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"THE STRUCTURE OF LAW"

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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, "What is Law?" For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

With the backing of our diverse and disparate community, *The Journal Jurisprudence* has now evolved into a more diverse form. We will no longer be setting a question for each issue, but instead designing issues around the articles we received. Therefore, we invite scholars, lawyers, judges, philosophers and lay people tackle the any and all of the great questions of law. Knowing that ideas come in all forms, papers can be of any length, although emphasis is placed on readability by lay audiences.

Papers may engage with case studies, philosophical arguments or any other method that answers philosophical question applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

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EDITORIAL: THE STRUCTURE OF LAW

I have always felt that traditional law journals are prejudiced towards established authors from English-speaking countries. This is not to say that such people do not produce insightful and important article, but it is to say that many people produce important and original jurisprudential thinking. In that spirit, *The Journal Jurisprudence* actively curates articles from established and unestablished authors, particularly those outside the Anglo-American clique.

In this third edition of *Jurisprudence*, we have five articles connected to the theme of 'The Structure of Law.' With the increasing diversity and quality of articles put before me, it was a challenge to select just five. Disappointingly, we declined to publish many articles, not because of quality, but because each issue is designed around a theme.

Assistant Professor Kyle A. Scott of the University of North Florida speaks to the mistreatment of Plato by the established literature in his article *A Platonic Critique of Codification*. Using his deep and passionate knowledge of this great philosophy, Professor Scott illustrates how Platonic philosophy can give insight into positivism and codification. He further extends this argument into modern constitutional debates with ease and clarity.

Dr Ofer Raban of the University of Oregon delivers a commanding and original commentary on the relationship between the federal and state constitutions in the United States. He contextualises this relationship with a tradition dating back to the Westminster parliament and elucidates how this complex relationship is the genesis of greater civil liberties. It is our pleasure to publish *A Ratchet that Can Get Stuck: On the Relationship between the American Federal and States' Constitutions*.

In his article *Where do Constitutional Modalities Come From?*, Mr Jesse Merriam considers the competing interpretations of Ronald Dworkin and Phillip Bobbitt in regards to constitutional interpretation. In a very original way, Mr Merriam suggests that complexity theory, which is usually applied in economics and finance, provides a better platform for constitutional interpretation. Mr Merriam is a young scholar of tremendous potential and the originality of this article is a testament to his future promise.

Dr Nehaluddin Ahmad of the Multimedia University of Malaysia situates traditional jurisprudential debates on sovereignty within the context of Islamic jurisprudence. He seeks to understand the term 'sovereignty,' as used by

Hobbes and Austin, within the counterpoint presented by an Islamic worldview. This is an important piece of scholarship in an area of law often ignored by the euro-centric jurisprudential discourse. *The Journal Jurisprudence* has the honour of bring this argument to the world in *Sovereignty: Its Concomitant Ingredients, its Pragmatic Constraints and Islamic Jurisprudence.*

Mr Jason S. Crye, a practitioner and scholar, offers us insight into, what he terms, ancient constitutionalism. Particularly, he chronicles the life and impact of Sir Edward Coke. Using the work of the great British jurist, Mr Crye takes us on a journey from the Magna Carta to modern constitutionalism. *Ancient Constitutionalism: Sir Edward Coke's Contribution to the Anglo-American Legal Tradition* is an original and important contribution to the study of the history of law that is central to the discipline of jurisprudence.

Mr Aron Ping D'Souza
Melbourne, Australia
22 April 2009

A PLATONIC CRITIQUE OF CODIFICATION

Assistant Professor Kyle A. Scott
University of North Florida

Abstract: Jeremy Bentham's philosophy of law had great influence in America as he served as the intellectual predecessor to America's codification movement. Criticism of codification has dwindled to almost nothing in the past seventy years. This paper suggests that criticism of codification, and legal positivism in general, can be found in a rather unlikely source: Plato. Mainstream legal philosophy does not treat Plato seriously on this point. This paper will turn to Plato for a definition of law and its proper form. In this paper, I show how Plato's definition of law and its proper form serves as a critique of legal positivism and codification. This discussion has implications for modern notions of constitutionalism and lawmaking.

Keywords: Codification, Positivism, Plato, *Phaedrus*, *Statesman*, *Minos*

The rule of law is a necessity. Unfortunately, deficiencies in our understanding of the law complicate the matter. We often assume that the rule of law will provide a measure of justice that would not be achieved otherwise. But achieving justice is dependent upon how laws are created, interpreted and executed. In order for rule of law to provide those things, which we demand of it, we must first understand what just law is and what form it ought to take.

It is not uncommon for debates in political philosophy to cluster around two schools of thought. Such is the case in the dispute between legal positivists and anti-positivists.[1] The two modern pillars of this debate are H.L.A. Hart and Ronald Dworkin. "For the past four decades, Anglo-American legal philosophy has been preoccupied—some might say obsessed—with something

[1] There might be some objection to my categorization of legal theory as political philosophy. No doubt more than just political scientists partake in legal theory, actually far more law school professors engage in the enterprise than those in political science departments do. The argument I rest my categorization on is that lawmaking is necessarily a political enterprise. "In the modern world law plays a major role in the theoretical writing about politics. This is especially true in the United States; where prominent judges write political philosophy and political theorists actively seek to influence judicial interpretation of constitutional law" Josiah Ober, "Law and Political Theory" in *The Cambridge Companion to Ancient Greek Law*. Edited by Michael Gagarin. (2005) Cambridge, UK: CambridgeUniversity Press, 394. And for this study—one that focuses on Plato's legal theory—the relationship between law and politics is especially relevant when we understand that, "The practice of law and the development of political theory were closely intertwined within the Greek experience…" (Ober 2005, 394).

called the 'Hart-Dworkin' debate."[2] Certainly, there are substantial variations within each school of thought—in some cases, there is little agreement over the central tenets of each school[3]—but even still, the parameters within which modern legal philosophy is debated is defined by the conflict between positivists and anti-positivists. If such a thing can be done, to state simply and directly the position of legal positivists is to say, "What counts as law in any particular society is fundamentally a matter of social fact…What the law is and what the law ought to be are separate questions."[4] The opposing view is that moral considerations must play a role in legal decisions.[5]

Positivists and anti-positivists lack a definition of law independent of their jurisprudence. In each instance, the definition of law is dependent upon the jurisprudence, and the jurisprudence is dependent upon the definition of law. "One cannot identify the law on the basis of those same considerations which the law is there to settle."[6] In order to create a coherent jurisprudence the definition of law must come before the theory. However, a definition of the law is insufficient for building a theory. If a scholar develops a definition of law—either what it is or what it ought to be—the next step in theory building should be to define the form the law is to take. In the Hart-Dworkin debate the form of law is treated as an application of the theory rather than a component of the theory. This is a grievous error as it underestimates the normative and practical import of form. Positivists are more likely to fall into this trap than their opponents are since positivists understand law as an authoritative social institution, or rather, a *de facto* authority.[7] And while legal

[2] Scott J. Shapiro, *The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed*, Public Law and Legal Theory Working Paper Series No. 77. University of Michigan Law School, 1.

[3] Andrei Marmor, "Exclusive Legal Positivism." in *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Edited by Jules Coleman and Scott Shapiro. (2005) Oxford, UK: Oxford University Press. Kenneth Einar Himma, "Inclusive Legal Positivism." in *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Edited by Jules Coleman and Scott Shapiro. (2002) Oxford, UK: Oxford University Press. H.L.A. Hart, *The Concept of Law*, 2nd Edition. (1997) Oxford, UK: Oxford University Press. Joseph Raz, *Ethics in the Public Domain*. (1993) Oxford, UK: Oxford University Press. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (1983) Oxford, UK: Oxford University Press. Carlos S. Nino, *Dworkin and Legal Positivism*, 89 Mind (1980).

[4] Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 Ethics. 286 (2001).
This is not the only definition possible nor is it beyond dispute the best definition. Exclusive positivists say that law is independent of moral reasoning whereas inclusive positivists try to soften this point by arguing that morality can be included into the discussion of law. But the position of inclusive legal positivists is criticized for being internally inconsistent. Marmor, above n 3, 115n17, 124; see also John Finnis, *On the Incoherence of Legal Positivism*, 75 Notre Dame Law Review 1597 (2000) for a discussion on the incoherence of positivist thought. For the most part, those legal positivists who preceded Hart—Hobbes, Austin, Bentham—were of the exclusive variety.

[5] Ronald Dworkin, *Law's Empire*, (1986) Cambridge, MA: Harvard University Press.

[6] Marmor, above n 3, 120.

[7] Raz, above n 3.

positivists acknowledge that law must be legitimate, they state that the law always claims legitimacy, offering no viable—or legal—option for recourse.[8] For positivists, "legality is never determined by morality but rather by social practice."[9] This paper does not defend Dworkin's position, but it does critique the positivists, particularly those whose theory requires codified law.[10]

Mainstream legal philosophy does not treat Plato seriously on this issue. This paper will turn to Plato for a definition of law and its proper form. In so doing, the paper moves the debate beyond its current parameters thus opening a new path for political philosophy by exploring the deficiencies of our most common form of law. Codified law, since Bentham at least, has dominated the efforts of legal reformers. When a country reforms its laws it does so through codification. Plato offers the most comprehensive critique of this method of law making.

The *Laws* and the *Republic* might seem the proper place to turn to understand Plato's theory of law. Seth Benardete writes, "The discussion of law is the proper mean between the theme of the *Republic* and that of the *Laws*."[11] The *Laws* and the *Republic* seem to be at tension with one another and that tension cannot be resolved by looking at those texts alone. To understand the *Laws* and the *Republic* the reader must already understand Plato's definition of the law and its proper form. Without this understanding one can be led astray to conclude that in the *Laws* Plato, "seems to have no idea of indefinite progress; one cannot improve upon perfection, and like Bentham he is apparently so confident of his science of legislation as to think that perfection is not very far distant."[12]

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[8] Marmor, above n 3, 108.

[9] Shapiro, above n 2; see also Himma, above n 3, 125.

[10] Marmor, above n 3 and John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, (1998) Indianapolis, IN: Hackett Publishing. Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*. Edited by J.H. Burns and H.L.A. Hart. (1977) London, England: University of London Anthlone Press. One subset of the positivist school are those who emphasize recognition. "Legal validity, according to this view which I will strive to defend here, is entirely dependent on the conventionally recognized sources of law" (Marmor, above n 3, 105). Since accepted sources of law are almost entirely codified law, particularly in the United States where the pinnacle of law is a codified constitution and where the codification movement pioneered by David Dudley Field has transformed areas previously governed by common law—such as the Uniform Commercial Code, Federal Rules of Civil Procedure, Sentencing Commissions in the United States—into codified law, it is accurate to classify exclusive positivists with positivists who require codified law even if the exclusive positivists do not explicitly mention codified law.

[11] Seth Benardete, *Plato's* Statesman*: Part III of* The Being of the Beautiful. (1986) Chicago, IL: University of Chicago Press, 130.

[12] Glen Raymond Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, (1993) Princeton, NJ: Princeton University Press, 570-571. Other scholars have made similarly inaccurate comparisons. "Although committed to justice, Greek theorists were in some sense

This paper provides insight into the definition and proper form of law by examining the *Minos*, *Phaedrus*, and *Statesman*. With these three dialogues, Plato gives us insight into his theory of law. While restricting one's reading to only these three dialogues will not produce a comprehensive understanding of Plato's theory of law, reading these three texts will allow one to grasp what Plato meant by the term law and what form law ought to take. This paper will show that, for Plato, law sets out to discover the truth and codified law prevents the realization of that pursuit.

This paper will first consider the *Minos* and move on to a discussion of the *Phaedrus* followed by a discussion of the *Statesman*. The final section of the paper will provide a synthesis of the three dialogues to show how they can be, and should be, read together.

Minos

It has been suggested that the *Minos* is entirely preliminary in that it is an introduction to the *Laws*.[13] Even if this is the case, it does not mean the dialogue is unimportant or deserves being ignored in the manner it has been traditionally. The *Minos* deserves attention, if for no other reason; because it is the only Platonic dialogue whose only theme is defining law.

As argued in the *Phaedrus*, the good writings are those that pursue the serious things.[14] This is the recurrent theme of the *Minos*, which defines law by its pursuit to discover the truth.[15] And that pursuit is where the law gains its legitimacy.[16] The law's pursuit of truth is also consistent with art in that art

legal positivists who could sum up the separation between any given set of laws and objective morality within the phrase *nomos basileus*" (Ober, above n 1, 395). Statements such as these fail to appreciate the differences among Greek theorists (i.e., Hesiod, the Stoics, Plato) on the question of law. Oddly, Ober even acknowledges the differences among Greek theorists at a later point (Ober, above n 1, 396), but nonetheless classifies them all as positivists. Also, statements linking Greek theorists to positivism, particularly Plato, demonstrate a lack of appreciation for the restrictiveness of positivism and its exclusion of moral considerations; positions Plato necessarily rejects. This is an odd oversight on behalf of Ober who at 395fn2 acknowledges that legal positivism is linked to the thought of Hobbes, Locke, and Rousseau; hardly theorists one would classify with Plato in terms of legal theory.

