out numbers spoon-fed to them by expert witnesses does not render them competent decisionmakers in areas in which they are otherwise unqualified.

The District Court also relied heavily on the views of the Receiver and Special Master, and those reports play a starring role in the Court's opinion today. . . . The use of these reports is even less consonant with the traditional judicial role than the District Court's reliance on the expert testimony at trial. The latter, even when, as here, it is largely the expression of policy judgments, is at least subject to cross-examination. Relying on the un-cross-examined findings of an investigator, sent into the field to prepare a factual report and give suggestions on how to improve the prison system, bears no resemblance to ordinary judicial decisionmaking. It is true that the PLRA contemplates the appointment of Special Masters (although not Receivers), but Special Masters are authorized only to "conduct hearings and prepare proposed findings of fact" and "assist in the development of remedial plans." This does not authorize them to make factual findings (unconnected to hearings) that are given seemingly wholesale deference. Neither the Receiver nor the Special Master was selected by California to run its prisons, and the fact that they may be experts in the field of prison reform does not justify the judicial imposition of their perspectives on the state. . . .

II

The Court's opinion includes a bizarre coda noting that "[t]he State may wish to move for modification of the three-judge court's order to extend the deadline for the required reduction to five years." The District Court, it says, "may grant such a request provided that the State satisfies necessary and appropriate preconditions designed to ensure the measures are taken to implement the plan without undue delay"; and it gives vague suggestions of what these preconditions "may include," such as "interim benchmarks." It also invites the District Court to "consider whether it is appropriate to order the State to begin without delay to develop a system to identify prisoners who are unlikely to

reoffend,” and informs the State that it “should devise systems to select those prisoners least likely to jeopardize public safety.” (What a good idea!)

The legal effect of this passage is unclear—I suspect intentionally so. If it is nothing but a polite remainder to the State and to the District Court that the injunction is subject to modification, then it is entirely unnecessary. As both the State and the District Court are undoubtedly aware, a party is *always* entitled to move to modify an equitable decree, and the PLRA contains an express provision authorizing District Courts to modify or terminate prison injunctions.

I suspect, however, that this passage is a warning shot across the bow, telling the District Court that it had *better* modify the injunction if the State requests what we invite it to request. Such a warning, if successful, would achieve the benefit of a marginal reduction in the inevitable murders, robberies, and rapes to be committed by the released inmates. But it would achieve that at the expense of intellectual bankruptcy, as the Court’s “warning” is entirely alien to ordinary principles of appellate review of injunctions. . . . Moreover, when a district court enters a new decree with new benchmarks, the selection of those benchmarks is also reviewed under a deferential, abuse-of-discretion standard of review—a point the Court appears to recognize. Appellate courts are not supposed to “affirm” injunctions while preemptively noting that the State “may” request, and the District Court “may” grant, a request to extend the State’s deadline to release prisoners by three years based on some suggestions on what appropriate preconditions for such a modification “may” include.

Of course what is really happening here is that the Court, overcome by common sense, disapproves of the results reached by the District Court, but cannot remedy them (it thinks) by applying ordinary standards of appellate review. It has therefore selected a solution unknown in our legal system: A deliberately ambiguous set of suggestions on how to modify the injunction, just deferential enough so that it can say with a straight face that it is “affirming,” just stern enough to put the District Court on notice that it will likely get reversed if it does not follow them. In doing this, the Court has aggrandized itself, grasping authority that appellate courts are not supposed to have, and using it to enact a compromise solution with no legal basis other than the Court’s say-so. That we are driven to engage in these extralegal activities should be a sign that the entire project of permitting district courts to run prison systems is misbegotten.

But perhaps I am being too unkind. The Court, or at least a majority of the Court’s majority, must be aware that the judges of the District Court are likely to call its bluff, since they know full well it cannot possibly be an abuse of discretion to refuse to accept the State’s proposed modifications in an injunction that has just

been approved (*affirmed*) in its present form. An injunction, after all, does not have to be perfect; only good enough for government work, which the Court today says this *is*. So perhaps the coda is nothing more than a ceremonial washing of the hands—making it clear for all to see, that if the terrible things sure to happen as a consequence of this outrageous order do happen, they will be none of this Court’s responsibility. After all, did we not want, and indeed even suggest, something better?

III

In view of the incoherence of the Eighth Amendment claim at the core of this case, the nonjudicial features of institutional reform litigation . . . and the unique concerns associated with mass prisoner releases, I do not believe this Court can affirm this injunction. . . . [A] court may not order a prisoner’s release unless it determines that the prisoner is suffering from a violation of his constitutional rights, and that his release, and no other relief, will remedy that violation. Thus, if the court determines that a particular prisoner is being denied constitutionally required medical treatment, and the release of that prisoner (and no other remedy) would enable him to obtain medical treatment, then the court can order his release; but a court may not order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that that will happen to them in the future.

This view follows from the PLRA’s text that I discussed at the outset. “[N]arrowly drawn” means that the relief applies only to the “particular [prisoner] or [prisoners]” whose constitutional rights are violated; “extends no further than necessary” means that prisoners whose rights are not violated will not obtain relief; and “least intrusive means necessary to correct the violation of the Federal right” means that no other relief is available.

I acknowledge that this reading of the PLRA would severely limit the circumstances under which a court could issue structural injunctions to remedy allegedly unconstitutional prison conditions, although it would not eliminate them entirely. If, for instance, a class representing all prisoners in a particular institution alleged that the temperature in their cells was so cold as to violate the Eighth Amendment, or that they were deprived of all exercise time, a court could enter a prisonwide injunction ordering that the temperature be raised or exercise time be provided. Still, my approach may invite the objection that the PLRA appears to contemplate structural injunctions in general and mass prisoner-release orders in particular. The statute requires courts to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief” and authorizes them to appoint Special Masters, provisions

that seem to presuppose the possibility of a structural remedy. It also sets forth criteria under which courts may issue orders that have “the purpose or effect of reducing or limiting the prisoner population.”

I do not believe that objection carries the day. In addition to imposing numerous limitations on the ability of district courts to order injunctive relief with respect to prison conditions, the PLRA states that “[n]othing in this section shall be construed to . . . repeal or detract from otherwise applicable limitations on the remedial powers of the courts.” The PLRA is therefore best understood as an attempt to constrain the discretion of courts issuing structural injunctions—not as a mandate for their use. For the reasons I have outlined, structural injunctions, especially prisoner-release orders, raise grave separation-of-powers concerns and veer significantly from the historical role and institutional capability of courts. It is appropriate to construe the PLRA so as to constrain courts from entering injunctive relief that would exceed that role and capability. . . .

Justice ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

. . . I do not dispute that general overcrowding *contributes* to many of the California system’s healthcare problems. But it by no means follows that reducing overcrowding is the only or the best or even a particularly good way to alleviate those problems. Indeed, it is apparent that the prisoner release ordered by the court below is poorly suited for this purpose. The release order is not limited to prisoners needing substantial medical care but instead calls for a reduction in the system’s overall population. Under the order issued by the court below, it is not necessary for a single prisoner in the plaintiff classes to be released. Although some class members will presumably be among those who are discharged, the decrease in the number of prisoners needing mental health treatment or other forms of extensive medical care will be much smaller than the total number of prisoners released, and thus the release will produce at best only a modest improvement in the burden on the medical care system. . . .

The State proposed several remedies other than a massive release of prisoners, but the three-judge court, seemingly intent on attacking the broader problem of general overcrowding, rejected all of the State’s proposals. . . .

[S]anitary procedures could be improved; sufficient supplies of medicine and medical equipment could be purchased; an adequate system of records management could be implemented; and the number of medical and other staff positions could be increased. Similarly, it is hard to believe that staffing vacancies cannot be reduced or eliminated and that the qualifications of medical personnel cannot be improved by any means short of a massive prisoner release. Without

specific findings backed by hard evidence, this Court should not accept the counterintuitive proposition that these problems cannot be ameliorated by increasing salaries, improving working conditions, and providing better training and monitoring of performance.

While the cost of a large-scale construction program may well exceed California's current financial capabilities, a more targeted program, involving the repair and perhaps the expansion of current medical facilities (as opposed to general prison facilities), might be manageable. After all, any remedy in this case, including the new programs associated with the prisoner release order and other proposed relief now before the three-judge court, will necessarily involve some state expenditures.

Measures such as these might be combined with targeted reductions in critical components of the State's prison population. A certain number of prisoners in the classes on whose behalf the two cases were brought might be transferred to out-of-state facilities. The three-judge court rejected the State's proposal to transfer prisoners to out-of-state facilities in part because the number of proposed transfers was too small. But this reasoning rested on the court's insistence on a reduction in the State's general prison population rather than the two plaintiff classes.

When the State proposed to make a targeted transfer of prisoners in one of the plaintiff classes (*i.e.*, prisoners needing mental health treatment), one of the District Judges blocked the transfers for fear that the out-of-state facilities would not provide a sufficiently high level of care. The District Judge even refused to allow out-of-state transfers for prisoners who volunteered for relocation. And the court did this even though there was not even an allegation, let alone clear evidence, that the States to which these prisoners would have been sent were violating the Eighth Amendment. . . .

Finally, as a last resort, a much smaller release of prisoners in the two plaintiff classes could be considered. Plaintiffs proposed not only a systemwide population cap, but also a lower population cap for inmates in specialized programs. The three-judge court rejected this proposal, and its response exemplified what went wrong in this case. One judge complained that this remedy would be deficient because it would protect only the members of the plaintiff classes. . . . Overstepping his authority, the judge was not content to provide relief for the classes of plaintiffs on whose behalf the suit before him was brought. Nor was he content to remedy the only constitutional violations that were proved—which concerned the treatment of the members of those classes. Instead, the judge saw it as his responsibility to attack the general problem of overcrowding. . . .

Before ordering any prisoner release, the PLRA commands a court to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.” This provision unmistakably reflects Congress’ view that prisoner release orders are inherently risky. . . .