[13] Leo Strauss, "On the *Minos*" in *Roots of Political Philosophy: Ten Forgotten Socratic Dialogues*, Edited by Thomas L. Pangle. (1987) Ithaca, NY: Cornell University Press, 67.

[14] Plato, *Phaedrus*, Translated by Harold North Fowler. The Loeb Classical Library. (2001) Cambridge, MA: Harvard University Press, 278d. Referred to as *Phaedrus* hereafter.

[15] Plato, *Minos*, Translated by Thomas L. Pangle in *Roots of Political Philosophy: Ten Forgotten Socratic Dialogues*. Edited by Thomas L. Pangle. (1987) Ithaca, NY: Cornell University Press, 315a. Referred to as *Minos* hereafter.

[16] Strauss 1987, 70.

pursues the discovery of things.[17] Good law can only be accomplished by kingly law, meaning law generated from good men.[18] Because men are infinitely variable laws too must be infinitely variable in that they must adapt themselves to different men in order to pursue the truth of things.[19] Ideally, a king with a wise soul would make the laws on the spot.[20]

Infinitely variable does not mean unstable.[21] As is seen in the example of the *aulos*, the laws must be wise and stable.[22] So while the *Minos* is clear on the point that law must be stable, variable, and wise; it is not clear on how to accomplish this mighty task.

A definition alone is insufficient, though it is certainly necessary, for developing a legal theory. The next step is to determine how to create laws that reflect the definition of law. While not explicitly discussed in the *Minos*, the *Phaedrus* and the *Statesman* provide the necessary insight. Once considered in this light, one can reflect back on the *Minos* and see how the *Minos*, *Phaedrus*, and *Statesman* work in unison.

Phaedrus

John Kayser has argued that the *Phaedrus* should be read as the first dialogue, even though it is not, since it takes up writing as one of its subjects. Therefore, in order to understand any dialogue one must first understand Plato's teaching on writing which is most clearly expressed in the *Phaedrus*.[23]

Following the dramatic action of the dialogue reveals the *Phaedrus*' teaching on writing. Phaedrus comes to Socrates with a speech from Lysias which he thinks is of outstanding quality. Socrates observes that Phaedrus is carrying a written transcript of the speech and asks him to read it. So Phaedrus and Socrates find a spot below a tree near a stream outside of the gates of Athens at which time Phaedrus, after resisting at first, reads the speech to Socrates. Socrates remarks

[17] *Minos*, 314b; *Phaedrus*, 269e.
[18] *Minos*, 317b-c.
[19] *Ibid*., 318a-c.
[20] *Ibid*., 317b-d.
[21] Also, one should not confuse variable with different, as the unnamed interlocutor does. The unnamed interlocutor uses the different strategies of burial and sacrifice across cultures to show that laws are different (*Ibid*., 315b-d). Socrates does not respond directly to this rebuttal but offers to embark on the discussion through a different manner of speaking. The reader is left to wonder if the cultures do vary that much or if it is enough of a similarity that all the cultures bury and sacrifice and differences in how they are carried out are unimportant in terms of the law.
[22] *Ibid*., 318c.
[23] John R. Kayser, *Noble Lies and Justice: On Reading Plato*, 5 Polity. 491, 494 (1973).

that the speech is not very good and responds with his own unwritten speech that far surpasses the other speech. The action reveals the following points: First, one must truly understand the truth of things in order to craft a good speech. Second, the unwritten speech is superior to the written. Third, in order to achieve these goals one must be outside the city.[24]

Good Rhetoric

The point of words is to lead the soul.[25] Therefore, one must not misuse words. In order to use words correctly so as not to mislead the soul, one must understand the soul and the difference between good and evil.[26]

Composing speeches well—either written or unwritten—is an art that requires one to divide things up and bring them back together. Socrates mentions specifically his preference for dialectical works as they are the only form that can divide things into their natural classes and bring them together.[27] Dialectic provides what all great arts provide, a discussion and high speculation about nature.[28] Socrates refers to dialectical speech as an art; while ignoring books of rhetoric.[29] It is unclear at this point, though briefly mentioned, whether dialectic may be taught, though it is agreed it would be gratifying if it could be taught.[30] But what is not in doubt is that proper discourses and training can give the soul the proper belief and virtue.[31]

"But evidently the man whose rhetorical teaching is a real art will explain accurately the nature of that which his words are to be addressed, and that is the soul, is it not?"[32] The good rhetorician must be able to classify men and speeches and know which speeches go with which man. The good rhetorician will be able to describe the soul accurately, the direction and action of the rhetoric, and adapt the speech to the differing needs of different souls in order to persuade the soul to virtue.[33] The rhetorician must know how to speak to

[24] It might be instructive, when considering the *Phaedrus*, to keep Plato's *Seventh Letter* in mind, specifically 341c-e in which he writes that only a joint intercourse between teacher and pupil can lead to a true understanding of a subject, writing cannot. In this section of the *Seventh Letter* Plato also demonstrates why he thinks the written word is insufficient for teaching the multitude.
[25] *Phaedrus* 261a, 271d.
[26] *Ibid.*, 258d, 260a-c.
[27] *Ibid.*, 265d-e, 266a-b.
[28] *Ibid.*, 269e.
[29] *Ibid.*, 266d.
[30] *Ibid.*, 265d, 269e.
[31] *Ibid.*, 270b.
[32] *Ibid.*, 270e.
[33] *Ibid.*, 271a-c.

each man and possess the knowledge of when to keep silent.[34] And while all discourses are different, all have the same ends, and all are organized as a living thing with a body, head, and feet. The middle, according to Socrates, must fit in relation to the whole.[35] Only philosophy can give someone the knowledge to categorize men and speeches and to organize discourses correctly.[36] The discussion of the best rhetorician began with a discussion of knowledge of what is best for the whole[37] which sets up the argument that follows that in order to serve the whole one must be able to serve the individual which cannot be done without understanding the whole.

Critique of the Written Word

Socrates and Phaedrus engage in a discussion of the written word after it is observed that the locusts were singing and their song is the gift of the muses; a gift which then plays on the soul and is audible, not something written.[38] It is stated bluntly that the books on rhetoric have gaps in them and that books cannot provide a full education. Thus one who learns from books has incomplete knowledge.[39] The written word is imitative of the living word of the one who truly knows.[40] This leads Socrates to worry that the written word cannot convey knowledge sufficiently which may lead us to be dominated by the instruments of our desire.[41] Because it is imitative it is insufficient, but this does not answer what the precise objections to the written word are. There are four, the last three of which are inseparable from one another. First, the written word destroys memory. Second, written words are distributed equally and identically to all. Third, they cannot be questioned or defend themselves. Fourth, they mislead people into thinking they truly understand something when they do not.

By using the example of Theuth and Thamus, Socrates demonstrates to Phaedrus how writing can be destructive. Theuth brought to Thamus his

[34] *Ibid*., 271d-272b. This may shed some light on the question of whether dialectic can be taught. *Ibid*., 265d, 269e
[35] *Ibid*., 264c.
[36] *Ibid*., 261a.
[37] *Ibid*., 270b-c.
[38] *Ibid*., 259a-e.
[39] *Ibid*., 268c-e.
[40] *Ibid*., 276a-b. In this section Phaedrus says, "You mean the living and breathing word of him who knows, of which the written word may justly be called an image." Socrates responds, "Exactly."
[41] Charles L. Griswold, *Self-Knowledge in Plato's* Phaedrus, (1986) New Haven, CT: Yale University Press, 207. It has also been suggested that the distance between the written word and the oral word is equivalent to the distance between life and death or knowledge and ignorance. Graeme Nicholson, *Plato's* Phaedrus*: The Philosophy of Love*, (1999) West Lafayette, IN: Purdue University Press, 78.

inventions. Thamus listened intently but when Theuth got to the letters Thamus objected. Theuth argued that the letters would make men wiser and improve their memory.[42] Thamus objected on both grounds arguing that the letters would induce forgetfulness as the letters would make it unnecessary for men to practice their memory since it could be replaced by letters. The written word is good for reminding but bad for memory.[43] The reader can see this point made earlier when Phaedrus, now not reading from the scroll on which he wrote Lysias' speech, inadvertently misquotes the speech by replacing madly with manfully. A mistake Socrates corrects, though not working from a scroll at any point in the dialogue.[44]

"You have invented an elixir not of memory, but of reminding; and you offer your pupils the appearance of wisdom, not true wisdom, for they will read many things without instruction and will therefore seem to know many things, when they are for the most part ignorant and hard to get along with, since they are not wise but only appear wise."[45] Thamus reasoned that because men could read the words without assistance or guidance men would think themselves wise without truly being wise. This is encouraged by the written word because the written word cannot be questioned or respond to a misreading, nor can the written word say something particular to a general audience. Written words treat everyone the same.[46] Furthermore, written words encourage the pursuit of knowledge in books, not the true knowledge attained by self-questioning.[47]

While one can see how discouraging self-examination can lead to false wisdom, the lack of wisdom produced by the written word is based on two factors: its inability to respond to questions and its inability to know its audience. That written words cannot defend themselves is an obvious conclusion, yet a conclusion that Socrates feels the need to mention.[48] Because they cannot defend themselves they can be misinterpreted which means the reader can walk away thinking he has attained an accurate understanding when in fact he has not.

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[42] *Phaedrus* 274e-275a.
[43] *Ibid*., 275d; Nicholson, above n 41, p. 76.
[44] *Phaedrus* 265a.
[45] *Ibid*., 275a-b.
[46] Plato, *Statesman*, in *Plato's* Statesman*: Part III of* The Being of the Beautiful, Translated by Seth Benardete. (1986) Chicago, IL: University of Chicago Press, 294d-295a. Referred to as *Statesman* hereafter.
[47] Griswold, above n 41, 206, 212. That the dialogue between Theuth and Thamus occurs over virtue in the oral word and vices in the written word is meant to illustrate Socrates' position on dialogue as the medium for philosophical discussion (Griswold, above n 41, 205; Nicholson, above n 41, 75).
[48] *Phaedrus* 275d-e.

Following the example of Theuth and Thamus, and the agreement between Socrates and Phaedrus that the written word is a mere image of the one who truly knows, Socrates uses the example of the husbandman to show Phaedrus again why not knowing one's audience is harmful. The example shows that a husbandman will not plant his seeds in the heat of summer but only in those conditions that are right for growing. And because the person who has knowledge of the just and the good and beautiful can be no less wise than the husbandman then we must conclude that the wise person will not plant his words in those who are not ready to receive them.[49] Whereas, as discussed above, the good rhetorician must be able to divide men into appropriate categories and divide speeches into appropriate categories and know which category of speeches apply to each category of man, the written word is incapable of doing so thus making it a bad rhetorician.[50]

For serious matters Socrates prefers dialectic. The dialectical method allows one to plant seeds of truth into those souls fitting for intelligent words as certain souls are endowed with different qualities not all of which may be ready to receive the seeds of truth.[51] While the written word may be good for reminding it is not good for improving the memory or making one wise. Because it is unable to defend itself or know its audience the written word cannot instil wisdom in the reader.[52] Written words are intended to be playful and the good writer acknowledges that the written word is insufficient.[53] What is necessary for writing to be good is impossible to be captured in written laws—mainly the ability to know one's audience, provide a specific message suitable for that audience, and the ability to defend itself thus allowing for certainty and clarity—and those who make laws often mistake themselves for gods because they have written laws, which therefore displays their inability to be good law writers.[54]

The *Phaedrus* does not provide a complete treatment of lawmaking. This is why the *Statesman* must now be consulted.

Statesman

[49] *Ibid.*, 276b-c.
[50] *Ibid.*, 271d-272b, 275e; Nicholson, above n 41, 76.
[51] *Phaedrus* 269d, 276e-277a. Griswold makes a compelling argument that writing and *techne* are related only to the extent that *techne* cannot be communicated through writing. Griswold, above n 41, 204.
[52] In addition to the passages from the *Phaedrus* cited above on this matter see also Kayser , above n 23, 498 and 504.
[53] *Phaedrus* 277e-278b, 277d-e.
[54] *Ibid.*, 277b-e, 258c, 278c.

Like the *Phaedrus* and *Minos*, research on the *Statesman* has been sparse compared to the amount of attention dialogues like the *Republic* and the *Apology* have received. Most of the earlier research on the *Statesman* is merely a summary of the argument.[55] But even these summaries get some of the information incorrect as Davis states that the *Statesman* performs a Solonian function.[56] This cannot be accurate if we are to take seriously Socrates' criticism of Solon in the *Phaedrus*.[57] In mainstream political science, Paul Stern[58] makes the most recent contribution to *Statesman* scholarship. Stern provides an insightful analysis of the role of *phronesis* in lawmaking. However, Stern's analysis does not include a discussion of what form law ought to take. This paper builds upon Stern's analysis to explain why law that comes from the statesman is superior to written law.

Young Socrates and the Stranger agree that statesmanship is necessary.[59] For only a statesman can, "distribute to those in the city that which with mind and art is most just, and can keep them safe and make them better for worse as far as possible."[60] The true statesman, who rules in accordance with art, is therefore free to act in the absence of, or contrary to, the written laws.[61] The Stranger gives the example of a doctor who leaves written instructions for his patients to follow while he is away. If the doctor returns and finds that things have changed and there is a better way to treat the patients than the written instructions provided, the doctor ought to be free to change his treatment.[62] To do otherwise would endanger the health of those who are under his care. The same is true for the statesman. Even when a law is in force, if the statesman deems it not in the best interest of the city he may violate it and provide for the city what is best. This point is supported by the sailor example as well.[63] Thus, it is a commonly accepted point that the statesman may act contrary to the written laws.[64] Unfortunately statesmanship is the most difficult human science

[55] Morris Davis, *The Statesman as a Political Dialogue*, 88 American Journal of Philology. (1967).
[56] *Ibid.*, 325. Davis is not the only one who has incorrectly attributed this position to Plato's statesman. Cairns seems to stop his reading of the *Phaedrus* at 257-258 when Plato writes of Lycurgus, Solon and other statesmen who like to sign their name to law. Huntington Cairns, *Plato's Theory of Law*, 56 Harvard Law Review (1942). Had Cairns and Davis considered *Phaedrus* 278c they would have revised their position and recognized that 257-258 was the beginning of a challenge to Phaedrus about what a true author ought to be.
[57] *Phaedrus* 278c.
[58] Paul Stern, *The Rule of Wisdom and the Rule of Law in Plato's Statesman*, 91 American Political Science Review. (1997).
[59] *Statesman* 292d.
[60] *Ibid.*, 297b. This follows the lesson learned from following the dramatic action of the *Phaedrus* that the good speech—which is the unwritten speech—can only exist outside of the city's walls.
[61] *Ibid.*, 293a-b, 293c-d, 295b.
[62] *Ibid.*, 295c-d.
[63] *Ibid.*, 297e-298a.
[64] Andrea Wilson Nightingale, *Plato's Law code in Context: Rule by Written Law in Athens and Magnesia*, 49 *The Classical Quarterly*. 113-114 (1999); Jacob Klein, *Plato's Trilogy:* Theaetetus*, the*

to acquire and a multitude is unlikely to acquire it.[65] Nevertheless, the state ought to be ruled by the highest *available* intelligence, for it is always better for the wise to rule the unwise.[66] If there is a city with no true statesman there must be an alternative to rule by a statesman. If a statesman is absent the highest *available* intelligence is the law. Rule of law is the second best regime.

The second best regime is not a just regime, but it is attempting to become just, just as the definition of law in the *Minos* is trying to become the discovery of what is.[67] The just regime, that which is ruled by a statesman, does not need written laws but all other regimes do simply because absent a statesman and absent laws tyranny will reign.[68] In the discussion devoted exclusively to the second best regime that begins at 297e and continues to 299e, the reader finds that the second best regime is imitative, much like the written word in the *Phaedrus* was found to be imitative of true wisdom.[69] Written law is consistently referred to as imitative.[70] This means that written law cannot be a true art, which means it does not discuss or speculate about nature in general, or human nature in particular.[71]

A comparison between the second best regime and the statesman's regime continues beyond 299e, and at each point the dialogue suggests that there are certain limitations imposed by law that will never allow the second best regime to become just. Laws in a second best regime prohibit violation; they must, as only the statesman—who is absent in the second best regime—is capable of violating the law justly.[72]

It is intimated that laws may be reformed without being violated as laws are made through trial and error.[73] However, when we unpack this simple statement the matter appears to reverse. Laws are prohibitions.[74] No one in the second best regime is authorized to violate these prohibitions.[75] But trial-and-error reform can only occur when errors are recognized. Errors in prohibitions can only be seen when a prohibition is violated, or when it is determined that a particular prohibition will lead to an undesirable outcome. This is problematic

Sophist*, and the* Statesman, (1977) Chicago, IL: University of Chicago Press, 185; Benardete, above n 11, 133; Davis, above n 55, 320.

[65] *Statesman* 292d.

[66] *Ibid*., 290d, 296b.

[67] *Minos* 315a.

[68] *Statesman* 301a-b; Cairns, above n 56, 361.

[69] *Statesman* 299d; *Phaedrus* 275a-b.

[70] *Statesman* 301a.

[71] *Ibid*., 299c, 300c; Klein, above n 64, 187; *Phaedrus* 269e.

[72] *Statesman* 300c, 295b.

[73] *Ibid*., 300b.

[74] *Ibid*., 300c.

[75] *Ibid*., 300c, 295b.

in that if no one is authorized to violate the law, then all violations of a particular prohibition are illegitimate in the second best regime, thus there can be no reform through trial and error by violation, particularly since written law cannot admit its shortcomings. The second manner in which trial and error can be carried out is prohibited by the laws as well, but in a much more discreet manner.

"It is plain: all the arts we have would completely perish, and they would never come to be at a later time on account of this law that forbids their search. And hence life, which even now is hard, would prove to be altogether unliveable throughout that time."[76] This is the response by Young Socrates to the Stranger when he asks, "Whatever would come to light if all these things should be practiced in this way, in conformity with writings and not in conformity with art?"[77] We know for certain that the two men must be speaking of all written laws and not just a select few as it was already determined—and would be again—that all written laws are imitative.[78] Thus, recognizing that a prohibition has led to an undesirable outcome would be impossible under the rule of law since the law by design is stifling and would prohibit the sort of independent thinking necessary to recognize an undesirable characteristic in the law. Anyone having the nerve to speak out against the laws or violate them would be punished by death.[79] Thus, the trial and error method of making laws is impossible as the written law prohibits all violations and stifles the thought necessary for questioning the law. Therefore, we should not be surprised at the badness of the second best regimes since laws, which guide second best regimes, cannot adapt to the changing needs of the city.[80] The rule of law acts "as if it were some self-willing and foolish human being who allows no one to do anything contrary to his own order or even for anyone to ask a question, not even if it turns out that, after all, something new is better for someone contrary to the speech which he himself enjoined."[81] Laws, then, like the written speeches in the *Phaedrus*, do not allow themselves to be questioned.

Because this is the result of the written law, it is imperative that a statesman is independent of the written law and violate it when necessary. It has already

[76] *Ibid.*, 299e.
[77] *Ibid.*, 299e; see also Benardete, above n 11, 136; Klein, above n 64, 189; Nightingale, above n 64, 114-115.
[78] *Statesman* 299c-d, 301a.
[79] *Ibid.*, 297e.
[80] *Ibid.*, 301e-302a.
[81] *Ibid.*, 294c. In light of 294c it might seem overkill to have led the reader through an elaborate refutation of the trial-and-error fallacy, but this would have been merely refuting one line with the other without directly dealing with, or resolving the contradiction. The contradiction is put in place to show that even those laws that can be legally changed are in themselves contradictory, further demonstrating the insufficiency of the law.

been shown that the dialogue makes direct statements that the statesman should be independent of the law. But why the statesman should be authorized to do so has not been explored, though avoiding the pitfalls of the second best regime ought to be reason enough in some respects.

In the *Phaedrus* written speeches were unable to target their audience and appeal to individuals individually, the same is true with written laws in the *Statesman*. "Because a law would never be capable of comprehending with precision for all simultaneously the best and the most just and enjoining the best, for the dissimilarities of human beings and of their actions and the fact that almost none of the human things is ever at rest…"[82] The law cannot be precise and comprehensive. The law treats everyone the same.[83] Human nature is dynamic and varying therefore nothing static can decide anything in all cases at all times. Written law treats humans as something less than human. By the definition of the great arts given in the *Phaedrus* we know that written laws cannot be one of the great arts since written laws do not "demand discussion and high speculation about nature" but instead ignore nature, and perhaps even violate it.[84]

While it is determined that something never simple cannot be governed by something that is always simple that is precisely what the law tries to do.[85] This is almost an identical point to that made in the *Phaedrus* at 271d-272b that written speeches are inferior to spoken ones as it is the job of the rhetorician to divide men and speeches according to their nature and apply the proper speeches to the proper man, something the written word could never accomplish. Because in the second best regime a fixed law must govern what is always changing, irresolvable conflicts will inevitably result.[86] The limitations of the written law make the statesman necessary. If statesmen were constrained by the law life would be unliveable.

Synthesis

This paper has set out to discover the proper form of the laws so that they may be allowed to discover what is, as that is what they desire to be according to the *Minos*. The discussion of the *Phaedrus* and the *Statesman* has shown that knowledge of the nature of things is imperative for one who seeks to govern. Written law is an insufficient substitute for the one who possesses true knowledge. Written words are limited, and in some cases can do harm, such as

[82] *Ibid*., 294a-b.
[83] *Ibid*., 294b-c, e.
[84] *Phaedrus* 269e. Written law treats an individual with lower dignity than the many (Strauss, above n 13, 77).
[85] *Statesman* 294b-c; Klein, above n 64,184.
[86] Cairns, above n 56, 362.

when they allow someone to think he or she is wise when he or she truly is not. The above discussion intentionally separated the dialogues from one another; though it should be clear to the reader how they work together. In case it is not, this section will combine the three dialogues through certain instances where they overlap in order to show the reader, explicitly, that the written law is a poor substitute for the one who has true knowledge and that proper laws are those laws that are guided by this knowledge.

The *Minos* states directly that the one who is most knowledgeable about law is the one who is most knowledgeable about the *aulos*.[87] This statement seems most impractical. The most literal interpretation of this sentence suggests that Joshua Bell is the American best suited to make laws. While he may be the nation's most celebrated violinist, it is hard to imagine him as the nation's foremost expert on lawmaking as well. This statement by Socrates begins to make sense, however, when read in light of the *Phaedrus*. The musician has true knowledge of harmony. This knowledge is distinct from simply knowing how to strike the highest and lowest chords. To the latter individual the true knower of harmony would say, "You know the necessary preliminaries of harmony, but not harmony itself."[88] Therefore we may correctly reason that the one who is most knowledgeable about the *aulos* is the one who knows how to strike the highest and lowest notes and understands how to use this skill in making the notes work in harmony, just as the statesman must know how to make the people and the laws work in harmony, and be free to adjust the laws when necessary in order to maintain that harmony.[89] This point is consistent with Jacob Klein's analysis of *Statesman* 305e-311c when he says that the statesman must be able to weave the different people and needs together to form a whole. It should not be lost on the reader how closely related Klein's discussion of weaving in the *Statesman* is to the discussion of the true rhetorician in the *Phaedrus*, as the true rhetorician is able to "weave" the proper speeches and men together so that each learns what is necessary and proper. This reinforces the earlier conclusion that it is misguided to think that written laws are a sufficient substitute for the true knowledge of how to rule since they are mere imitations of true knowledge.[90]

Medicine is used in all three dialogues to illustrate the same point. In the *Minos* Socrates states that prescriptive writing comes from those who possess the knowledge of the art they are writing about, suggesting of course that the

[87] *Minos* 317e.

[88] *Phaedrus* 268e.

[89] *Statesman* 300e; see also Stern, above n 58, 274.

[90] It should also be remembered that in the *Minos* the best *distributor* of the law is also the most knowledgeable about the law (*Minos* 317e), a point directly comparable to the statement in the *Statesman* that "as long as they [just statesmen] always *distribute* to those in the city that which with mind and art is most just." *Statesman* 297b, italics my own.

statesman possesses knowledge of an art.[91] What has previously been assumed is that there is a possibility that art does not have to be written.[92] But that possibility has not been fully explored in the extant literature. If the reader of the *Minos* goes to the *Phaedrus*, the reader will see that a man who learns medicine from a book only, and thinks himself a physician, should be thought mad.[93] The *Statesman's* use of medicine quite clearly illustrates the point expressed in the *Minos* and *Phaedrus* that written laws and books in general, do not contain full knowledge. The *Statesman* shows that a doctor who leaves written instructions for his patients must be free to change those instructions as the need arises, as it is the doctor who possesses the knowledge of medicine and not the written instructions or the patient who he or she leaves the instructions with.[94] The point is more forcefully stated in the *Statesman* than anywhere else; even those instructions written by the one who possesses true knowledge cannot make the reader of those instructions as knowledgeable as the author. These examples support the conclusion that the written law is incapable of instilling true virtue.[95]

A common theme throughout all three dialogues is the variability in human nature, or the differences between humans. The *Phaedrus* strikes a stark contrast between the written word and the rhetorician on this point. The contrast is that written words do not know their audience and therefore cannot give to a reader what he or she needs as each reader has different needs.[96] As mentioned above, the *Statesman* points out, humans are infinitely variable and the law does a disservice by treating each individual the same.[97] Therefore we might conclude that while law is better than no law, the law cannot be just as it is impossible for something simple to be applied to something that never is.[98] Understanding the *Minos*' teaching on the law cannot be understood without reference to these lessons. The *Minos* does not explicitly recognize the differences between individuals to the extent the other two dialogues do. The *Minos* allows us only to speculate as to why the best laws are those handed down by the king on the spot or why the best laws are those laws given orally.[99] The only way to understand if this speculation is correct is to consult the other dialogues; it would be irresponsible to let only our speculation inform us.

[91] *Minos* 316c-e. For those who might be interested, this begins the central section of the central part of the dialogue. Strauss, above n 13, 72.
[92] Strauss, above n 13, 72.
[93] *Phaedrus* 268c. This section in the *Phaedrus* precedes by only a few lines, and therefore serves as an introduction to, the discussion of harmony that has already been dealt with in this paper.
[94] *Statesman* 295c-e.
[95] Benardete, above n 11, 130.
[96] *Phaedrus* 261a, 271a-272b.
[97] *Statesman* 294a-b.
[98] Klein, above n 64, 184.
[99] On this last point, one may speculate that this is why the discussion of lawgiving changes from written laws to spoken laws when the best laws are discussed. *Minos* 318c.