Despite the record of past prisoner release orders, the three-judge court in this case concluded that loosing 46,000 criminals would not produce [an upsurge in crime] and would actually improve public safety. In reaching this debatable conclusion, the three-judge court relied on the testimony of selected experts, and the majority now defers to what it characterizes as the lower court’s findings of fact on this controversial public policy issue.

This is a fundamental and dangerous error. When a trial court selects between the competing views of experts on broad empirical questions such as the efficacy of preventing crime through the incapacitation of convicted criminals, the trial court’s choice is very different from a classic finding of fact and is not entitled to the same degree of deference on appeal.

The particular three-judge court convened in this case was “confident” that releasing 46,000 prisoners pursuant to its plan “would in fact benefit public safety.” According to that court, “overwhelming evidence” supported this purported finding. But a more cautious court, less bent on implementing its own criminal justice agenda, would have at least acknowledged that the consequences of this massive prisoner release cannot be ascertained in advance with any degree of certainty and that it is entirely possible that this release will produce results similar to those under prior court-ordered population caps. After all, the sharp increase in the California prison population that the three-judge court lamented, has been accompanied by an equally sharp decrease in violent crime. These California trends mirror similar developments at the national level, and “[t]here is a general consensus that the decline in crime is, at least in part, due to more and longer prison sentences.” If increased incarceration in California has led to decreased crime, it is entirely possible that a decrease in imprisonment will have the opposite effect. . . .

The three-judge court acknowledged that it “ha[d] not evaluated the public safety impact of each individual element” of the population reduction plan it ordered the State to implement. The majority argues that the three-judge court nevertheless gave substantial weight to public safety because its order left “details of implementation to the State’s discretion.” Yet the State had told the three-judge court that, after studying possible population reduction measures, it concluded that “reducing the prison population to 137.5% within a two-year period cannot be accomplished without unacceptably compromising public safety.” The State

found that public safety required a 5-year period in which to achieve the ordered reduction. . . .

The members of the three-judge court and the experts on whom they relied may disagree with key elements of the crime-reduction program that the State of California has pursued for the past few decades, including “the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws.” And experts such as the Receiver are entitled to take the view that the State should “re-thin[k] the place of incarceration in its criminal justice system.” But those controversial opinions on matters of criminal justice policy should not be permitted to override the reasonable policy view that is implicit in the PLRA—that prisoner release orders present an inherent risk to the safety of the public. . . .

[I]n largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken. The decision below should be reversed, and the case should be remanded for this to be done.

I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong.

In a few years, we will see.

* * *

As of this writing (July 1, 2013), the three-judge court is threatening to hold the governor of California in contempt for failure to effectuate the prescribed reduction in prison population. The governor’s plan would reduce population to 143% of design capacity, as opposed to 137.5%.

THE DUTY TO ENGAGE

Justice Scalia says that structural reform litigation entails judges acting as “long-term administrators . . . running social institutions.” This may overstate the unilateral control that judges exercise in such cases. Practically, structural litigation often and perhaps always requires on-going and complex negotiation between the adversary litigants themselves (and their lawyers), in which the role

of the third-party adjudicator (judge, master, receiver, etc.) may vary from hands-on to hands-off. Such litigation is sometimes characterized as a bargaining process between the parties, with the adjudicator playing only a general framing role. Witness the importance of consent decrees, of the kind that governed the *Plata* case for a time.

The Constitutional Court of South Africa has especially endorsed the negotiation aspect of such litigation. While issuing structural injunctions in some cases, the Court has also recognized, as a complement to such injunctions or a substitute for them, a duty on the part of government entities to “engage” with the persons whose constitutional rights are at risk. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and Others* (2008), the Court, in deciding whether a city government’s proposed eviction of several thousand people from unsafe and unhealthy residences would violate their constitutional housing rights, said it would consider whether the city had fulfilled its duty to “engage” with them.

**Occupiers of 51 Olivia Road, Berea Township v. City of
Johannesburg and Others**
Constitutional Court of South Africa [2008] ZACC 1

... Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine—

- (a) what the consequences of the eviction might be;
- (b) whether the city could help in alleviating those dire consequences;
- (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and
- (e) when and how the city could or would fulfil these obligations.

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side. . . .

It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the peoples' claims should preferably facilitate the engagement process in every possible way.

[I]t is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejection order. . . .

It will not always be appropriate for a court to approve all agreements entered into consequent upon engagement. It is always for the municipality to ensure that its response to the process of engagement is reasonable. . . .

* * *

Ultimately, the city in *Olivia Road* reached an agreement with the plaintiffs to provide them with alternative accommodation and to improve the conditions of their residences during the interim. The Court approved this

agreement, saying: “The City is to be commended for the fact that its position became more humane as the case proceeded through the different courts, and for its ultimate reasonable response to [this court’s] engagement order.”

THE ENFORCEMENT
OF INTERNATIONAL LAW

DISCUSSION LEADERS

OONA HATHAWAY AND SCOTT SHAPIRO

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Tens of thousands of international treaties are currently in force, covering nearly every aspect of international affairs and nearly every facet of state authority. And yet many observers argue that international law is ineffective, even meaningless. The principal objection made by critics of international law is that international law cannot be real law because it cannot matter in the way that real law must matter because it lacks mechanisms of coercive enforcement—including, most obviously, the police. This Chapter considers this challenge, examining when and how international law is enforced and the role that courts now play in that enforcement.

As the first part of the Chapter shows, international law did not always face the challenges that it does today. For hundreds of years, when a state broke an obligation to another, the harmed state was entitled to use force to remedy the wrong. That changed only very recently, when the 1928 Kellogg-Briand Pact, together with the United Nations Charter, outlawed war. This had an unanticipated and perhaps unintended effect: with war now illegal, the enforcement of international law through war was also illegal. International law, in other words, outlawed the enforcement of international law! If states may not use force to ensure that others abide by international law, how may international law be enforced?

The second part of this Chapter takes a step back. It considers the theoretical framework of international law and its relationship to domestic law by examining the chief spokesperson for the monist approach to international law—Hans Kelsen—and a trenchant critique of Kelsen’s view by the contemporary scholar, Mattias Kumm.

The third part turns to the modern battlefield of international law enforcement—the courts. The materials detail several contrasting approaches to the questions of whether and how to enforce international law within a domestic or nested international legal system. These cases raise the question of why the courts have taken such different approaches to the incorporation of international law. Are the different approaches explained simply by the different constitutional regimes? If so, what discretion do domestic courts have in the enforcement of international law? And how can one explain that the Supreme Court of the United States—which has a constitution that explicitly incorporates international law into domestic law—has adopted an extremely strong dualist approach, whereas the Supreme Court of Belize—which has a constitution that hardly mentions

international law—has taken a much more monist approach?¹ If domestic courts are not, in fact, guided only by constitutional text in their approach to international law enforcement, what does (and what should) guide them?

The fourth and final part of the Chapter considers restrictions on the enforcement of international law in domestic and international courts. The focus is on one leading challenge that has faced many domestic and international courts: foreign sovereign immunity. In a world in which war may no longer be used to enforce international law, a world in which courts are often the last recourse, the doctrine of sovereign immunity poses a significant challenge to the effective enforcement of international law. The doctrine also sometimes pits one principle of international law—sovereign immunity—against others—most notably, *jus cogens* principles of international law. How should courts approach such conflict, and what does the decision to grant immunity do to the prospects for international law enforcement in a world that now relies so heavily on courts for effective enforcement? Should judges consider their role in the international legal system when making judgments on immunities, or ought they instead be guided only by their role within their domestic legal system (and are the two truly all that distinct)?

THE ENFORCEMENT OF INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE

Oona Hathaway & Scott Shapiro²

At the turn of the 20th century, war was understood as a perfectly legitimate tool of statecraft and as a morally permissible way for individuals to remedy the violation of natural rights. When a state was wronged, war was the way to right the wrong. The legal right to territory, people, and goods were decided by war—even one that was entirely unjust. Agreements negotiated at the end of a gun were binding. Neutral states were required to trade equally with all parties to a war or lose their neutral status. States that used economic sanctions

¹ Oona A. Hathaway, *Treaties' End*, 117 YALE L.J. 1236, 1362-72 (2008) (providing comparative data on the domestic legal status of treaties in every constitution in the world).

² This discussion summarizes part of the argument made at length in our forthcoming book, *The Worst Crime of All: The Paris Peace Pact and the Beginning of the End of War* (Simon & Shuster, forthcoming 2016).

against aggressive states invited military retaliation. Indeed, they had as good as declared war.

In this legal order—which we call the Old World Order—there was no doubt about the gravity of *pacta sunt servanda*. A state that failed to live up to its treaty obligations was placing itself at risk of war. Indeed, it was the country that violated the treaty that would be considered the wrongdoer, *not* the country waging war to remedy the violation.

At the time of the General Pact for the Renunciation of War (better known as the Kellogg-Briand Pact) in 1928, this Old World Order had reigned with changes only at the margins for more than three hundred years. Set into motion by Hugo Grotius, the so-called “father of international law,” the Old World Order allowed individuals and states to treat war much like a lawsuit—using it to remedy violations of rights and to secure title to property and territory.

The only means to remedy wrongs in a world without a supreme sovereign or common judge was war. Grotius declared, “When judicial settlement ends, war begins.” War was thus neither illegal nor immoral. It was a sanctioned procedure—in fact, *the* sanctioned procedure—for resolving disputes. States had the right to go to war precisely because they could not turn to a court for relief. There was, after all, no world court. Unlike individuals, who could resolve their disputes in court, states had no choice but to take the law into their own hands. Thus, sovereigns could make war to enforce any legal claim, however mundane. States could use their military to collect debts, recover stolen property, claim compensation for accidents, resolve dynastic disputes, seek redress for treaty violations, protect freedom of the seas, and even open up trade with xenophobic nations.