There are other instances of shared examples between these three dialogues, but none more than the ones selected work in concert to show the insufficiency of the written law. What must be in place is wisdom, or knowledge of nature, and for various reasons the written word cannot achieve this knowledge. The very nature of written law is inimical to human nature in that one is static and the other is variable. While laws can change they must first be violated, thus further demonstrating their insufficiency. The first step in formulating just laws is to first recognize the insufficiency of writing. We must not replicate the error of Solon pointed out in the *Phaedrus* and think ourselves wise because we can set down in writing prohibitions of human action. Only the pursuit of what underlies writings has worth. Writings are generated by humans with a particular knowledge, and perhaps writing brings to light the limits of human knowledge.

Conclusion

In order for a law to be just it must persuade individuals to virtue. For this to be accomplished it must understand human nature. Written law cannot be just because it does not understand human nature. Just like other types of writing, written law can mislead people into thinking they are attaining something when they are not. And too like other types of writings, written law prohibits the sort of questioning that makes true knowledge possible. The shortcomings of written law are self-reinforcing thus creating a scenario in which the distance between the just and the law is increasing.

Law is not an option; we must have it. The question this paper raises is whether our current understanding of creating and reforming laws cannot be improved. As stated in the beginning, the current trend in legal reform is to codify and make uniform. Legal reform can take on other forms. Scholars must think seriously about the form of law and the extent of its impact. Jeremy Bentham took up this task, now it is time to correct the shortcomings of his codification movement.

This paper does not settle the Hart-Dworkin debate, but it lays bare some of the deficiencies of the positivist position, particularly of those in the exclusive camp. First, law must admit its limitations in order to change; positivistism in its strictest form does not allow the law to make such an acknowledgement. What is lawful is right say the positivists. Second, positivists do not show an appreciation for the variation in human nature. Law, like good teaching, must meet the individual where she or he is, and take them where it would like for them to go. Before we can think ourselves ready to create jurisprudence, we must first be able to define the law and then theorize about its proper form.

Plato did this, and we should refine our understanding of his theory so that we may continue in the tradition of pursuing the truth.

A RATCHET THAT CAN GET STUCK: ON THE RELATIONSHIP BETWEEN THE AMERICAN FEDERAL AND STATES' CONSTITUTIONS

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Abstract: This essay is a short exposition of the relationship between the civil rights provisions of the federal and state constitutions. It surveys the historical and structural relationships among them, and then examines the ratchet-like operation of state constitutional rights – that is, the fact that state constitutions can only provide more civil liberties than the federal constitution does. As it comes out, there are some important qualifications to the ability of state constitutions (or, for that matter, both federal and state legislatures) to provide greater civil liberties than those of the federal constitution: conflicts between and within civil rights provisions may determine not only the floor, but also the ceiling, for certain constitutional liberties. Consequently, an inordinately conservative U.S. Supreme Court might not only produce a cramped federal civil rights regime, but also limit the ability of the states to expand civil liberties to their own constituencies.

In the 1980s, when the British were deliberating the adoption of a Bill of Rights coupled with the powers of judicial review, some opposed such judicial powers on the ground that British judges were so conservative and "establishment-minded" that their interpretation would result in too cramped a regime of civil liberties.[1] But there was something odd about an argument against judicial review that was based on fear of *contracted* liberties: however cramped a view of a Bill of Rights judges may have, the British Parliament could always go beyond the rights elaborated by judges and offer greater protections.[2] After all, civil

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[1] For a review of this claim *see* Michael Zander, A Bill of Rights? (Sweet & Maxwell, 3d. ed. 1985).

[2] In fact, it is unlikely that judges reviewing legislation for compliance with a Bill of Rights would have a more cramped view of those rights than the legislature, since judges interpreting a Bill of Rights develop a professional bias that inclines them to expand liberties vis-à-vis legislative actions. As James Madison put it, "independent tribunals of justice will consider

rights provisions constitute the floor for civil liberties, not the ceiling; they mark minimal guarantees, but do not preclude more expansive ones. Thus, granting judges the authoritative say about what the Bill of Rights require (rather than leaving such determinations to the legislature) could only expand civil liberties beyond Parliament's vision, but not contract them. Judicial review even by conservative and establishment-minded judges almost always results in more civil rights. I say *almost* because, as we shall see below, there are some interesting exceptions to this general principle.

A similar situation prevails where the institution that can expand on – but not detract from – judicially-determined civil rights is not a legislature but *another judicial system interpreting another civil rights code*. This is the situation, among other places, in the United States, which has a federal judiciary and a federal constitution operating alongside state judiciaries and state constitutions. Thus these distinct judicial systems (the federal and the states') interpret two distinct constitutional civil rights codes – those of the Federal Constitution (whose authoritative interpreters are the federal courts, though state courts are also authorized to apply them), and those of the constitutions of the various states (whose authoritative interpreters are state courts, though federal courts are also authorized to apply them).

As in the case of a British Bill of Rights authoritatively interpreted by a judiciary (where Parliament may only provide more – but not less – civil rights protections), American state constitutions can only provide more – but not less – civil rights protections than those afforded by the Federal Constitution. And so, similarly, the result of such institutional arrangement will almost always be the expansion of civil liberties. Nevertheless, to repeat, this is not always the case: sometimes an interpretation of the Federal Constitution would prevent state constitutions (or, for that matter, legislatures) from providing greater protections. This happens whenever there are conflicts among civil rights – where one constitutional right restricts the reach of another right, or where granting a right to one party precludes its extension to other parties. In such cases, as we shall see, judicial interpretations of civil rights provisions may provide not only the floor for civil rights protections, but also the ceiling.

Section I provides a structural and historical survey of the relationship between federal constitutional law and state constitutional law; Section II discusses the rise of the so-called New Judicial Federalism – the resurgence of state

themselves in a peculiar manner the guardians of those rights [and] will be naturally led to resist every encroachment upon [them]." (1 Annals of Cong. 439, Gales & Seaton eds. 1789).

constitutions as major sources of civil rights protections; and section III examines those relatively exceptional cases where interpretations of the Federal Constitution may limit the ability of state constitutions (and the ability of state and federal legislation) to expand civil rights.

SECTION I

The U.S. Constitution of 1787 came to replace the earlier Articles of Confederation, which had created too loose a union among the 13 original American states. Accordingly, the new Constitution endowed the federal government with important powers not granted it under the earlier document – including the powers to tax, to raise armies, to regulate the national economy, and to establish a federal court system. Like the older Articles of Confederation – indeed like any constitution hoping to be effective – the new constitution contained a Supremacy Clause, a provision asserting the supremacy of the Federal Constitution (and any federal law authorized by it) vis-à-vis states' statutory or constitutional law.[3] In cases of conflict between state law (including state constitutional law) and federal law, federal law prevails. Needless to say, this supremacy principle also applies to the federal Bill of Rights – as the first ten amendments to the U.S. Constitution, ratified mere three years after the ratification of the constitution itself, are collectively known.

The federal Bill of Rights is intimately linked with many civil rights provisions of state constitutions. Its drafters modeled the Bill of Rights on some early state constitutional provisions,[4] and judicial interpretations of the Bill of Rights has often been influenced by state interpretations of their own provisions.[5]

[3] "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 Laws of any State to the Contrary notwithstanding." Article VI, Clause 2, United States Constitution.

[4] *Compare* VA. BILL OF RIGHTS § 8 (1776), *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (F. Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS] ("That in all capital or criminal prosecutions a man hath a right to…be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage. . . ."), *with* U.S. CONST. amend. VII. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...to be confronted with the witnesses against him....").

[5] See, e.g., *Mapp v. Ohio,* 367 U.S. 643, 651 (1961) (stating that "more than half of those [states] passing upon [the exclusionary rule], by their own…judicial decision, have wholly or partly

Moreover, some later state constitutions were modeled, in turn, on the federal Bill of Rights,[6] and the interpretation of state constitutions has often been influenced by, and even tracked one-for-one, the federal judiciary's interpretation of equivalent federal constitutional provisions. (This so-called "lockstep doctrine" has been adopted in some states by court decisions[7] and even by state constitutional amendments.[8]) Furthermore, certain state constitutional amendments were modeled directly on *judicial interpretations* of the Federal Constitution.[9] The result, unsurprisingly, is a great similarity between the civil rights protections afforded by the states and those afforded by the Federal Constitution.

Nevertheless, such constitutional protections often do diverge – both because of dissimilar constitutional language, and because of different interpretations of similar provisions. Yet, given the supremacy of federal law over state law, when they diverge they do so in one way only: with state constitutions providing *greater* constitutional protections than those provided by the Federal Constitution.

This state of affairs was not always so. Notwithstanding the Supremacy Clause, the federal Bill of Rights did not, at first, govern state laws or state actions. The Bill of Rights originally applied only to the *federal* government: the impetus for its adoption was concern over the great powers of the newly-created federal regime, and the Bill came as an explicit limitation on the federal government's

adopted or adhered to [it]," in announcing that the exclusionary rule is mandated by the Federal Constitution.

[6] *Compare, e.g.,* IOWA CONST. art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated..."), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…" Of course, some similarities between the federal and state constitutions are the result of both the federal constitution and a state constitution borrowing directly from the same state.

[7] *See*, *e.g.*, State v. Jackson, 672 P.2d 255, 258 (Mont. 1983) (holding that the protections against self-incrimination contained in MONT. CONST. art. II, § 25 are identical to those contained in the federal Fifth Amendment).

[8] *See, e.g.,* Florida Const. Art. 1 § 12: Searches and Seizures (1982) ("…This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court…").

[9] Following the U.S. Supreme Court's recognition of an *implicit* right to privacy in the Federal constitution (under the Due Process Clause), several states amended their state constitutions to include *explicit* provisions guaranteeing privacy rights. *See, e.g.,* ALASKA CONST. art. I, § 22 (added 1972) ("The right of the people to privacy is recognized and shall not be infringed. . . .").

ability to turn tyrannical vis-à-vis the people and the states.[10] And so when, in *Barron v. Mayor of Baltimore* (1833), litigants appearing before the U.S. Supreme Court claimed that the city of Baltimore (a state entity) violated certain Bill of Rights provisions, the Court responded by saying that the Bill was simply "not…applicable to the States."[11] The states remained free to violate the federal Bill of Rights – within the limits imposed by their own constitutions.

This constitutional structure was dramatically revised in 1868, with the ratification of the 14th Amendment to the U.S. Constitution. That Amendment – one of three adopted on the heels of the American Civil War – applied explicitly to state governments. Indeed it was *state* governments that administered the system of slavery over which the Civil War had been fought, and which afterward continued to impinge on the civil rights of the now-freed slaves. Among other constitutional guarantees (which include the "Equal Protection of the Laws," a centerpiece of modern civil rights protection that does not appear in the Federal Constitution), the 14th amendment forbids the states to "deprive any person of life, liberty, or property, without due process of law…" In a long process that began decades after the adoption of the 14th Amendment and is still in the making, the U.S. Supreme Court has read the 14th Amendment Due Process Clause as "incorporating" (i.e., containing, and thereby making applicable vis-à-vis the states) almost all the provisions of the Bill of Rights.[12] It did so by holding that the 14th Amendment's Due Process Clause protects against violations of "fundamental rights" (defined as "principle[s] of justice…rooted in the traditions and conscience of our people..."[13]), and then reading most of the rights appearing in the Bill of Rights as "fundamental."[14] Thus the civil liberties enshrined in the federal Bill of

[10] Some early drafts of the Bill of Rights sought to limit the power of state governments as well, but were rejected. (See., e.g., James Madison's proposed First Amendment, which read: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable. No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." By contrast, the adopted version of the First Amendment begins by stating: "*Congress* shall make no law…" [emphasis added].)
Annals of Congress. The Debates and Proceedings in the Congress of the United States. "History of Congress." 42 vols. Washington, D.C.: Gales & Seaton, 1834--56.

[11] 32 U.S. 243 (1833).

[12] The question of whether the Second Amendment to the U.S. Constitution (which secures the right to "keep and bear arms") is incorporated through the Fourteenth Amendment is now being litigated in the courts.

[13] Palko v. Connecticut, 302 U.S. 319, 324-325 (1937).

[14] See, e.g., Malloy v Hogan, 378 U.S. 1 (1964) (incorporating into the Due Process Clause the Fifth Amendment's privilege against self incrimination); Duncan v Louisiana, 391 U.S. 145

Rights, which originally pertained only to the federal government, finally became binding also on the American states (and on all their derivative local and municipal powers).