The fact that states had the legal right to use force in order to resolve their disputes had profound implications not only for international relations but for the law too. Indeed, the sovereign right to wage war formed the foundation of the entire legal system—for the law of the world, if you will. Invaders had the right to their conquests, strong states could extort valid treaties from weaker ones, and refusing to trade with an aggressor was itself seen as an act of aggression that gave the victim a legal right to respond.

Today, it is widely agreed that this is no longer true. The world renounced war in the Kellogg-Briand Pact in 1928—at the time the most widely ratified treaty the world had seen—and renunciation of war would lie at the core of the new United Nations Charter. Its promise would be embedded in the Charter’s guarantee that “All Members shall refrain in their international relations from the

threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

The prohibition on the threat or use of force—the renunciation of war—became the linchpin of the post-war order. It soon became clear that the renunciation of war required a change in nearly all the rules governing international relations. The representatives assembled on that fateful day in Paris were prepared to reject the foundation on which the international system had been built three centuries earlier. But they had not come fully to terms with the extent to which the entire structure of international law Grotius had built depended upon that very same foundation.

For the purposes of this Seminar, what is particularly interesting is what the repudiation of war means for the enforcement of international law. The prohibition on the use of force for any purpose made it impossible to force states into agreements they did not want. It also had the effect of making it easier to persuade states to make treaty commitments they were not sure they could keep. After all, a state’s failure to live up to a treaty’s terms would no longer be cause for war against it. Indeed, the outlawry of war created a striking new reality: *international law protected states from being compelled to comply with international law.*

The outlawry of war would have the felicitous effect of enabling an explosion in international law. But this, like much else, would prove a two-edged sword. The renunciation of Grotius’s Old World Order would make possible unprecedented international cooperation. But it would also enable noncompliance. It would, moreover, generate the peculiar dilemma of the modern age: at the very moment of the human rights revolution, which placed obligations on states to respect the fundamental rights of their own citizens, the rules of the international order prevented states from enforcing those obligations through force. For the protection international law offers to sovereignty inheres in states regardless of the merit of their governments or their actions. It insulates the autocratic and the democratic, the rights-abuser and the rights-protector, alike. Put differently, it protects liberal states from interference, but it also prevents liberal states from interfering.

Treaties, for example, had long been enforced by threat of war. The 1928 Pact outlawing war created a puzzle of how even to enforce the Pact itself. It would seem odd to enforce a treaty renouncing war by threat of war or by war—and, indeed, many explicitly rejected the idea. But if the treaty could not be enforced by threat of war, then how could it be enforced? For that matter, how

could *any* treaty be enforced? Indeed, the prohibition on war created a puzzle for international law as a whole: international law (in the form of the Pact) prohibited the use of force *even for the purpose of enforcing international law*. The Pact, in other words, renounced the very foundational principle on which Grotius had built the Old World Order—war could no longer be used as a legal remedy.

Where does this leave international law? International law is no longer in the hands of generals. It is now largely in the hands of judges instead.

THEORETICAL APPROACHES TO INTERNATIONAL LAW AS LAW

The philosophical question of whether to conceive of law as monistic or dualistic (which, like Hans Kelsen, we also term “pluralistic”) is both a central theoretical problem and at the heart of debates in doctrine about whether courts should be venues of enforcement of international obligations.

Roughly speaking, the philosophical debate between monism and dualism can be rendered as follows: monists believe that there can only be one legal system, whereas dualists think that there can be, and indeed are, multiple legal systems. In particular, monists believe that international law and domestic law form one juridical order, whereas dualists believe that they are separate systems. Monists tend to argue that international law ought to be taken more seriously in legal decision-making (e.g., that treaties ought to be understood as self-executing or that international law trumps conflicting domestic law) than pluralists do.

The chief spokesperson for the monist camp is Hans Kelsen. Kelsen argued throughout his long career that dualism is an incoherent doctrine. On his view, one cannot take international law seriously if one does not see international and domestic law as forming one coherent order. As Antonio Cassese explained, “the Kelsenian monistic theory . . . had a significant ideological impact. It brought new emphasis to the role of international law as a controlling factor of state conduct. It was instrumental in consolidating the notion that state officials should

abide by international legal standards and ought therefore put international imperatives before national demands.”¹

If Kelsen is right—and dualism is, in fact, conceptually incoherent—what implications does that have for legal decision-making?

Hans Kelsen
*Pure Theory of Law**

... Traditional theory ... sees in international and national law two different, mutually independent, isolated, norm systems, based on two different basic norms. This dualistic construction—or rather, “pluralistic” construction, in view of the multitude of national legal orders—is untenable, if both the norms of international law and those of the national legal orders are to be considered as simultaneously valid legal norms. This view implies already the epistemological postulate: to understand all law in one system—that is, from one and the same standpoint—as one closed whole. Jurisprudence subsumes the norms regulating the relations between states, called international law, as well as the norms of the national legal orders under one and the same category of law. In so doing it tries to present its object as a unity. The negative criterion of this unity is its lack of contradiction. This logical principle is also valid for the cognition in the realm of norms. It is not possible to describe a normative order by asserting the validity of the norm: “*a* ought to be” and at the same time “*a* ought not to be.” In defining the relation between international and national law, it is important, above all, to answer the question whether there can be an insoluble conflict between the two systems of norms. Only if this question has to be answered in the affirmative, the unity of international and national law is excluded. In that case, indeed, only a dualistic or pluralistic construction of the relations between international and national law would be possible. If so, however, we cannot speak of both being valid at the same time. This is demonstrated by the relation between law and morals. Here, indeed, such conflicts are possible—for example, if a certain moral order forbids taking of human life under all circumstances, while at the same time a positive legal order prescribes the death penalty and authorizes the government

¹ ANTONIO CASSESE, *INTERNATIONAL LAW* 215 (2d ed. 2005).

* Excerpted from HANS KELSEN, *PURE THEORY OF LAW* 328-329 (Max Knight trans, Univ. of Los Angeles Press 2005) (1934).

to go to war under the conditions determined by international law. In this dilemma, an individual who regards the law as a system of valid norms has to disregard morals as such a system, and one who regards morals as a system of valid norms has to disregard law as such a system. This is expressed by saying: From the viewpoint of morals, the death penalty and war are forbidden, but from the viewpoint of law both are commanded or at least permitted. By this is only expressed, however, that no viewpoint exists from which both morals and law may simultaneously be regarded as valid normative orders. No one can serve two masters.

If an insoluble conflict existed between international and national law, and if therefore a dualistic construction were indispensable, one could not regard international law as “law” or even as a binding normative order, valid simultaneously with national law (assuming that the latter is regarded as a system of valid norms). The relations concerned could be interpreted only either from the viewpoint of the national legal order or from that of the international legal order. Insofar as this is assumed by a theory which believes that insoluble conflicts exist between international law as a “law” but only as a kind of international morality, nothing could logically be objected. But most representatives of the dualistic theory feel obliged to regard both international and national law as valid legal orders, independent of each other in their validity and subject to possible conflict with each other. Such a theory, however, is untenable.

In the excerpt below, Mattias Kumm responds to Kelsen’s monism. Kumm wonders why to accept the monistic position that there can only be one legal point of view. He asks whether there could be multiple, incompatible legal orders, each of which accepts the legitimacy of the other order, but on its own terms.¹

When reading the excerpt, consider whether it is possible to take a legal order seriously—to regard it as a binding *legal* order—if one takes it as Kumm suggests. Note that international law and domestic law make mutually incompatible claims to authority. As normally construed, international law claims supremacy over domestic law, but under Kumm’s approach, domestic law claims

¹ The seminar examined the related idea of constitutional pluralism last year. See Alec Stone Sweet & Miguel Poiares Maduro, *Constitutional Pluralism and Constitutional Conflicts*, in GLOBAL CONSTITUTIONALISM: LAW’S BORDERS (Judith Resnik ed., 2012).

supremacy over international law. Is a legal system taken seriously if one of its core normative claims is rejected?

Mattias Kumm

*How Does European Union Law Fit into the World of Public Law?
Costa, Kadi and Three Models of Public Law**

. . . According to Kelsen the world of law has to be conceived in monist terms. Taking a legal point of view is incompatible with the claim that from the point of view of one legal order (say, the European legal order) x is the case, but from the point of view of another legal order (the legal order of Member States) y is the case. There can be no coexistence of different legal systems constituted by different ultimate legal rules. The world of law is unified not as an empirically contingent matter, but as a conceptual matter.

This is not the place to provide a comprehensive discussion and critique of the argument. Here it must suffice to point out that the argument is not at all obvious. It is not clear why it would undermine the status of EU Law as law that there is another legal system that incorporates EU Law on its own terms. It is unclear why it should be *conceptually impossible*, as opposed to, say, undesirable on pragmatic grounds, to imagine the legal world in pluralist terms. What is *conceptually* wrong with acknowledging the possibility of the existence of different legal orders, each of which recognize the authority of the law of the other on its own terms? There does not *have to be* only one legal point of view, even though it *might* be desirable that there be only one on other normative grounds. Member States may or may not be doing the right thing if they insist on determining the status of EU Law in light of their own national constitutional requirements. But they are not thereby undermining the status of EU Law as law properly so called. . . .

* Excerpted from Mattias Kumm, *How Does European Union Law Fit into the World of Public Law? Costa, Kadi and Three Models of Public Law*, in *POLITICAL THEORY OF THE EUROPEAN UNION* (Jürgen Neyer & Antje Wiener, eds., 2011).

ENFORCING INTERNATIONAL LAW TODAY: INTERNATIONAL LAW IN DOMESTIC COURTS

The theoretical issues discussed above play out around the world in a variety of cases. Four cases are provided below: two that take an obviously dualist approach—*Medellin v. Texas* (U.S. 2008) and *Kadi v. Council of the European Union* (E.C.J. 2008)—and two that take a more monist approach—*South Africa v. Grootboom* (S. Afr. 2000), and *Aurelio Cal v. the Attorney General of Belize* (Belize 2007). How do these cases conceive of the relationship between international and domestic law? And how do they conceive of the role of domestic courts in enforcing international law?