SECTION II

To fully understand the significance of this enormous expansion of civil liberties in the U.S., it is important to realize the omnipresence of constitutional law in American legal life. Unlike many other constitutional democracies, which may have a constitution but no powers of judicial review (or highly restricted ones),[15] or which may have judicial review but vest this power in special constitutional courts (often with limitations as to who may bring constitutional claims)[16] – in the U.S. all judges, be they federal or state judges, county or village judges, appellate or trial court judges, judges in courts of general jurisdiction or in bankruptcy courts or in small claims courts, *all* judges enjoy the power of judicial review. Moreover, American constitutional doctrine governs wide swaths of American law, spreading its influence over all sorts of legal actions, so that constitutional claims – be they federal or state constitutional claims – can be found in the smallest and most mundane lawsuits, and in rather abundant quantities. American judges habitually strike down laws, regulations, and executive actions that violate constitutional provisions, or render "limiting constructions" that limit the reach of such laws so as to make them constitutional.

It is therefore unsurprising that the extension of the federal Bill of Rights to the American states, from which it had been previously barred, was immediately felt as a dramatic expansion of civil liberties in America. To be sure, some state constitutions did provide robust civil rights protections, but many American states did not, and the application of the Bill of Rights to those states signaled a radical change in the civil liberties of their residents.

But the ensuing expansion of civil liberties in America was not merely the result of the expanding reach of the federal Bill of Rights: it was also the result of the now-dual system of civil rights protections – the federal Bill of Rights and state constitutional provisions – which allowed state constitutions to move only in

(1968) (incorporating into the Due Process Clause the Sixth Amendment's right to a trial by jury in criminal cases).

[15] See, e.g., the Dutch constitution (GW. ch. 6, art. 120).

[16] In France, for example, claims can only be brought by a quorum of legislators, or by certain government ministers. 1958 CONST. art. 61.

one direction, namely, toward more civil liberties. As in the case of the proposed British Bill of Rights, interpreted by judges but expandable by Parliament, state constitutions could not derogate from federal constitutional rights but could certainly expand on them.[17]

Indeed things could not have been otherwise: it would be absurd to read civil rights provisions as providing the floor *and the ceiling* for civil liberties – if only because such an interpretation would be completely at odds with the text and the intent of such constitutional provisions. The First Amendment to the U.S. Constitution, for example, provides that "Congress shall make no law… abridging the freedom of speech": on what basis can this legal rule be read to *limit* the ability of Congress (or others) to guarantee that freedom? Such a preposterous reading would conflict, in the most direct way, with the *raison d'être* of such provisions. Moreover, reading constitutional provisions as providing both the floor *and the ceiling* for civil liberties would turn courts into super-legislatures, with the power to exercise judicial review over any government action that affects (rather than merely burdens) civil liberties. (All would depend, of course, on where the judiciary chooses to place the ceiling; but under such a system, all policy in areas touching on civil liberties could be wrested away from legislative hands.) A "floor and ceiling" interpretation of civil rights provisions was not and never could be in the cards. The application of the federal Bill of Rights to the states therefore created a dual system of civil rights protections whereby state courts reading their own state constitutions could provide more, but not less, protections than the Federal Constitution does.

The expansion of civil liberties by state courts interpreting their states' constitutions beyond the minimum required by the Federal Constitution – a phenomenon known in the United States as "New Judicial Federalism" – began in earnest only in the 1970's, and for obvious reasons. The process of "incorporation" – i.e. that of making the federal Bill of Rights applicable to the states – achieved real momentum only with the famous Warren Court (named after Chief Justice Earl Warren) of the 1960's, a Court that also gave an expansive interpretation to the provisions of Bill of Rights. The Warren Court expanded civil rights in virtually all directions – from free speech rights, to equal protection, to voting rights, to the rights of criminal defendants both during the investigatory stage and later at trial. Consequently, these newly

[17] See, e.g., Prunyard, at 81 ("Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

applicable Bill of Rights protections went beyond many of those afforded by the states (indeed otherwise the occasions for "incorporating" them would not have arisen). It was only when the Burger (1969-1986) and then the Rehnquist (1986-2005) Courts came on the scene that the U.S. Supreme Court began *contracting* civil liberties, refusing to continue down the road of expansive civil rights and chipping away at some of the rights recognized by earlier decisions. It was under these more conservative federal supreme courts (including today's Roberts Court) that state courts began to go beyond federal protections more aggressively through interpretations of their own constitutional provisions (though, to repeat, state constitutions were always at liberty to provide greater civil rights protections than the federal Bill of Rights, as some in fact did[18]). Interestingly, this trend was explicitly encouraged by some liberal U.S. Supreme Court justices, who now found themselves only too often in the dissent, and who kept reminding their colleagues on state courts that U.S. Supreme Court decisions constituted only the minimal protections that states could provide.[19]

When state courts first began reading their state constitutions as going beyond federal civil rights protections – often under provisions identical or near-identical to the federal ones – there were indignant outcries from various quarters. Many of these decisions concerned criminal procedure, a highly controversial area of civil liberties in the crime-ridden U.S., and some scholars, politicians, and law enforcement officials soon proclaimed them unjustified judicial activism and a blow to national uniformity.[20] Some actions were taken: in some instances state constitution were amended so as to overrule judicial interpretations;[21] in others, a constitutional provision was added so as to restrict

[18] See, e.g., New York State's expansive right to counsel under Article I, Section 6, of the New York Constitution.

[19] *See*, *e.g.*, Robbins v. California, 453 U.S. 420, 451 n. 12 (1981) (Stevens, J., dissenting) ("[D]rivers in many states will have to persuade state supreme courts to interpret their state constitution's equivalent to the Fourth Amendment to prohibit the unreasonable searches permitted by the Court here."). *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986).

[20] *See*, *e.g.*, Earl M. Maltz, *False Prophet – Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L. Q. 429 (1988).

[21] For example, in 2008 California voters approved a state constitutional amendment prohibiting the state from recognizing marriages between same-sex couples after the California Supreme Court interpreted the California constitution (under provisions similar to the federal ones) as going beyond the protections afforded by the Federal Constitution. *See*, in Re Marriage Cases, 183 P.3d 384 (Cal. 2008). The legality of this 2008 amendment is currently being challenged in the California courts.

the courts from going beyond federal constitutional rights, at least in some areas of constitutional law.[22] (Such an amendment, of course, essentially writes off a state's own constitutional provisions – though many of these provisions pre-date the applicability of the Bill of Rights to the states, so that their virtual annihilation is not wholly unfounded.) And sometimes, as already mentioned, the decision to toe the federal line came from state supreme courts themselves, in the form of the "lockstep doctrine," which can be found in quite a number of states.[23] Still, the phenomenon of Judicial Federalism – that is, of state courts going beyond federal Bill of Rights protections in their interpretation of constitutional provisions that are similar to the federal ones – has endured those past (and present) critiques, and is today an entrenched feature of the American constitutional landscape.

Which brings us back to our initial point – that a polity operating under two concurrent Bills of Rights, interpreted by two court systems, where one of those systems reading one of those Bills of Rights is authoritative as to minimal civil rights protections, can only gain in civil liberties, because the second (subservient) Bill of Rights operates as a ratchet capable of moving in only one direction – towards greater civil rights protections. As a matter of fact, however, there are cases where the authoritative Bill of Rights limits the protections afforded by the second Bill of Rights – and (in the American case) the ability of state courts (or legislatures) to provide greater protections under their own constitutional provisions.

SECTION III

The ratchet-like operation of such dual civil rights systems gets stuck whenever civil rights conflict: that is, when extending liberties in one direction limits their extension in another.

The U.S. Supreme Court has faced a number of such cases. *Pruneyard Shopping Center v. Robins*, a case from 1980, involved the free speech rights of protestors at a private shopping mall.[24] In 1976 the U.S. Supreme Court, overruling an earlier precedent, held that – unlike government entities – privately-owned shopping malls were not bound by the free speech provisions of the First

[22] See, e.g., fn. 8, *supra*.

[23] *See, e.g.*, State v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984) (holding that Ill. Const. Art. 1, § 6 is coextensive with U.S. Const. Amend. 4 for purposes of probable cause for an arrest; overturning state appellate court).

[24] 447 U.S. 74 (1980).

Amendment.[25] But when political protestors were thrown out of a shopping mall in Campbell, California, the California Supreme Court held that the California Constitution's free speech provision did apply to these privately-owned shopping centers.[26] The shopping mall owner then appealed to the U.S. Supreme Court, arguing, *inter alia*, that the California decision violated his *property rights* under the 5th Amendment to the U.S. Constitution. In other words, the owner argued that the free speech rights recognized by the California Constitution were in conflict with private property rights recognized by the Federal Constitution – and should therefore be invalidated under the Supremacy Clause. The U.S. Supreme court ultimately rejected the claim, stating that no federal constitutional right was violated; but here was an instance where the ratchet could have gotten stuck: expansive civil rights under one provision could have constricted civil rights under another, and thus could have prevented state courts from expanding civil liberties under that second provision.

The potential for such conflicts is not insignificant, especially given the ever-expanding scope of constitutional protections. Property rights may conflict not only with free speech rights but also, for example, with equal protection rights (expansive rights of exclusion from private property may conflict with anti-discrimination rights); equal protection rights may in turn conflict with rights of association (one landmark U.S. Supreme Court decision held it a violation of the constitutional right of expressive association to forbid the Boy Scouts of America from discriminating against homosexuals[27]). The right to free speech could conflict with the constitutional right to a fair trial (the U.S. supreme Court invalidated a regulation forbidding judicial candidates running for office from making controversial political statements during their campaigns, raising concerns about the impartiality of America's state judiciary[28]); the right to the free exercise of religion could conflict with the prohibition on the establishment

[25] Hudgens v. NLRB, 424 U.S. 507 (1976).

[26] The federal First Amendment reads: "Congress shall pass no law . . . ." The relevant California Constitution provision reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." In its decision the Supreme Court of California took note of the fact that "[t]hough the framers could have adopted the words of the federal Bill of Rights they chose not to do so." Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979).

[27] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[28] Republican Party of Minn. v. White, 536 U.S. 765 (2002). Most state judges – as opposed to federal judges – are elected for office.

of religion (consider chaplains running prayer sessions in the military);[29] and claims were made in the U.S. Supreme Court that the right to life conflicts with the right to have an abortion,[30] or with the right to refuse medical treatment[31] – the list goes on and on. Expansive civil rights in one domain may effectively curtail civil rights in another.

Another source of restriction on the ability of state constitutions to expand civil liberties is interpretations of a civil right that expand that right to some claimants while effectively blocking it to others. The U.S. Supreme court has recently rendered such an interpretation of the Equal Protection Clause. Faced with a lawsuit on behalf of white parents whose children were denied a place in their public school of choice because of their race, the Court held that the affirmative action policies of two schools were unconstitutional[32] The decision struck down efforts on the part of public school officials to achieve greater racial integration in the American educational system, where housing patterns often produce racially homogenous schools. The dissenting justices in the case objected that although such affirmative action policies were not *mandated* by the Federal Constitution's Equal Protection Clause, neither were they forbidden by it. More to our point, racial integration of public schools, hypothetically speaking, may be *mandated* by the Equal Protection provisions of *state* constitutions. Here was a conflict between the claims for equality of two groups – white pupils denied admission to the school of their choice because of attempts to racially integrate American public schools, and minority pupils whose racially homogenous schools produce less effective learning environments, and presumably contribute to the isolation of the races. The decision, in accepting the claim of the former, effectively foreclosed the possibility that the latter's claim for equality would be recognized (either by a state constitution or by a legislature).

Naturally, conflicts among rights can also arise under a single, unified constitutional system; but these conflicts assume an added significance in the context of dual systems, where they may place a sharp limitation on the autonomy of a subordinate entity (be it an American state, or a European country subjected to a European-wide civil rights regime). Such conflicts mark an important qualification to the general principle of a ratchet-like operation: dual civil rights adjudicative systems could provide more civil rights protections

[29] See, e.g., Locke v. Davey, 540 U.S. 712 (2004).

[30] See, e.g., Roe v. Wade, 410 U.S. 113 (1973).

[31] Cruzan v. Dir. Mo. Dept. of Health, 497 U.S. 261 (1990).

[32] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

only where the superior system of rights does not contain conflicting constitutional liberties. This is the kernel of truth in the claim with which we began – that conservative and establishment-minded judges interpreting a Bill of Rights may bring about an impoverished regime of civil liberties. Paradoxically, such judges can endanger a robust civil rights regime not by giving cramped interpretations to civil rights provisions, but by giving overly expansive interpretations to some civil rights to the detriment of others.

The concern is a real one. After all, different political ideologies tend to prefer certain civil rights and disfavor others. Thus American conservatives and liberals are likely to differ on the resolution of conflicts between, say, private property rights and free speech rights, rights of association and anti-discrimination rights, or the right to life versus the right to refuse medical treatment – with the result that the resolution of such conflicts may prove damaging to an entire vision of civil liberties.

CONCLUSION

The problem of adjudicating conflicting civil rights provisions is receiving growing scholarly attention.[33] Some of these scholars express doubt at the very possibility of resolving such conflicts rationally, believing they involve inherently unprincipled balancing. Such claims often rely on the alleged 'incommensurability of fundamental values,' a thesis denying the existence of a common measure among fundamental values like liberty and equality (that lie at the heart of modern civil rights regimes). That thesis was elaborated, among others, by Isaiah Berlin, who noted: "To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge." In the end, said Berlin, "the possibility of conflict – and of tragedy – [in the choice among conflicting values] can never wholly be eliminated…"[34] If there is no 'common measure' with which to compare the fundamental values of equality and liberty, then a conflict between two such constitutional rights cannot be resolved by simply opting for the smaller loss. What makes these conflicts "tragic" is therefore the fact that no given resolution (and its consequent loss) can be justified by comparison to its alternatives (though these alternatives are also no better than the original

[33] *See*, *e.g.*, LORENZO ZUCCA, CONSTITUTIONAL DILEMMAS: CONFLICTS OF FUNDAMENTAL LEGAL RIGHTS IN EUROPE AND THE USA (2007); CONFLICTS BETWEEN FUNDAMENTAL RIGHTS (Eva Brems, ed., 2008).