In 1993, José Ernesto Medellín, a Mexican national, was arrested for the sexual assault and murder of two teenage girls in Texas. Law enforcement officials failed to inform Medellín of his right to notify the Mexican consulate of his detention as required by the Vienna Convention on Consular Relations. At trial, Medellín was convicted and sentenced to death. While Medellín’s case was on appeal in the U.S. courts, Mexico initiated a case at the International Court of Justice on behalf of 51 Mexican nationals, including Medellín. In 2004, in *Avena v. United States of America*, the International Court of Justice (ICJ) held that the United States had violated the Vienna Convention on Consular Relations and the detained Mexican nationals were entitled to review and reconsideration of their convictions. In response, President George Bush issued a memorandum to the U.S. Attorney General providing that Texas State courts should give effect to the ICJ’s decision, but the Texas Court of Criminal Appeals refused and dismissed Medellín’s appeal. He then turned to the U.S. Supreme Court.

Medellín v. Texas Supreme Court of the United States 552 U.S. 491 (2008)

John ROBERTS, Chief Justice:

... We granted certiorari to decide two questions. *First*, is the ICJ’s judgment in *Avena* directly enforceable as domestic law . . . in the United States? *Second*, does the President’s Memorandum independently require the States to provide review . . . of the claims of the 51 Mexican nationals named in *Avena*

without regard to state procedural default rules? We conclude that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law We therefore affirm the decision below. . . .

Medellín first contends that the ICJ's judgment in *Avena* constitutes a "binding" obligation on the state and federal courts of the United States. He argues that "by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are *already* the 'Law of the Land' by which all state and federal courts in this country are 'bound.'"^{*}

[N]o one disputes that the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. . . .

This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that . . . do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall's opinion in *Foster v. Neilson* (1829), which held that a treaty is "equivalent to an act of the legislature," and hence self-executing, when it "operates of itself without the aid of any legislative provision." When, in contrast, "[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson* (1888). In sum, while treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Igartua-De La Rosa v. United States* (U.S. 1st Cir. 2005).

A treaty is, of course, "primarily a compact between independent nations." *Head Money Cases* (1884). It ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. . . . "If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Head Money Cases* (1884). Only "[i]f the treaty contains stipulations which are self-executing, that is, require

^{*} Article VI of the U.S. Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Law of any state to the Contrary notwithstanding.

no legislation to make them operative, [will] they have the force and effect of a legislative enactment.” *Whitney v. Robertson* (1888).

Medellín and his *amici* nonetheless contend that the Optional Protocol, United Nations Charter, and ICJ Statute supply the “relevant obligation” to give the *Avena* judgment binding effect Because none of these treaty sources creates binding federal law in the absence of implementing legislation . . . we conclude that the *Avena* judgment is not automatically binding domestic law. . . .

As a signatory to the Optional Protocol, the United States agreed to submit disputes . . . to the ICJ. . . . Of course, submitting to jurisdiction and agreeing to be bound are two different things. A party could, for example, agree to compulsory nonbinding arbitration. . . .

The most natural reading of the Optional Protocol is as a bare grant of jurisdiction. It provides only that “[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice” Art. I. The Protocol says nothing about the effect of an ICJ decision The Protocol is similarly silent as to any enforcement mechanism.

The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter Article 94(1) provides that “[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party.”

[T]he Article is not a directive to domestic courts. It does not provide that the United States “shall” or “must” comply with an ICJ decision Instead, “[t]he words of Article 94 . . . call upon governments to take certain action.” . . . In other words, the U.N. Charter reads like “a compact between independent nations” that “depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Head Money Cases* (1884)

[A]rticle 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state. . . .

[A]nd even this “quintessentially *international* remed[y],” is not absolute. First, the Security Council must “deem necessary” the issuance of a recommendation or measure to effectuate the judgment. . . . Second, as the

President and Senate were undoubtedly aware . . . the United States retained the unqualified right to exercise its veto of any Security Council resolution. . . .

If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause. Mexico or the ICJ would have no need to proceed to the Security Council to enforce the judgment in this case. Noncompliance with an ICJ judgment through exercise of the Security Council veto—always regarded as an option by the [United States] . . . —would no longer be a viable alternative. There would be nothing to veto. . . . [T]here is no reason to believe that the President and Senate signed up for such a result.

In sum, Medellín's view . . . would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts And those courts would not be empowered to decide whether to comply with the judgment—again, always regarded as an option by the political branches—any more than courts may consider whether to comply with any other species of domestic law. . . .

The ICJ Statute . . . provides further evidence that the ICJ's judgment in *Avena* does not automatically constitute federal law judicially enforceable in United States courts. . . . Article 59 of the statute provides that “[t]he decision of the [ICJ] has *no binding force* except between the parties and in respect of that particular case.” The dissent does not explain how Medellín, an individual, can be a party to the ICJ proceeding. . . .

Our conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the “postratification understanding” of signatory nations. . . . [N]either Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts. . . . [T]he requested relief would not be available under the treaty in any other signatory country. [This] strongly suggests that the treaty should not be so viewed in our courts.

[W]e reiterated in *Sanchez-Llamas* what we held in *Breard*,* that “absent a clear and express statement to the contrary, the procedural rules of the forum

* Editors' Note: *Breard v. Greene* (U.S. 1998), involved a Paraguayan national who was convicted of rape and capital murder in Virginia and sentenced to death. Although law enforcement failed to notify the Paraguayan consulate of his arrest in violation of the Vienna Convention, the U.S. Supreme Court held that by not asserting his Vienna Convention claim in state court, Breard had

State govern the implementation of the treaty in that State.” Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no statement in the [relevant treaties] that supports the notion that ICJ judgments displace state procedural rules.

Moreover, the consequences of Medellín’s argument give pause. An ICJ judgment, the argument goes, is not only binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind a judgment and quarrel with its reasoning or result. . . . And there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ. Indeed, that is precisely the relief Mexico requested. . . .

In short . . . “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.” . . . Given that[,] . . . it is difficult to see how that same structure and purpose can establish . . . that *judgments* of the ICJ nonetheless were intended to be conclusive on our courts. . . .

[W]e do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so. And whether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide. . . .

[T]hat the judgment of an international tribunal might not automatically become domestic law hardly means the underlying treaty is “useless.” Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations. And Congress could elect to give them wholesale effect . . . through implementing legislation, as it regularly has. . . .

procedurally defaulted and was barred from raising it in later habeas proceedings. The Court applied the same logic in *Sanchez-Llamas v. Oregon* (U.S. 2006). According to the Court, Sanchez-Llamas, a Mexican national, was unable to raise his Vienna Convention claim despite the fact that the ICJ had held that the Vienna Convention precludes the application of procedural default rules to such claims.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting.*

. . . In my view, the President has correctly determined that Congress need not enact additional legislation. The majority places too much weight upon treaty language that says little about the matter. The words “undertak[e] to comply,” for example, do not tell us whether an ICJ judgment rendered pursuant to the parties’ consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders’ original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation. . . .

[I] would find that the United States’ treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction. . . .

A determination that the ICJ judgment is enforceable does not quite end the matter, for the judgment itself requires us to make one further decision. It directs the United States to provide further judicial review of the 51 cases of Mexican nationals “by means of its own choosing.” [I] believe the judgment addresses itself to the Judicial Branch. This Court consequently must “choose” the means. . . . [I] believe that the proper forum for review would be the Texas-court proceedings that would follow a remand of this case. . . .

* Editors’ Note: Not reproduced are Appendix A, “Examples of Supreme Court decisions considering a treaty provision to be self-executing,” and Appendix B, “United States Treaties in force containing provisions for the submission of treaty-based disputes to the International Court of Justice.”

In sum, a strong line of precedent, likely reflecting the views of the Founders, indicates that the treaty provisions before us and the judgment of the International Court of Justice address themselves to the Judicial Branch and consequently are self-executing. In reaching a contrary conclusion, the Court has failed to take proper account of that precedent and, as a result, the Nation may well break its word even though the President seeks to live up to that word and Congress has done nothing to suggest the contrary.

While *Medellín* focused on the enforcement of an international judgment by domestic courts, the next case considers the validity of a European Union regulation implementing a binding United Nations Security Council resolution.

On October 15, 1999, the Security Council adopted Resolution 1267, in which it condemned the “sheltering and training of terrorists” in Afghanistan. It provides that all the States must “[f]reeze funds and other financial resources . . . owned or controlled directly or indirectly by the Taliban, . . . and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban.” A year later, the Security Council adopted Resolution 1333 instructing a committee to establish a list of individuals and entities associated with Usama bin Laden and Al-Qaeda who would be subject to the asset freeze. In 2001, the Committee added Yassin Abdullah Kadi and the Al Barakaat International Foundation to this list.

In order to implement these Security Council resolutions, the EU Council adopted Regulation No 467/2001, imposing an asset freeze against Kadi and Al Barakaat. Arguing that the Regulation violated their fundamental rights under EU law, Kadi and Al Barakaat petitioned the European Court of Justice seeking annulment of the Regulation. In 2005, the Court of First Instance of the European Communities in *Kadi v. Council of the European Union and Commission of the European Communities* upheld the legality of the Regulation (referred to as “*Kadi*” in the decision of the ECJ excerpted below). Kadi and Al Barakaat then sought review in the European Court of Justice.

**Kadi and Al Barakaat International Foundation v. Council of the
European Union and Commission of the European Union**
European Court of Justice (2008)
[2008] ECR I-6351

[The Court first considered and ultimately rejected the appellants' argument that the regulations were adopted without a legal basis in EC law.]