[34] *See*, *e.g.*, ISAIAH BERLIN, Two Concept of Liberty, in FOUR ESSAYS ON LIBERTY (1969) at 171.

proposal). In the end, such resolutions involve an unjustifiable choice sacrificing value A to value B (though, to repeat, sacrificing value B to value A is equally unjustified).

This has led some scholars to declare that, if the incommensurability of values is to be taken seriously, the resolution of real conflicts among fundamental rights cannot be "rational."[35] Needless to say, such claims have serious ramifications to the institutional arrangement we have been examining here: if true, resolutions of conflicts among fundamental rights would be little more than naked value preferences – the sort of decisions, that is, that are better left to political decision-making rather than to judicial interpretation. Thus the federal judiciary's imposition of a solution hindering state constitutions from striking a different balance may appear wholly unwarranted: instead, the choice between different civil liberties should be left to legislative determinations, or, as a minimum, to state constitutional provisions (which at least allow for some local autonomy).

Other scholars, unsurprisingly, consider these assessments misguided, and they go to propose grand methodologies for identifying optimal solutions. Some, for example, suggest an order of priority among fundamental rights, while others call attention to a distinction between rights' 'cores' and 'peripheries' such that an instance of the former should trump an instance of the latter.

As always, it is advisable to remain skeptical of both extremes in this debate: on the one hand, the possibility of a grand theoretical framework offering a comprehensive rational methodology for the resolution of conflicts among fundamental rights, one that goes beyond trivial generalities, strikes me as overly optimistic: the universe of civil rights is sufficiently diverse, and the occasions for conflicts among them sufficiently varied, that little can be said by way of resolving all such disputes. On the other hand, whatever one can say about fundamental values in the abstract, in the context of specific, contextual conflicts, there *is* usually a less costly resolution to be identified. Moreover, the claim that such resolutions are somehow not *rational* derives from an overly narrow view of rationality – one which denies that tribute to any discourse incapable of producing one uniquely correct result. Courts deciding conflicts among civil rights – by comparing expected benefits and costs – are engaged in

[35] Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19, 20 (Eva Brems, ed., 2008) ("conflicts of fundamental rights may entail constitutional dilemmas. In these cases, we are left with no guidance as to what to do. Legal reasoning, I suggest, is not capable of producing a single right answer in these cases; more importantly, these cases cannot be resolved rationally.").

a perfectly rational discourse. Even if, *arguendo*, there is no one correct solution to such questions, there are always alternatives that a rational deliberation could eliminate. Rationality is not an all-or-nothing affair, and reasoned deliberations are fundamentally different – indeed fundamentally superior – to simply relying on unreflective preferences or ideological prejudices in resolving such disputes.

Two things remain clear: courts should strive for awareness of possible or actual conflicts among constitutional rights when they resolve constitutional disputes; and they should exercise caution whenever they identify such conflicts – especially when their solution might deprive states of their ability to extend civil liberties. But this cautionary counsel is a weak one: it is by no means a call for some doctrine of judicial abstention or minimalism. Sometimes decisiveness and an expansive reading of one right to the great detriment of another would be perfectly justified. In the end, such resolutions must be worked out in the context of actual conflicts, by looking hard at the factual circumstances and trying to imagine all the possible ramifications of a given decision: as the saying goes, God is in the details – but then again, so is the devil.

WHERE DO CONSTITUTIONAL MODALITIES COME FROM? COMPLEXITY THEORY AND THE EMERGENCE OF INTRADOCTRINALISM

Mr Jesse Merriam*

Justice Oliver Wendell Holmes famously said "hard cases make bad law,"[1] and constitutional scholars and judges generally believe that the hardest constitutional cases involve "modal conflicts," *i.e.*, conflicts between two methods of constitutional interpretation. So, it would seem, the worst constitutional decisions involve modal conflicts. This essay draws from complexity theory, the study of the unpredictability inherent in complex systems, to argue that resolutions of modal conflicts are not necessarily bad but they are often lawless.

Part I briefly examines the longstanding debate over how courts interpret the Constitution. This discussion will be important to understanding why lawyers and courts have been so uncomfortable with the notion that constitutional law is an evolutionary and creative enterprise; they fear that such a notion will imply that judicial power is arbitrary and therefore illegitimate. In reviewing the most prominent attempts to save law from creativity, Part I focuses on Ronald Dworkin's interpretationism, which holds that the ideal judge could determine the right answer to a legal question by interpreting the law as a whole, and Phillip Bobbitt's modal approach, which claims that lawyers and courts interpret the Constitution by considering six and only six modalities of constitutional interpretation. Part I argues that Bobbitt's modal approach is by far the most satisfying account because, unlike Dworkin's interpretationism, Bobbitt's approach complies with the hermeneutic notion that public understanding must rest on common meanings. Part I then observes that even Bobbitt's account has problems: it fails to explain how lawyers and courts interpret the Constitution when confronting a conflict between the modalities, and it fails to account for or permit the emergence of new modalities.

Part II then discusses some proposed solutions to these two defects in Bobbitt's modal approach. In particular, Part II focuses on Ian Bartrum's recent proposal to use metaphor theory to explain how combinations of modalities, or "hybrid-modalities," can emerge from cases that raise modal

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[1] *Northern Securities Co. v. U.S.* (1904) 193 U.S. 197, 400-01 (Holmes, J., dissenting).

conflicts. Part II concludes that although Bartrum's use of metaphor theory represents a significant advancement in the debate over this issue, it is still incomplete because it does not capture the unpredictability and randomness in the emergence of new modalities.

Part III proposes that complexity theory, with its focus on the unpredictability and non-linearity of complex systems, provides a better way of understanding the creation of new modalities. After providing some background on the leading complexity theories, this section argues that modal conflicts are instances of legal chaos, analogous to far-from-equilibrium systems in thermodynamics, in which complex forces resonate to produce outcomes that are *ex ante* unpredictable.

Part IV explores precisely how complexity theory can apply to cases involving modal conflicts. Part IV argues that some modal conflicts resemble near-equilibrium systems and do not generate new modalities; some modal conflicts resemble far-from-equilibrium systems and do generate a new combination of modalities, what we can call "hybrid-modalities"; and a final category of modal conflicts are even farther from equilibrium and create new modalities altogether. In describing this final category of modal conflicts, Part IV identifies an emerging modality, what we might call "intradoctrinalism," the interpretation of a particular doctrine in a way that makes all of the Court's doctrines logically cohere.

The paper concludes with some reflection on how complexity theory can apply to other legal problems, such as how courts can reconcile conflicts between competing legal regimes.[2] The paper thus has both a narrow purpose, to use complexity theory to fill in the gaps in Bobbitt's modal approach, as well as a broader purpose, to advance complexity theory as a means of examining legal problems in general. With this broader purpose, the paper stands alongside recent efforts to place complexity theory at the forefront of the debate over how to explain social phenomena.

I. The Birth of the Constitutional Modalities

Perhaps the most enduring controversy in constitutional law is over how to interpret the U.S. Constitution. This controversy has been going on since the

[2] For discussions of how courts can reconcile this conflict, see Robert B. Ahdieh, *Dialectical Regulation* (2006) 38 Conn. L. Rev. 863; Robert A. Schapiro, *Toward a Theory of Interactive Federalism* (2005) 91 Iowa L. Rev. 243; Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts* (2004) 79 N.Y.U.L. Rev. 2029.

founding of the republic, but it wasn't really brought to the fore until Herbert Wechsler's famous 1958 Holmes Lecture at Harvard Law School.[3] In that lecture, Wechsler contended that for the U.S. Supreme Court to justify its power to review the constitutionality of laws, it must interpret the Constitution according to "neutral principles." This ignited a long debate over how and whether the Court could accomplish this task, leading scholars to reject the neutral-principle enterprise and begin examining the modalities of constitutional interpretation.

A. The Search for Neutral Principles

According to Wechsler, a neutral principle consists of two elements: content generality and equal applicability. Wechsler thus defined a principled decision as one resting on "reasons quite transcending the immediate result that is achieved," and applying to all parties equally, "whether a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist."

Wechsler's lecture started a debate over which judicial decisions were actually neutral. Wechsler and some of his followers claimed that *Brown v. Board of Education*[4] did not rest on a neutral principle because the opinion used education-specific social science to invalidate the "separate but equal" doctrine. But other scholars contended that the *Brown* opinion did in fact rest on a neutral principle, such as the "antisubordination" principle that the government may not discriminate against any racial minority.[5]

The debate turned a corner when Robert H. Bork led a conservative movement in the 1970s arguing that courts must be neutral not only in how they *apply* constitutional principles, as Wechsler had urged, but also in how they *derive* such principles.[6] For these conservatives, the only neutral way for the Court to derive constitutional principles was to interpret the Constitution according to its original intent, and thus, they concluded, if the Constitution was drafted to favour free enterprise over communism, then courts should simply favour corporations over workers.

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[3] The following year, this lecture was turned into a Harvard Law Review article. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law* (1959) 73 Harv. L. Rev. 1.

[4] (1954) 347 U.S. 483.

[5] *See, e.g.,* Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler* (1959) 108 U. Pa. L. Rev. 1.

[6] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems* (1971) 47 Ind. L.J. 1.

Seeing that conservatives and liberals would not agree on what constituted a neutral principle, many leftist constitutional scholars began to reject the entire neutral-principles enterprise. Many of these scholars drew from hermeneutic philosopher Charles Taylor, who, in his famous essay "Neutrality in Political Science,"[7] argued that because human interpretation and understanding are value-laden, normativity imbues any study of human relations. As Taylor put it, no theoretical framework is absolutely value-neutral because each framework "secrete[s] a certain value position."[8]

In a significant Harvard Law Review article in 1983, Mark Tushnet applied this thinking to constitutional law.[9] In that article, Tushnet drew from hermeneutic philosophy to argue that both Wechsler's neutralism and Bork's originalism wrongly assumed a stability and determinacy in interpretation. Tushnet's argument was part of a broader movement within the legal academy, the critical legal studies movement, which claimed that there is no such thing as a legitimate exercise of judicial power and that there are no right answers to legal questions. According to these critical legal theorists, most judges and lawyers do not actually believe there is such thing as legal truth, but they *act* as though this truth exists so that they can maintain their power over the adjudicative process. For these theorists, fancy legal verbiage serves only to disguise politics as law.

Perhaps unsurprisingly, many in the legal academy shunned these critical legal scholars. As Yale Law Professor Robert Burt recounts, there were "fierce attacks on [critical legal scholars] as 'nihilists,' even extended by some to argue for their exclusion from the legal academy and relocation in humanities departments such as political or perhaps even military science."[10]

Seeking to save law from this nihilism while also repudiating originalism's conservative values, a group of liberally minded scholars claimed that courts can derive neutral constitutional principles by interpreting America's "fundamental values." While these "interpretationists" have diverged in what they perceive as America's guiding fundamental values, they all have agreed that there is such thing as an intelligible fundamental value, and almost all have

[7] This is the second of many essays in Charles Taylor, *Philosophy and the Human Sciences, Philosophical Papers 2* (1985).
[8] Ibid 73.
[9] Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles* (1983) 96 Harv L. Rev. 781.
[10] Robert A. Burt, *The Constitution in Conflict* (1992) 10.

agreed that of all the interpretationist theories, Ronald Dworkin's account is most powerful.

B. Ronald Dworkin's Interpretationism

Ronald Dworkin set out to prove that both the originalists and the critical legal theorists were wrong. Dworkin countered originalists like Bork by declaring that constitutional interpretation involves much more than simply reading the Constitution or determining what its framers intended in drafting that text. Rather, Dworkin argued, the Constitution contains general concepts, not historically contained commands, and each generation must determine particular *conceptions* of those general concepts.[11]

This would seem to open Dworkin up to the claim that there is not just one correct constitutional interpretation, but Dworkin preempted this claim by arguing that there is only one right conception, the one that comports with moral and political philosophy. So Dworkin's ideal judge would decide cases by applying "a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government."[12] Dworkin aptly named this ideal judge Hercules, because discerning the right principle would prove to be a Herculean task.

The difficulty of this task became clear when Dworkin's jurisprudence took a hermeneutic turn almost a decade later in *Law's Empire*.[13] In that book, Dworkin explained that law is an "interpretive practice" in that lawyers and judges, to identity the right principle to apply in a given case, must engage in "constructive interpretation."[14] This constructive interpretation consists of three stages: (1) a preinterpretive stage in which a community identifies the relevant rules and standards that apply to a given practice; (2) an interpretive stage in which the community settles on a justification for the practice; and (3) a postinterpretive stage in which individuals consider that justification to determine for themselves what the practice actually requires.