... 248. In the first part of his second ground of appeal, Mr Kadi maintains that inasmuch as the judgment in *Kadi* takes a view, first, of the relationships between the United Nations and the members of that organisation and, second, of the procedure for the application of resolutions of the Security Council, it is vitiated by errors of law as regards the interpretation of the principles of international law concerned

255. In his reply . . . Mr Kadi maintains, in addition, that Community law requires all Community legislative measures to be subject to the judicial review carried out by the Court, which also concerns observance of fundamental rights, even if the origin of the measure in question is an act of international law such as a resolution of the Security Council.

256. So long as the law of the United Nations offers no adequate protection for those whose claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to give effect to resolutions of the Security Council. According to Mr Kadi, the re-examination procedure before the Sanctions Committee, based on diplomatic protection, does not afford protection of human rights equivalent to that guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . ('the ECHR'), as demanded by the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*

259. By the first part of its third ground of appeal, Al Barakaat criticises the Court of First Instance's preliminary observations in *Yusuf and Al Barakaat* on the relationship between the international legal order under the United Nations and the domestic legal order or the Community legal order

260. A resolution of the Security Council, binding per se in public international law, can have legal effect vis-à-vis persons in a State only if it has been implemented in accordance with the law in force. . . .

262. Conversely, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Council approve, in essence, the analysis made in that connection by the Court of First Instance in the judgments under appeal and endorse the conclusion drawn therefrom that, so far as concerns the internal lawfulness of the contested regulation, the latter, inasmuch as it puts into effect resolutions adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations, in principle escapes all review by the Community judicature, even concerning observance of fundamental rights, and so for that reason enjoys immunity from jurisdiction. . . .

269. The Commission maintains that two reasons may justify not giving effect to an obligation to implement resolutions of the Security Council such as those at issue . . . ; they are, first, the case in which the resolution concerned is contrary to *jus cogens* and, second, the case in which that resolution falls outside the ambit of or violates the purposes and principles of the United Nations and was therefore adopted *ultra vires*. . . .

271. In the Commission's view, however, the Court of First Instance was right to hold that the Community judicature cannot in principle review the validity of a resolution of the Security Council in the light of the purposes and principles of the United Nations.

272. If, nevertheless, the Court were to accept that it could carry out such a review, the Commission argues that the Court, as the judicature of an international organisation other than the United Nations, could express itself on this question only if the breach of human rights was particularly flagrant and glaring

273. That is not, in the Commission's view, the case here, owing to the existence of the re-examination procedure before the Sanctions Committee

281. [I]t is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. . . .

283. [F]undamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of

human rights on which the Member States have collaborated or to which they are signatories[, including] the ECHR

284. It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community.

285. It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

286. [T]he review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

287. [I]t is not . . . for the Community judicature . . . to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.

288. However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

289. The Court has thus previously annulled a decision of the Council approving an international agreement after considering the internal lawfulness of the decision in the light of the agreement in question and finding a breach of a general principle of Community law, in that instance the general principle of non-discrimination

293. Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to

resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.*

294. In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them. . . .

298. It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299. It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council

* Editors' Note: Article 60 of the Treaty Establishing the European Community provides, in part:

1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

Article 301 provides:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

300. What is more, such immunity from jurisdiction for a Community measure like the contested regulation . . . cannot find a basis in the EC Treaty. . . .

304. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.*

305. Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.

306. Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States. . . .**

309. That interpretation is supported by Article 300(6) EC, which provides that an international agreement may not enter into force if the Court has delivered

* Editors' Note: Article 307 provides:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

** Editors' Note: Article 300(7) provides:

Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.

an adverse opinion on its compatibility with the EC Treaty, unless the latter has previously been amended. . . .*

314. In the instant case it must be declared that the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter. . . .

316. As noted above in paragraphs 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty

318. It has in addition been maintained that, having regard to the deference required of the Community institutions vis-à-vis the institutions of the United Nations, the Court must forgo the exercise of any review of the lawfulness of the contested regulation in the light of fundamental rights, even if such review were possible, given that, under the system of sanctions set up by the United Nations, having particular regard to the re-examination procedure which has recently been significantly improved by various resolutions of the Security Council, fundamental rights are adequately protected.

319. According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.

320. In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations . . . , those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.

* Editors' Note: Article 300(6) provides:

The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.

321. In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.

322. Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified

323. [A]lthough it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto. . . .

325. Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.

326. It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

327. The Court of First Instance erred in law, therefore, when it held . . . that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council . . . must enjoy immunity from jurisdiction

328. The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect. . . .

In 2000, Mrs. Grootboom, along with a group of 510 children and 390 adults, filed suit against the Government of South Africa. They alleged that the State had violated its obligations to guarantee all citizens access to adequate housing and the rights of children to shelter. The group had been living in an informal settlement when they were evicted and their possessions destroyed.

The Constitutional Court of South Africa, in a unanimous decision, ruled that the Constitution, interpreted in light of international law, required the state to take positive measures to ensure an adequate measure of housing for the petitioners. The Court went further and stressed that the right to housing could not be guaranteed in isolation of the Constitution's other social and economic rights, including the right to healthcare, social security, and sustenance. It issued a declaratory order requiring the government to devise a plan specifying its steps to guarantee petitioners all social and economic rights in a timely fashion.

South Africa v. Grootboom
Constitutional Court of South Africa
2001 (1) SA 46 (Oct. 4, 2000)

YACOOB J:

. . . 26. During argument, considerable weight was attached to the value of international law in interpreting section 26 of our Constitution.* Section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights.** [President of the Court] Chaskalson, in the context of section 35(1) of the interim Constitution,*** said:

* Editors' Note: Section 26 of the Constitution of South Africa provides:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

** Editors' Note: Section 39 provides:

1. When interpreting the Bill of Rights, a court, tribunal or forum -
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

27. The *amici* submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant) is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. Article 11.1 of the Covenant provides:

-
- b. must consider international law; and
 - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
 3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

*** Editors' Note: Section 35(1) of the interim Constitution provided:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

This Article must be read with Article 2.1 which provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

28. The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

(a) The Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access* to adequate housing.

(b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

29. The obligations undertaken by states parties to the Covenant are monitored by the United Nations Committee on Economic, Social and Cultural Rights (the committee). The *amici* relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

[O]n the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period

of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources." In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

30. It is clear from this extract that the committee considers that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant. A state party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.

31. The concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a "minimum essential level" that must be satisfied by the states parties. The committee developed this concept based on "extensive experience gained by [it] . . . over a period of more than a decade of examining States parties' reports." The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant. The committee has also used the

general comment “as a means of developing a common understanding of the norms by establishing a prescriptive definition.” Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.

32. It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information. . . .

45. The extent and content of the obligation consist in what must be achieved, that is, “the progressive realisation of this right.” It links subsections (1) and (2) [of section 26 of the Constitution] by making it quite clear that the right referred to is the right of access to adequate housing. The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular. The committee has helpfully analysed this requirement in the context of housing as follows:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be

read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived. . . .

75. The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes. . . .

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Cameron AJ concur in the judgment of Yacoob J.

Aurelio Cal v. Attorney General (Belize 2007) arose when hundreds of members of two Mayan villages in Southern Belize filed separate lawsuits alleging that the government violated constitutionally guaranteed land rights based on principles of equality and the right to property and asking for the

Supreme Court of Belize to grant the village customary title to their traditional lands.¹ They argued that the customary land rights of the Maya people of Belize, including the claimants, had been recognized and affirmed as property by the Inter-American Commission on Human Rights in the *Maya Indigenous Communities Case* (2004). The Court ruled in favor of the claimants. It found that the village had constitutionally protected property rights based on their customary land use and tenure. The Court, moreover, agreed with the claimants that it was proper to interpret the national constitutional right to property in light of the decisions of the Inter-American Court and the United Nations Declaration of the Rights of Indigenous Peoples.

Aurelio Cal v. Attorney General
Supreme Court of Belize
Claim Nos. 171 & 172 of 2007

Abdulai CONTEH, Chief Justice:

15. . . . [The Claimants had previously filed] a Petition to the Inter-American Commission on Human Rights. . . .

16. [In the case of the *Maya Indigenous Communities* case, t]he Inter-American Commission on Human Rights delivered its Report . . . on the merits, on 12th October 2004.

17. The defendants have, however, in the written submissions of their learned attorney, taken exception to this Report in her words:

The court cannot merely adopt any findings of facts and law made in another case unrelated to any alleged breach of the provisions of

¹ Editors' Note: The Belize Constitution mentions international law only twice. The Preamble to the Constitution "requires policies of state . . . which promote international peace, security and equitable international economic and social order in the world *with respect for international law and treaty obligations in the dealings among nations*" (emphasis added). Article 10 in Part II of the Constitution, which guarantees the freedom of movement, states:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision . . . , *in respect of the right to leave Belize, of securing compliance with any international obligation of the Government.*

Part II, Art. 10(3)(b) (emphasis added). The articles relied on by the claimants in this case—articles 3, 3(a), 3(d), 4, 16 and 17—do not directly reference international law.

the Constitution. The petition to the Commission related to alleged violations of . . . the American Declaration of the Rights and Duties of Man, which is an international treaty. If the court were to simply adopt the findings of the Commission . . . that would result in the court enforcing an international treaty and would clearly fall within the bounds of non-justiciability.

21. Of course, the present proceedings are not a claim to enforce the findings of the Inter-American Commission on Human Rights in that case. The present proceedings rather concern claims relating to alleged breaches of some human rights provisions of the Belize Constitution and for certain declaratory relief and orders. However, the Inter-American Commission on Human Rights is the regional body charged with promoting and advancing human rights in the region and monitoring states['] compliance with their legal commitments under the Charter of the Organization of American States (OAS). Belize, as a member of the OAS, is therefore a party to the American Declaration of the Rights and Duties of Man, which as [the defendants' attorney] correctly noted, is an international treaty. And this treaty is within the proper remit of the Commission.

22. I am therefore of the considered view that much as the findings, conclusions and pronouncements of the Commission may not bind this court, I can hardly be oblivious to them: and may even find these, where appropriate and cogent, to be persuasive. . . .

[The Court then considered whether Maya customary land tenure existed in Southern Belize and ultimately found in favor of the Claimants. The Court further holds that these tenure rights are protected by the Constitution of Belize.]

116. I cannot part with this judgment without adverting to some of the obligations of . . . the State of Belize, in international law. Of course, these are domestic proceedings; but undoubtedly in the light of the issues raised they engage in my view, some of the obligations of the State in international law. I find that some of these obligations resonate with certain provisions of the Belize Constitution itself which I have adverted to earlier. . . .

117. Belize, of course, is a member of the international community and has subscribed to commitments in some international humanitarian treaties that impact on this case. A part of this commitment is to recognize and protect indigenous peoples' rights to land resources. . . .

120. In contemporary international law, the right to property is regarded as including the rights of indigenous peoples to their traditional lands and natural

resources. Belize is a party to several international treaties such as the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and The Charter of the Organization of American States; all of which have been interpreted as requiring states to respect the rights of indigenous peoples over their land and resources.

121. For example, in the case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), [the Inter-American Court of Human Rights] held that:

[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. . . .

122. In the *Maya Indigenous Communities* case . . . the Inter-American Commission on Human Rights (an organ of the Organization of American States of which Belize is a member) found that the rights to property protected by the OAS Charter through Article XXIII of the American Declaration of the Rights and Duties of Man,

are not limited to those property interests that are already recognized by States or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system had acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition. . . .

123. As a party to CERD, I believe it cannot seriously be argued that Belize is under [no] obligation to recognize and protect the claimants' Maya customary land tenure rights, as an indigenous group. The United Nations Committee on the Elimination of All Forms of Racial Discrimination (which is mandated to monitor states' compliance with CERD) has confirmed that the failure of states to recognize and respect indigenous customary land tenure is a form of racial discrimination that is not compatible with CERD. . . .

124. These considerations, engaging as they do Belize's international obligation towards indigenous peoples, therefore weighed heavily with me in this case in interpreting the fundamental human rights provisions of the Constitution agitated by the cluster of issues raised, particularly, the rights to property, life, security of the person, the protection of the law and the right not to be discriminated against. . . .

125. Treaty obligations aside, it is my considered view that both customary international law and general principles of international law would require that Belize respect the rights of its indigenous people to their lands and resources. Both are, including treaties, the principal sources of international law: see Article 38 of the International Court of Justice. Customary international law evolves from the practice of States in matters of international concern and "general principles" are those commonly accepted by States and reflected in their international relations or domestic legal systems It is the position that both customary international law and the general principles of international law are separate and apart from treaty obligations, binding on States as well. . . .

128. Both sources of international law are discernible from international instruments, reports and decisions by authoritative international bodies[;] . . . states' assertions and communications at the international and national levels[;] and the actions of states internationally and domestically

129. In . . . *Mary and Carrie Dann v United States* (Inter-American Commission on Human Rights, 2002) . . . , a case concerning claims by members of the Western Shoshone indigenous people to lands in the State of Nevada, U.S.A., the Commission stated that the general international legal principles in the context of indigenous human rights include the following:

the right to indigenous peoples to legal recognition of . . . their control, ownership, use and enjoyment of territories and property;

the recognition of their property and ownership rights with respect to lands, territories and resources that they have historically occupied; and

where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and recognition that such title may only be changed by mutual consent

130. Moreover, although Belize has yet to ratify Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries[,] . . . it is not in doubt that . . . this instrument contains provisions concerning indigenous peoples' right to land that resonate with the general principles of international law regarding indigenous peoples.

131. Also, importantly in this regard is the recent Declaration on the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations on 13 September 2007. Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them. This Declaration . . . was adopted by an overwhelming number of 143 states in favour with only four States against with eleven abstentions. It is of some signal importance, in my view, that Belize voted in favour of this Declaration. And I find its Article 26 of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources. Article 26 states:

“Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership
3. States shall give legal recognition and protection to these lands, territories and resources. . . .”

132. I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. In Article 42 of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and states, are enjoined to promote respect for and full application of the Declaration's provision and to follow up its effectiveness. . . .

134. I conclude therefore, that the defendants are bound, in both domestic law in virtue of the Constitutional provisions that have been canvassed in this case, and international law, arising from Belize's obligation thereunder, to respect the rights to and interests of the claimants as members of the indigenous Maya community, to their lands and resources which are the subject of this case.

RESTRICTIONS ON ENFORCING INTERNATIONAL LAW IN COURT

Courts are central to the enforcement of international law in the modern era, but there are restrictions on when and how they may play this role. States define, and in the process restrict, the jurisdiction of their courts. U.S. courts, for example, have a personal jurisdiction requirement and a series of domestic prudential and statutory doctrines that curb assertions of extraterritorial jurisdiction.¹ International law, by contrast, imposes few restrictions on the capacity of the courts of individual states to remedy violations of international law.² Indeed, international law relies on states to enforce international law. Yet the international law doctrine of sovereign immunity—a doctrine based in the independence and equality of states that make up the international system—

¹ For example, under U.S. law, a court-made rule known as “the act of state doctrine” may furnish a defense from lawsuits that concern the public acts of a foreign government within that state. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Thereafter, Congress enacted what is known as the “Hickenlooper Amendment to the Foreign Assistance Act of 1964,” Pub. L. No. 87-565, § 301(d)(3), 76 Stat. 255, 260-61 (1964) (codified at 22 U.S.C.A. § 2370(e)(2)), which barred U.S. courts from applying the act of state doctrine in certain cases relating to a right to specific property which has been expropriated or nationalized abroad). Several other prudential doctrines may result in U.S. courts not deciding the claims. One such rule is a requirement that available legal remedies in the domestic legal system where the alleged misconduct took place must be exhausted. *See, e.g., Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679-685 (U.S., 7th Cir. 2012). Another is known as the “political question doctrine,” under which courts in specific instances defer to the political branches. *See, e.g., Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46-53 (U.S., D.D.C. 2010). In the Foreign Sovereign Immunities Act of 1976, Congress also crafted statutory immunities for certain acts undertaken by foreign governments. 28 U.S.C. § 1602 et seq.

² “Customary international law limits on a nation’s regulation of extraterritorial events are less clear [than the power of an individual U.S. state to regulate conduct outside its borders] because there are few international decisions on point, and because state practice does not reveal a settled custom.” Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1207-1208 (1998).

imposes some limits on the authority of the courts of one state to sit in judgment of the conduct of the government or officials of another.

The law of sovereign immunity is complex and has many permutations. In brief, there are three forms of sovereign immunity—state immunity (which covers the state and its agencies for “public” acts), status-based immunity (which covers current-holders of particular offices, generally limited to the head of state, head of government, and minister of foreign affairs for all acts), and conduct-based immunity (which covers officials who are not entitled to status-based immunity as well as former state officials for certain acts taken in an official capacity). States may waive all three.

The excerpts below briefly consider the foundation of sovereign immunity—and invite reflection on how it can be reconciled with the essential role that courts play in the international law system. *Schooner Exchange v. McFaddon* (1812) provided the first definitive treatment of foreign state immunity in U.S. courts. Compare the decision to a brief excerpt from the 1927 *Lotus* case, in which the Permanent Court of International Justice (which preceded the International Court of Justice) established the so-called *Lotus* principle, often considered a foundational principle of international law. More recently, in *Jurisdictional Immunities of the State*, heard by the International Court of Justice, the Court rejected an exception to state immunity for claims arising from *jus cogens* violations and concluded that Italy was obliged to grant Germany immunity for claims arising out of war crimes committed by German troops during World War II. The closing excerpt, about foreign official immunity with the 2012 decision of the Swiss Federal Criminal Court in *A. v. Office of the Attorney General of Switzerland*. There the Court concluded that the international law of conduct-based immunity does not provide immunity for conduct that violates international law.

The Schooner Exchange v. McFaddon

Supreme Court of the United States

11 U.S. 116 (1812)

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in

practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation. . . .

Compare Chief Justice Marshall's opinion in *Schooner Exchange* with the *Lotus* case excerpted below, holding that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition. Are sovereign equality, sovereign independence, and sovereign freedom of action reconcilable? How does the Permanent Court of International Justice seek to reconcile these principles in the *Lotus* decision?

The Case of the S.S. Lotus (France v. Turkey)

Permanent Court of International Justice

1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

. . . International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. . . .

In 1998, Luigi Ferrini, an Italian citizen, filed a civil suit in an Italian court against the Federal Republic of Germany. He claimed damages for his alleged imprisonment, deportation, and forced labor by German occupying forces in 1944. The court of first instance and appeals dismissed his case, holding that Germany was immune from the exercise of jurisdiction by Italy over the claims.

In *Ferrini v. Federal Republic of Germany* (2004), the Italian Court of Cassation reversed the lower courts and held that Germany was not immune. As the Court put it, because “functional immunity does not apply in circumstances in which the act complained of constitutes an international crime, there is no valid reason, in the same circumstances, to uphold State immunity and consequently to deny that one State’s responsibility for such crimes can be evaluated in the courts of another State.” It concluded: “All this confirms that, in the present case, the Federal Republic of Germany does not have the right to be declared immune from the jurisdiction of the Italian courts, and that such jurisdiction must therefore be affirmed. Further, in normative terms, this was already the case when this action was commenced.” The Court concluded there was a *jus cogens* exception to sovereign immunity.

In response to the *Ferrini* decision, Germany initiated proceedings against Italy in the ICJ in December 2008. Germany alleged that Italy had violated the international law of state immunity by denying it immunity in the *Ferrini* case. In the decision excerpted below, the ICJ agreed that Italy had breached the obligations it owed to Germany.