Dworkin offers an example to illustrate this process.[15] Dworkin asks us to imagine an aristocratic community that requires all non-nobles to remove their

[11] Dworkin has made this argument in several works, but his first prominent enunciation of this view appeared in Ronald Dworkin, *Hard Cases* (1975) 88 Harv. L. Rev. 1057.
[12] Ronald Dworkin, *Taking Rights Seriously* (1977) 107.
[13] Ronald Dworkin, *Law's Empire* (1986).
[14] Ibid 52.
[15] Ibid 47-49.

hats in the presence of nobles. In the preintepretive stage, members of the community simply follow the rule. But after mechanically applying this rule for some time, the community moves on to the interpretive stage, assigning some purpose to the rule, such as that the rule promotes courtesy. After assigning that purpose, the individual members then move on to the postinterpretive stage, determining for themselves what courtesy requires in a given context. This stage is highly individualized, as each member of the community will engage in "a conversation with oneself, as joint author and critic."[16] As a result of these independent and internal conversations, the community will divide over whether courtesy actually warrants the rule that non-nobles must remove their hats for nobles. This division among interpreters, Dworkin claims, is how the practice of constructive interpretation creates social change.

Dworkin's interpretationism fails to explain our adjudicative process, primarily for three reasons. One, Dworkin's interpretive scheme is too individualistic to account for how courts and lawyers publicly debate legal issues. In his book *Law and Truth*,[17] legal philosopher Dennis Patterson criticizes Dworkin precisely on this ground. In mounting this attack, Patterson cites Charles Taylor's essay "Interpretation and the Sciences of Man"[18] for the proposition that public understanding requires "common meanings," which are for Taylor "objects in the world that everybody shares."[19] These meanings essentially "are the basis of community."[20] So when a society's discussion of a subject turns on an issue where there is not such common meaning, a gap of understanding emerges, creating a split within the society.[21]

Drawing from Taylor's essay, Patterson explains that common legal meanings enable communities to share an understanding of legal norms, and without such common meanings, legal interpretation would lead to, in Dennis Patterson words, "an infinite regress of justification."[22] We can see this type of infinite regress in Dworkin's postinterpretive stage, where members of the community determine for themselves what a particular principle will mean in a given context. For example, we can imagine members of Dworkin's hypothetical community challenging each other *ad infinitum* about why courtesy warrants a

[16] Ibid 58.
[17] Dennis Patterson, *Law and Truth* (1996).
[18] This is the first essay appearing in Charles Taylor, *Philosophy and the Human Sciences, Philosophical Papers 2* (1985).
[19] Ibid 39.
[20] Ibid.
[21] Ibid 54.
[22] Ibid 94.

particular rule; without a common meaning of courtesy, there is no stopping point to this debate. Because Dworkin bases his interpretive scheme on individuals looking inward for meaning, rather than on common meanings, Dworkin does not seem to provide a way out of this infinite regress.

Another problem with Dworkin's scheme is that by arguing that there is only one coherent justification for a law's existence, Dworkin assumes that interpretation is univocal. But interpretation seems to yield a plurality of meanings. As Charles Taylor has written, even interpretations resting on common meanings are not univocal. Taylor offers several reasons for the plurivocity of interpretation, the principal reason being that each human "is a self-defining animal,"[23] and each change in self-definition alters our understanding of human values.

A third problem is that Dworkin assumes that all legal propositions require some sort of political or moral theory to be accepted as true, but this assumption appears false, at least for easy legal propositions. As Patterson notes, we can answer an easy legal question, like what is the speed limit in a given state, by simply reading the state speed limit. [24] This is an easy legal question to answer because a conventional mode of legal justification (*i.e.*, reading the law's text) easily disposes of the question. Moreover, even in the hard case involving an ambiguous law, lawyers and judges reason not by turning inward and considering the "law's grounds" as a whole, as Dworkin argues, but by analysing that particular law with the different modes of legal justification, such as by looking at the specific intent of the relevant lawmaking body. [25]

Given these defects in Dworkin's interpretationism, many scholars have rejected it and looked instead for a way for constitutional interpretation to rest on a public activity guided by intersubjecting meanings. Philip Bobbitt took up this challenge in two books, *Constitutional Fate: Theory of the Constitution*[26] and *Constitutional Interpretation.*[27]

C. Philip Bobbitt's Turn from Interpretation Toward Action

In *Constitutional Fate*, Bobbitt argued that constitutional theorists should abandon the idea that some constitutional interpretations are more legitimate

[23]Taylor, above n 18, 55.
[24] Patterson, above n 17, 94-5.
[25] Ibid.
[26] Phillip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).
[27] Phillip Bobbitt, *Constitutional Interpretation* (1991).

than others, because such an idea assumes some deeper, metaphysical significance to constitutional interpretation. Nearly ten years later, Bobbitt elaborated his theory in *Constitutional Interpretation.* Drawing from Ludwig Wittgenstein's philosophy of language, Bobbitt explained that constitutional interpretation is an action, not a metaphysical phenomenon, and in performing this action, lawyers and judges have established by custom that only six factors will guide their interpretations of the Constitution. Bobbitt argued that these factors form the modalities of constitutional interpretation, making any interpretive technique outside these modalities "illegitimate" – not as a metaphysical matter, but in the pragmatic sense – because the practitioners of constitutional interpretation adhere only to these six modalities. According to Bobbitt, the six modalities are:

> (1) Text (questioning what a particular word or term would mean to "a person on the street")[28]
> (2) History (considering the intentions of the constitutional framers and ratifiers)[29]
> (3) Structure (looking to the Constitution's structure as a whole to understand an individual provision's meaning within the document)[30]
> (4) Doctrine (drawing from the rules, principles, and standards that courts have established in prior cases)[31]
> (5) Prudence (weighing the policy consequences – *i.e.*, the practical costs and benefits – of various interpretations)[32]
> (6) Ethos (consulting the American ethic as expressed in the Constitution)[33]

[28] Justice Hugo L. Black famously held textualism as his principal modality, applying it to conclude that nearly all restrictions on speech are unconstitutional because the text of the Free Speech Clause absolutely provides that "Congress shall make *no law* . . . abridging the freedom of speech." (emphasis added). For examples of Black's textualism, see *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579; *Adamson v. People of State of California* (1947) 332 U.S. 46, 68-92 (Black, J., dissenting).

[29] All members of the current U.S. Supreme Court use this modality, though Justices Scalia and Thomas are most outspoken and systematic in their use of it.

[30] For example, under the structural modality, a court will interpret the scope of its jurisdiction by considering the Constitution's separation of powers, which distributes power among the three branches of the federal government, and federalism, which allocates power between federal and state governments. Charles Black is most famous for promoting structuralism.

[31] According to the doctrine of *stare decisis*, the Court's affords its prior decisions different weights, depending on several factors.

[32] The pragmatic approach is most popular among law-and-economic scholars and judges, such as Seventh Circuit Judge Richard A. Posner.

[33] One such ethical principle is the Lockean notion that the government has limited powers and

These six modalities, according to Bobbitt, form our constitutional grammar. So to form a sensible statement about the Constitution, we must rely on at least one of these modalities. Bobbitt's approach has been incredibly influential and well-received because his approach moves constitutional interpretation away from an obsession with legitimacy and solipsism. Indeed, by describing what lawyers and judges actually do in practice, Bobbitt largely dissolved the abstruse philosophical questions about what is a legitimate way of interpreting the Constitution and how individual interpretations can lead to public understanding.

Unfortunately, however, Bobbitt's scheme has two major defects that have threatened his entire enterprise. One defect can be characterized as "the modal-conflict problem": Bobbitt's scheme does not adequately explain how courts decide cases when two or more modalities conflict with one another. The second defect can be characterized as "the modal-stasis problem": by limiting constitutional arguments to a grammar consisting of only six modalities, Bobbitt seems to ignore the evolutionary and creative component of constitutional law. Indeed, for Bobbitt to argue that all extra-modal arguments are nonsensical, *i.e.*, illegitimate, he must commit himself to a static vision of constitutional law, a vision that is belied by the fact that lawyers continue to create novel arguments and constitutional law continues to evolve.

Bobbitt did attempt to solve the modal-conflict problem in *Constitutional Interpretation* by claiming that judges do and should turn inward to their consciences to resolve modal conflicts. Bobbitt calls this inward movement a "recursion to conscience,"[34] which he sees as "the crucial activity on which the [modal] constitutional system of interpretation . . . depends."[35] This recursion is so crucial for Bobbitt because it provides "[t]he space for moral reflection on our ideologies, just as garden walls can create a space for a garden."[36]

Many scholars, however, have not found this solution satisfying, for it makes judging modal conflicts an individualistic and largely unprincipled exercise. Indeed, just as Dennis Patterson has criticized Dworkin's interpretationism,

ultimate authority thus resides in the individual. For one of the most systematic – and controversial – accounts of Lockeanism's role in the American ethos, see Louis Hartz, *The Liberal Tradition in America* (1955).

[34] Bobbitt, *Constitutional Interpretation* (1991) 184.

[35] Ibid.

[36] Ibid 177.

Patterson has also argued that Bobbitt's proposed solution similarly fails because it makes judging an inward and subjective experience. In making this argument, Patterson again points to Charles Taylor's claim that communities construct understanding through common meanings.[37] Similar to how Patterson charges Dworkin for not resting his interpretationism on Taylor's notion of community understanding, Patterson likewise argues that Bobbitt fails to provide a mechanism whereby lawyers and judges resolve modal conflicts with common meanings. In a sense, Bobbitt's "recursion to conscience" is even more threatening to his modal scheme than Dworkin's individualism is to his interpretationism, because Bobbitt's entire modal scheme rests on Wittgenstein's notion that meaning arises only through public action; Bobbitt's scheme therefore does not seem to fit with his claim that judges resolve modal conflicts by consulting their consciences. For Bobbitt's modal scheme to succeed – and thus for constitutional interpretation to be rescued from critical legal theory's threat of nihilism and interpretationism's threat of solipsism – we must find a public mechanism by which lawyers and judges can resolve modal conflicts.

II. Ian Bartrum's Use of Metaphor Theory to Resolve the Problems in Bobbitt's Modal Approach

Such a public mechanism is proposed in a recent article by Ian C. Bartrum, who looks to Max Black's theory of metaphors to resolve both the modal-conflict and the modal-stasis problems.[38] Bartrum begins his article by explaining the traditional Aristotelian theory of metaphors, which holds that a metaphor is "the application of an alien name by transference either from genus to species, or from species to genus, or from species to species, or by analogy, that is, proportion."[39] Under this view, a metaphor simply compares concepts.

Bartrum then discusses how twentieth-century theorists challenged this account by arguing that metaphors are different from similes in that metaphors do not merely compare concepts but actually produce new meanings. In particular, Bartrum examines two theorists, Ivan Richards, who claimed that the interaction of two distinct ideas produces metaphors,[40] and Max Black, who extended Richards's notion of interaction to develop the theory that a

[37] Patterson, above n 17, 145.
[38] Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt's Theory of the Constitution* (2008) 17 Wm. & Mary Bill Rts. J. 157.
[39] Aristotle, *Poetics* 21 (1997) 41.
[40] I.A. Richards, *The Philosophy of Rhetoric* (1936).

metaphor is the combination of two entities, a frame and a focus.[41] The frame, according to Black, is the principal idea that a metaphor expresses, and the focus is the secondary idea that interacts with the frame to create the metaphor.

Bartrum explains Black's example of the war-chess metaphor. We often use chess terms to describe battles; for example, we might say that a particular battle placed the enemy in check. Black argues that this metaphor consists of a frame (the battle) and a focus (the chess vocabulary), and their interaction enables us to understand war in a way we could not understand it through literal description. To illustrate Black's theory further, Bartrum offers his own example of how "playing more than one musical note at a time can produce a chord [in which] the overlapping notes create a new sound that cannot be understood simply in terms of its constituent parts."[42]

Linking metaphor theory with Bobbitt's constitutional modalities, Bartrum argues that just as the interaction of ideas create metaphors, the interaction of modalities create new modalities, what Bartrum calls a "modal metaphor." Bartrum offers three examples of such modal metaphors.

One modal metaphor is "intratextualism," an interpretive methodology most often associated with Akhil Amar's influential 1999 Harvard Law Review article by that name.[43] In that article, Amar explains how intratextualism is different from Bobbitt's textual modality. Whereas Bobbitt's textual modality defines words "as they would be interpreted by the average contemporary 'man on the street,'"[44] intratextualism defines words as they are used within the Constitution as a whole.

The most famous example of intratextualism is *McCulloch v. Maryland*,[45] where the Supreme Court considered whether the federal government's creation of a national bank was constitutional under the Necessary and Proper Clause. Maryland argued that the bank violated this clause because the national government did not *need* to create a national bank for it to regulate interstate commerce. Maryland's argument seemed iron-clad if the "necessary" in the Necessary and Proper Clause had this strictly logical meaning of being required for another act. But Chief Justice Marshall, looking to how the word "necessary" was used in other parts of the Constitution, concluded that in the

[41] Max Black, *Models and Metaphors: Studies in Language and Philosophy* (1962).
[42] Bartrum, above n 38.
[43] Akhil Reed Amar, *Intratextualism* (1999) 112 Harv. L. Rev. 747.
[44] Bobbitt, *Constitutional Interpretation,* 13.
[45] (1819) 17 U.S. (4 Wheat.) 316.