This decision raises a number of questions. Where is the line between immunity *required* by international law and immunity afforded to national courts as a matter of international comity? Is there any conflict between state immunity and *jus cogens* rules? Can conduct taken in violation of a *jus cogens* prohibition be an “official act” entitled to conduct-based immunity?

Jurisdictional Immunities of the State (Germany v. Italy)

International Court of Justice

2012 I.C.J. 1

Hisashi OWADA, President:

... 52. The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. Germany has fully acknowledged the “untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees,” accepts that these acts were unlawful and stated before this Court that it “is fully aware of [its] responsibility in this regard.” The Court considers that the acts in question can only be described as displaying a complete disregard for the “elementary considerations of humanity.” One category of cases involved the large-scale killing of civilians in occupied territory as part of a policy of reprisals, exemplified by the massacres committed on 29

June 1944 in Civitella in Val di Chiana, Cornia and San Pancrazio by members of the “Hermann Göring” division of the German armed forces involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier. Another category involved members of the civilian population who, like Mr. Luigi Ferrini, were deported from Italy to what was in substance slave labour in Germany. The third concerned members of the Italian armed forces who were denied the status of prisoner of war, together with the protections which that status entailed, to which they were entitled and who were similarly used as forced labourers. The Court considers that there can be no doubt that this conduct was a serious violation of the international law of armed conflict applicable in 1943-1945. Article 6 (b) of the Charter of the International Military Tribunal (1945), convened at Nuremberg included as war crimes “murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory,” as well as “murder or ill-treatment of prisoners of war.” The list of crimes against humanity in Article 6 (c) of the Charter included “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war.” . . . The murder of civilian hostages in Italy was one of the counts on which a number of war crimes defendants were condemned in trials immediately after the Second World War.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that immunity is governed by international law and is not a mere matter of comity.

54. As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight States parties to the European Convention on State Immunity of 16 May 1972 (hereinafter the “European Convention”), Italy is not a party and the Convention is accordingly not binding upon it. Neither State is party to the United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted on 2 December 2004 (hereinafter the “United Nations Convention”), which is not yet in force in any event. As of 1 February 2012, the United Nations Convention had been signed by 28 States and obtained thirteen instruments of ratification, acceptance, approval or accession. Article 30 of the Convention provides that it will enter into force on the thirtieth day after deposit of the thirtieth such instrument. Neither Germany nor Italy has signed the Convention.

55. It follows that the Court must determine, in accordance with Article 38 (1) (b) of its Statute, the existence of “international custom, as evidence of a general practice accepted as law” conferring immunity on States and, if so, what is the scope and extent of that immunity. . . .

In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.

56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been “adopted as a general rule of customary international law solidly rooted in the current practice of States.” That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that

there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it. . . .

80. Italy's second argument . . . is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. . . . First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms (*jus cogens*). . . .

81. The first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict (international humanitarian law as it is more commonly termed today, although the term was not used in 1943-1945). In the present case, the Court has already made clear . . . that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. The question is whether that fact operates to deprive Germany of an entitlement to immunity.

82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

83. That said, the Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. . . .

84. In addition, there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

85. That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario (2004); allegations of torture), France (Judgment of the Court of Appeal of Paris (Sept. 9, 2002), the *Bucheron* case (*Cour de cassation* 2003), the *X* case (*Cour de cassation* 2004), and the *Grosz* case (*Cour de cassation* 2006; allegations of crimes against humanity), Slovenia (*case No. Up-13/99*, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity), New Zealand (*Fang v. Jiang*, High Court (2007); allegations of torture), Poland (*Natoniewski*, Supreme Court (2010); allegations of war crimes and crimes against humanity) and the United Kingdom (*Jones v. Saudi Arabia*, House of Lords (2007); allegations of torture).

86. The Court notes that, in its response to a question posed by a Member of the Court, Italy itself appeared to demonstrate uncertainty about this aspect of its case. Italy commented,

Italy is aware of the view according to which war crimes and crimes against humanity could not be considered to be sovereign acts for which the State is entitled to invoke the defence of sovereign immunity . . . While Italy acknowledges that in this area the law of State immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity—namely a rule denying immunity with respect to every claim for compensation arising out [of] international crimes.

A similar uncertainty is evident in the orders of the Italian Court of Cassation in *Mantelli* and *Maietta* (Orders of 29 May 2008).

87. The Court does not consider that the United Kingdom judgment in *Pinochet (No. 3)* (2000) is relevant, notwithstanding the reliance placed on that judgment by the Italian Court of Cassation in *Ferrini*. *Pinochet* concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The distinction between the immunity of the official in the former type of case and that of the State in the latter case was emphasized by several of the judges in *Pinochet* (Lord Hutton, Lord Millett and Lord Phillips). In its later judgment in *Jones v. Saudi Arabia* (2007), the House of Lords further clarified this distinction, Lord Bingham describing the distinction between criminal and civil proceedings as “fundamental to the decision” in *Pinochet* (para. 32). Moreover, the rationale for the judgment in *Pinochet* was based upon the specific language of the 1984 United Nations Convention against Torture, which has no bearing on the present case.

88. With reference to national legislation, Italy referred to an amendment to the United States Foreign Sovereign Immunities Act, first adopted in 1996. That amendment withdraws immunity for certain specified acts (for example, torture and extra-judicial killings) if allegedly performed by a State which the United States Government has “designated as a State sponsor of terrorism” (28 U.S.C. 1605A). The Court notes that this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged.

89. It is also noticeable that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached in the European Convention, the United Nations Convention or the draft Inter-American Convention. The absence of any such provision from the United Nations Convention is particularly significant, because the question whether such a provision was necessary was raised at the time that the text of what became the Convention was under consideration. In 1999 the International Law Commission established a Working Group which considered certain developments in practice regarding some issues of State immunity which had been identified by the Sixth Committee of the General Assembly. In an appendix to its report, the Working Group referred, as an additional matter, to developments regarding claims “in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*” and stated that this issue was one which should not be ignored, although it did not recommend any

amendment to the text of the International Law Commission Articles (*Yearbook of the International Law Commission*, 1999). The matter was then considered by the Working Group established by the Sixth Committee of the General Assembly, which reported later in 1999 that it had decided not to take up the matter as “it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it” and commented that it was for the Sixth Committee to decide what course of action, if any, should be taken. During the subsequent debates in the Sixth Committee no State suggested that a *jus cogens* limitation to immunity should be included in the Convention. The Court considers that this history indicates that, at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy.

90. The European Court of Human Rights has not accepted the proposition that States are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law. In 2001, the Grand Chamber of that Court, by the admittedly narrow majority of nine to eight, concluded that,

Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. (*Al-Adsani v. United Kingdom* (2001))

The following year, in *Kalogeropoulou and others v. Greece and Germany* (2002), the European Court of Human Rights rejected an application relating to the refusal of the Greek Government to permit enforcement of the *Distomo* judgment and said that,

The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity.

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the

courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case. . . .

92. The Court now turns to the second strand in Italy's argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility. . . . For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.

94. In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the

duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

95. To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. In *Armed Activities*, it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess (*Armed Activities on the Territory of the Congo (New Application: 2002)*, Judgment, (2006)). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, (2002)). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

96. In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones v. Saudi Arabia*, House of Lords (2007)), Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario (2004)), Poland (*Natoniewski*, Supreme Court of Poland (2010)), Slovenia (*case No. Up-13/99*,

Constitutional Court of Slovenia (2001)), New Zealand (*Fang v. Jiang*, High Court (2007)), and Greece (*Margellos*, Special Supreme Court (2002)), as well as by the European Court of Human Rights in *Al-Adsani v. United Kingdom* and *Kalogeropoulou and others v. Greece and Germany* . . . , in each case after careful consideration. The Court does not consider the judgment of the French *Cour de cassation* of 9 March 2011 in *La Réunion aérienne v. Libyan Arab Jamahiriya* as supporting a different conclusion. The *Cour de cassation* in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity [the Court] considered . . . has limited immunity in cases where violations of *jus cogens* are alleged.

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected. . . .

107. The Court therefore holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

International law distinguishes between status-based immunity (immunity *ratione personae*) and conduct-based immunity (immunity *ratione materiae*). Status-based immunity depends on a foreign official's current status (e.g., as head of state) and lasts only as long as the official's tenure in office. Conduct-based immunity attaches only to acts taken in an official capacity but continues after a foreign official leaves office. How should a court determine whether conduct is an "official act" entitled to conduct-based (*ratione materiae*) immunity? Can *jus cogens* violations ever be official acts?

This question was taken up by the Swiss Federal Criminal Court in the case below. The case began when TRIAL, a non-governmental human rights organization, filed a criminal complaint against Khaled Nezzar, a former general, Chief of the Algerian Army, Minister of Defence, and member of the High

Council of State (HCE). TRIAL accused Mr. Nezzar of committing war crimes during the Algerian civil war. Two Algerian refugees in Switzerland also filed criminal complaints against Mr. Nezzar, alleging that they were subjected to torture. In response, Mr. Nezzar argued, among other things, that he enjoyed immunity *ratione materiae* for acts committed during the period between 14 January 1992 and 30 January 1994, when he served as Minister of Defence and member of the HCE. The Swiss Federal Criminal Court denied the existence of immunity *ratione materiae* in the decision below, on the grounds that “conduct contrary to fundamental values of the international legal order” could not “be protected by rules of that very same legal order.” The Court distinguishes this from status-based immunity of the kind at issue in the ICJ’s decision in the Jurisdictional Immunities case excerpted above.

Is the Swiss Federal Criminal Court correct to conclude that the international law of conduct-based (*ratione materiae*) immunity cannot protect conduct contrary to international law? Does this distinction offer the best mechanism for balancing the principles at stake in foreign sovereign immunity—according status-based immunity regardless of conduct, but limiting conduct-based immunity to conduct that does not violate the rules of the international legal order?

A. v. Office of the Attorney General of Switzerland
Swiss Federal Criminal Court
File No. BB.2011.140, Judgment of July 25, 2012

... 5.1. In his final ground for appeal, the appellant claims immunity from jurisdiction. In his opinion, the charges against him are related to war crimes that he would have allegedly committed in the exercise of his functions as Minister of Defence during the years 1992 and 1993. Moreover, as a former member of the HCE, he also benefits from full immunity from jurisdiction for the entire period under investigation The complainants argue that the appellant is not entitled to immunity from jurisdiction. . . .

5.2. The principle of procedural economy requires that the present Court look at the question of whether there is a procedural obstacle arising from the suspect’s status which prevents the authority from exercising its judicial power despite being competent. . . .

5.3. Serving Heads of State are absolutely exempt “*ratione personae*” from state coercion and any form of criminal jurisdiction of a foreign state for acts they may have committed, regardless of place, in the exercise of their official

functions. According to these principles, the immunity of Heads of State is a legal principle enshrined in customary international law. It derives from the immunity and the sovereignty of the State the person represents. Former Heads of States continue to enjoy immunity from criminal jurisdiction for acts performed in the exercise of their functions. This immunity is similar to that accorded to diplomatic staff as per Art. 39 (2) of the Vienna Convention of 18 April 1961 on Diplomatic Relations, which states that the immunity from criminal jurisdiction persists after diplomatic functions cease with respect to acts performed by the diplomatic agent in the exercise of his functions as a member of his country's mission. The question of immunity of a Head of State after the cessation of his governmental functions is, however, no longer a matter of unanimity among international scholars and jurisprudence in several countries.

5.3.1. On the subject of immunity, there are generally two distinct notions: personal immunity (*ratione personae*) and functional immunity (*ratione materiae*). The need to improve international cooperation has led to Heads of State, Heads of government and Ministers of Foreign Affairs (commonly referred to as "the Triad") being accorded *ratione personae* immunity in respect of all acts performed whilst in office, including those performed in a private capacity. Customary international law has traditionally accepted that Heads of State enjoy such *ratione personae* privileges in recognition of their mandate and as a symbol of the sovereignty that they embody by reason of their representative nature in inter-State relations. Immunity from criminal jurisdiction must, in particular, serve to prevent governmental activity from being paralyzed by politically motivated criminal accusations made against high-ranking foreign officials. . . . This kind of immunity is of a temporary nature because it is attached to the official function of its beneficiary and it becomes effective from the moment when the person officially takes up his functions up until the end of its official duties

5.3.2. As regards functional immunity (*ratione materiae*), it is agreed that representatives of foreign states other than the Triad members and officials who do not enjoy other immunities as members of the diplomatic or consular corps or as officials of international organisations covered by the headquarters agreement made by the relevant international organisation or by national law, shall enjoy, in principle, immunity from jurisdiction and from execution in foreign States. This immunity arises from acts performed in the exercise of official duties. The aim of functional immunity is both to protect the foreign official from the consequences of acts attributable to the State for which he is acting and thereby to ensure that State sovereignty is respected. It is generally accepted that functional immunity prevails for official acts performed whilst in office even after leaving office. However, this functional immunity, more commonly referred to as residual immunity, cannot protect a former official against criminal prosecution for

offences committed before or after leaving office nor for criminal offenses committed during the period whilst in office but which are not connected to that public function.

5.3.3. In respect to the residual immunity of Heads of State and more generally members of the Triad, the ICJ observed that the official shall cease to enjoy all immunities from jurisdiction in other States accorded to him by international law as soon as he ceases to hold the office of Minister of Foreign Affairs. Provided that it has jurisdiction under international law, a court of one State may prosecute a former Minister of Foreign Affairs of another State for acts committed before or after the period during which he held office, as well as for acts which were committed in his private capacity during this period. In the same judgment, the ICJ also pointed out that the immunity from jurisdiction enjoyed by a Minister of Foreign Affairs in office does not mean that he enjoys impunity for crimes, regardless of their severity. Jurisdictional immunity may well be an obstacle to prosecution for a certain period of time or for certain offences, but it does not exonerate the beneficiary from all criminal responsibility.

5.3.4. The legal doctrine, referring to both the emergence of new conventions and international institutions dedicated to the respect of humanitarian jus cogens rules and the existence of several judgments issued on this subject by national and international courts, has highlighted the emergence of an evolution towards an increase in the causes of exceptions to immunity from jurisdiction.

These exceptions are targeting the *ratione personae* immunity of incumbent Heads of State and the *ratione materiae* immunity of former Heads of State and high ranking State officials in cases of serious human rights violations as immunity *ratione materiae* depends on the quality of the acts in question and no longer on the official functions of the holder of the post, whose public role is terminated. Scholars frequently refer to the gradual erosion of immunity before national courts.

5.3.5. [I]t is undeniable that there is an explicit trend at the international level to restrict the immunity of (former) Heads of State vis-à-vis crimes contrary to rules of jus cogens. The prohibition against genocide and crimes against humanity, including the prohibition of torture, are part of jus cogens, and is therefore mandatory. The establishment of international tribunals, including the ICC and the tribunals for the former Yugoslavia and Rwanda are the most obvious examples of the abovementioned trend. Governed by the Rome Statute, the ICC is the first permanent international criminal court established to help ending impunity of the perpetrators of the most serious crimes affecting the international community and which are therefore recognized as part of jus cogens,

regardless of the official capacity of the perpetrators. As such, the ICC embodies the aspirations of the international community, which has over time reached a consensus on the urgent need to prosecute acts of genocide, crimes against humanity and war crimes. To this end, Art. 27 of the Rome Statute stipulates that the official quality of a Head of State or Head of government does not exonerate him under any circumstances of criminal responsibility, and that immunities attached to the official capacity of a person do not preclude the ICC from exercising its jurisdiction. This trend in international law is also reflected at the national level, where a similar evolution to put an end to impunity for the most serious crimes can be observed. A significant change in international practice can be recognized from the 1990s. The House of Lords judgments concerning the former Chilean president Augusto Pinochet issued in those years can be regarded [as] examples here. . . . In the Pinochet case, the British authorities ruled on three separate occasions that the immunity of the former dictator could not exempt him from criminal responsibility for violations of human rights committed outside of his duties as a Head of State. The Lords held that the Convention against Torture could not coexist with the principle of *ratione materiae* immunity for the acts of torture that the former Chilean President had committed during his term of office. Since this case, *ratione materiae* immunities of former Heads of State are no longer automatically granted vis-à-vis individual criminal responsibility, even for acts performed whilst in office. . . .

5.3.6. The scope of immunity from foreign criminal jurisdiction enjoyed by a State representative has been under consideration by the International Law Commission of the United Nations during the past few years. . . . Although the work of the ILC on the subject is not yet final, it has given rise to the emergence of opposing views. In a nutshell, the Special Rapporteur of the Commission bases his arguments exclusively on *lege lata* and tends to consider immunity as a norm that is not subject to exceptions. The opposing viewpoint has described the rapporteur's position as being partial since it does not take into account the current developments in international law concerning, in particular, the issue of serious crimes under international law. Be that as it may, it would appear from the ongoing work of the Commission that the absolute nature of *ratione personae* immunity of incumbent Triad members is affirmed as the leading view since any exception in this area would prevent concerned parties from performing their functions.* However, on the other hand, exceptions to *ratione materiae* immunity

* Editors' Note: The International Law Commission's (2001) Draft Articles on State Responsibility (2001) include the following articles:

Article 7. Excess of authority or contravention of instructions

in cases where crimes under international law are committed might be pertinent. On this point, it has been suggested to exclude immunity on the basis of the nature of the acts committed, such as private acts, illegal acts or ultra vires acts. In such cases, State officials would not be acting in their official capacity. In conclusion, what emerges from the report is the Commission's caution in carefully addressing the issue of immunity in order to achieve an acceptable balance between the need to ensure the stability of international relations and the need to avoid impunity of the perpetrators of serious crimes under international law. . . .

5.4.2. In light of the above-mentioned principles of international law, . . .
A. benefitted from *ratione personae* immunity during the period in which he held office. This immunity is now extinct.

5.4.3. In the case at hand, the question is whether, after the cessation of official duties, the appellant continues to enjoy immunity on other grounds. Following consultations . . . , it was confirmed from the outset that A. is not entitled to diplomatic status or accreditation in Switzerland that could protect him from criminal prosecution, and it was verified that the document in his possession only granted him transport privileges. It remains to be decided whether residual *ratione materiae* immunity covers all acts committed by A. during his office and supersedes the need to ascertain his possible responsibility with respect to the alleged serious violations of human rights. According to the principles that emerge from the legal doctrine and jurisprudence discussed above, an affirmative answer to this question is no longer unanimous. In fact, it is generally recognised that the prohibition of serious crimes against humanity, including torture, falls under customary law. This approach is shared by the Swiss legislator, according to the principle for which "the prohibition of genocide, crimes against humanity and war crimes is mandatory in nature (*jus cogens*)."¹ According to the Swiss legislator, "States are required to enforce this prohibition regardless of the existence of conventional rules and their validity. This duty aims at preserving the fundamental values of humanity and should be fulfilled regardless of the attitude of other States (*erga omnes*)."² In light of the fundamental value of the human

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 58. Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

rights at stake, the Swiss legislator has decided to “ensure a firm commitment to the suppression of such acts.” It would be contradictory and futile to, on the one hand, affirm the intention to combat against these grave violations of the most fundamental human values and, on the other, to accept a wide interpretation of the rules governing functional or organic immunity (*ratione materiae*), which would benefit former State officials with the concrete result to hinder, *ab initio*, any investigation. In such case, it would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same legal order. Such situation would be paradoxical and the criminal policy adopted by the legislator would be condemned to remain dead letter in almost all cases. This is not what the legislator wanted. It follows that, in the present case, the suspect cannot claim any immunity *ratione materiae*.

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