Constitution "necessary" does not have a strictly logical meaning but rather a practical meaning. According to Marshall, the Constitution's use of the term "necessary" means something like "reasonable" rather than "required." So even though the national bank was not actually required to regulate interstate commerce, the Court held that the bank was constitutional because it was *reasonably related* to regulating interstate commerce.

Bartrum points out that Marshall's intratextual reading of "necessary" in *McCulloch* is actually a combination of two constitutional modalities, textualism and structuralism. Marshall did not just apply the textual modality, for that would involve looking only to the actual meaning of "necessary." Marshall instead considered its meaning within the *total structure* of the document, thus combining textualism with structuralism.

Bartrum argues that intratextualism arose from the interaction of two modalities, just how a metaphor arises from an interaction of a frame and a focus. Indeed, Bartrum explains that by using textualism as a frame and structuralism as its focus, Chief Justice Marshall created the modal metaphor of intratextualism, and this modal metaphor, according to Bartrum, "may allow us to perceive constitutional meanings of which we were not yet aware."[46]

Another hybrid-modality for Bartrum is "doctrinal-prudentialism," which was largely created by Louis Brandeis before he became a Supreme Court Justice. While still a practicing lawyer, Brandeis wrote a 113-page brief in *Muller v. Oregon*,[47] in which Brandeis urged the Supreme Court to uphold the constitutionality of an Oregon law limiting the hours women could work each day in particular trades. Brandeis's brief is famous for being the first to rely principally on social-science data rather than legal precedents. To the surprise of many, this brief convinced the Supreme Court to uphold the Oregon law, even though the decision came at the height of the *Lochner* era, a time in which the Supreme Court consistently invalidated many similar labour regulations for violating the sacrosanct liberty to contract.[48]

Facing a conflict between Supreme Court doctrine and public policy, Brandeis created the modal metaphor of doctrinal-prudentialism. Brandeis clearly adhered to the doctrinal modality, expressly accepting the Supreme Court's doctrine that labour regulations must be reasonably related to legitimate government interests. But Brandeis also used the prudential modality by

[46] Bartrum, above n 38, 174.
[47] (1908) 208 U.S. 412.
[48] See, e.g., *Lochner v. New York*, (1905) 198 U.S. 45.

arguing that this particular regulation of women was reasonable because the regulation's benefits (improving the health of women) outweighed its costs (limiting the contractual rights of women workers and their employers). Combining these modalities, Brandeis argued that the Supreme Court could uphold the Oregon law without overruling its prior decisions. This combination of doctrinalism and prudentialism was, according to Bartrum, an "act of constitutional creativity,"[49] fusing social science and law, thus "mov[ing] the entire practice [of law] forward."[50]

A third hybrid-modality for Bartrum is "ethical-prudentialism." This hybrid-modality allows courts to create a controversial ethical right by prudentially limiting the application of the right due to the political costs of a more expansive interpretation. As an example of ethical-prudentialism, Bartrum offers *Brown v. Board of Education*, where the Court confronted a host of conflicting modal arguments: whereas the Fourteenth Amendment's text guaranteed "equal protection" for all citizens, the governing equal-protection doctrine allowed "separate but equal" treatment of different racial groups, and the constitutional history suggested the permissibility of racial segregation in public schools.

To resolve this modal conflict, the Court created a new hybrid-modality, using the ethical modality to invalidate the "separate but equal" doctrine but then using the prudential modality to put the decision into practice. Given the racism at the time, the Court knew that many states would resist a judicial mandate to integrate their schools immediately. And massive disobedience would undermine the ethical principle announced in the Court's opinion. So the Court, relying on the prudential modality, ordered schools to integrate "with all deliberate speed," allowing states to take an unspecified period of time to effectuate the Court's controversial opinion. This ethical-prudential hybrid allowed constitutional law to evolve.

Overall, Bartrum's project represents a significant advancement in the debate over constitutional interpretation because it seems to repair the two major defects in Bobbitt's modality approach. Indeed, Bartrum's metaphor theory seems to resolve the modal-conflict problem by demonstrating that courts create new hybrid-modalities to reconcile modal conflicts. Bartrum's theory also seems to resolve the modal-stasis problem because, under his theory, modal conflicts generate new ways of interpreting the Constitution, thus accounting for the evolutionary dimension of constitutional law.

[49] Bartrum, above n 38, 178.
[50] Ibid 188.

A major shortcoming of Bartrum's theory, however, is that it fails to account for the unpredictability and randomness often present in the creation of new modalities. Moreover, Bartrum largely ignores the fact that there are different types of modal conflicts. Some modal conflicts do not create new hybrid-modalities at all; in these instances, a court just decides the case by trumping one modality over its conflicting counterpart. Other modal conflicts, however, do create hybrid-modalities, like the ones discussed in Bartrum's article. But a third category is unlike the other two in that it arises from a conflict within one modality, stirring up so much legal chaos that it has the potential to create a new modality altogether. This third category is much like Bartrum's comparing a metaphor to a musical chord, whereby the chord produces a sound that is greater than the sum of its constituent parts. The following section will argue that the richest and most accurate account of this creative process is not metaphor theory but rather complexity theory.

III. Using Complexity Theory to Resolve the Problems in Bobbitt's Modal Approach

Complexity theory is the study of how complex systems operate. A common feature of these systems is that their constituent parts interact and in the process aggregate properties greater than their sum, self-organize spontaneously, and cooperate emergently. A summary of some leading works of complexity theory will reveal how we can conceive of constitutional interpretation as a complex system in which modal conflicts spontaneously create new modalities.

A. Background on Complexity Theory

A leading proponent of complexity theory was the chemist Ilya Prigogine, who in 1977 won a Nobel Prize for his work on dissipative systems in thermodynamics. His book *The End of Certainty*[51] challenges the traditional view that natural phenomena operate mechanistically. Prigogine explains that while isolated systems might operate like machines, as the Newtonian model holds, most systems in the real world operate dynamically because they are not isolated but are in fact open. Whereas near-equilibrium open systems do not evolve internally, far-from-equilibrium systems do evolve internally. Prigogine calls a far-from-equilibrium open system a "dissipative system," because such a system arises from a dissipative process – *i.e.*, a process by which energy is exchanged between the system and its surrounding environment.

[51] Ilya Prigogine, *The End of Certainty* (1996).

These dissipative systems evolve internally through several steps. When a system can no longer absorb energy, fluctuations occur, prompting a bifurcation point. The system must then choose between opposing directions, what Prigogine calls the "pitchfork bifurcation."[52] This presents an *ex ante* unpredictable decision of which pitchfork path the system will take. Once the system "chooses" a path, further bifurcation follows, again forcing the system to re-organize itself. Significantly, this unpredictable process can produce chaos or order, regression or evolution. Prigogine sees this process as an act of creativity.

What makes Prigogine's discoveries in thermodynamics relevant to the social sciences is that Prigogine argues that the chaotic creativity found in thermodynamic systems is amplified in the human experience. As Prigogine puts it, "We see that human creativity and innovation can be understood as the amplification of laws of nature already present in physics or chemistry."[53] When we are far from equilibrium, we, just like the dissipative system, spontaneously form new alignments to create new orders.

Similar to Prigogine, biologist Stuart A. Kauffman views human activity as a lawless and creative enterprise. Accordingly, Kauffman attacks physical reductionism – *i.e.*, the reduction of all phenomena to particles in motion – for failing to account for the values and creativity that we encounter in the world. In his book *Reinventing the Sacred*,[54] Kauffman discusses how biological evolution illustrates the world's creativity and unpredictability. One of Kauffman's favourite examples is the heart.

The heart's apparent function is to pump blood, so, Kauffman explains, Darwin's natural-selection theory would hold that the heart was *selected* for that purpose. But the heart of course does things in addition to this purpose; it also, for example, makes thumping sounds. For Kauffman, the heart's sound-making feature challenges physical reductionism, because physics will allow us only to identify all the heart's physical properties, not to identify its biological *purpose* to pump blood.

Kauffman explains that the heart's blood-pumping feature is its adaptation, but its sound-making feature is a Darwinian preadaptation, that is, a feature of an organism that has no selective significance in its normal environment but

[52] Ibid 65.
[53] Ibid 71.
[54] Stuart A. Kauffman, *Reinventing the Sacred* (2008).

nonetheless might be useful in an abnormal environment. In other words, the heart was "preadapted" to produce the novel function of producing sound. Kauffman explains that whenever an organism is the subject of natural section in its normal environment, a novel feature for an abnormal environment will be part of the natural-selection process.

Importantly, though, this preadaptation is not *ex ante* predictable. For example, we could not tell just by examining the heart that because its purpose is to pump blood, it also will produce sound. According to Kauffman, this unpredictability challenges Newtonian science because, under that methodology, the scientist derives predictions by first determining the set of all relevant possibilities.[55] Since we cannot know all the relevant possibilities, we cannot use the Newtonian method to calculate the evolution of the biosphere. Kauffman concludes that we therefore must accept the radical unpredictability and creativity of evolution.

Like Prigogine, Kauffman argues that this unpredictability applies not only to natural phenomena but also to human culture, creating a world of possibility or, in Kauffman's words, "the adjacent possible." For example, Kauffman writes, technological inventions operate in unpredictable ways, such as the invention of the tractor.[56] In trying to create the tractor, engineers realized that they would need a massive engine block, but after trying such a block on a chassis and seeing the chassis break, engineers realized that the massiveness and rigidity of the engine block would make it useable as the chassis itself. And this is how we make tractors now, using the engine block as the chassis. Kauffman argues that the block's feature of rigidity was like a Darwinian preadaptation, in that the block's rigidity was a feature that was not its primary function in its normal environment of serving as an engine block but its rigidity then became useful as a chassis in its new environment.

Kauffman argues that, just like our inventions, our economy is also ceaselessly creative and unpredictable because it consists of these Darwinian preadaptations. Due to this unpredictability, "the best venture capitalists are more often wrong than right,"[57] and even when they are right, it is usually a short-sighted prediction "rely[ing] as much on intuitions as on strict algorithms."[58]

[55] Ibid 133.
[56] Ibid 152.
[57] Ibid.
[58] Kauffman, above n 54, 153.

In much of his work, political economist Mark Blyth has similarly noted this uncertainty of economics. In his book *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*,[59] Blyth explores the move in the 1970s and 1980s away from Keynesianism and toward supply-side economics. Blyth argues that what explains this shift is not solely the structure of the economy but also the *ideas* of political agents at the time. And these ideas stemmed not just from the economic interests of those in power but rather from their identities. During times of economic uncertainty, Blyth argues, political agents make decisions based on how actions resonate with their identities. Indeed, "in moments of crises when agents are uncertain about their interests, they resort to repertoires of action that resonate with their core identities."[60]

This resonation between action and identity appears prominently in political theorist William Connolly's work. In his *Capitalism and Christianity, American Style*,[61] one of the most ambitious applications of complexity theory to social phenomena, Connolly explores the surprising but supremely powerful alliance in American politics between nonreligious capitalists and working-class evangelicals. Connolly argues that given the differences separating these two groups, we cannot understand their coalition by considering only their interests. Indeed, Connolly writes, there is very little that these groups have in common. What unites them, however, is their existential realities: they are resentful, the capitalists resenting any governmental action that limits their wealth-maximizing efforts and the evangelicals resenting those who have not embraced their view of salvation. According to Connolly, "the spirit of evangelical and corporate leaders resonates together across a set of doctrinal differences,"[62] and this resonation "sets the stage for a consolidation of a movement larger than the sum of its component parts."[63]

Connolly adeptly anticipates and counters the argument that complexity theory cannot apply to social systems. Some might argue, of course, that complexity theory is limited to natural science, because social systems, unlike their physical counterparts, stem from human agency. So this capitalist-evangelical alliance might merely be a rational decision by politically savvy agents seeking to maximize their power in one political party. But Connolly explains that agents of the capitalist-evangelical resonance machine, such as George W. Bush and

[59] Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (2002).
[60] Ibid 267.
[61] William Connolly, *Capitalism and Christianity, American Style* (2008).
[62] Ibid 41.
[63] Ibid.

Bill O'Reilly, do not construct but merely "dramatize the resonance machine."[64] In other words, "[t]hey are catalyzing agents and shimmering points in this machine; their departure will weaken it only if it does not acquire new personas to replace them."[65]

In applying complexity theory to social organizations, Russ Marion makes a similar argument in his *The Edge of Organization: Chaos and Complexity Theories of Formal Social Systems*.[66] In that book, Marion contends that we can apply complexity theory to social systems because charismatic leaders, such as Martin Luther King, inherit rather than start political movements. [67] So although political leaders must have their particular traits to trigger the movement, the movement will arise because of a special convergence of factors, not because of the leaders themselves. To put this in Prigogine's language of resonance, a political concept might circulate without consequence for many years before, due to a shift in circumstances, the concept "resonates" with other ideas and individuals, thereby creating a new movement. The resonance and not the political actor is the cause of change.

B. Applying Complexity Theory to Constitutional Theory

So what does complexity theory have to do with constitutional modalities? The answer has to do with the similarity between constitutional interpretation and far-from-equilibrium systems. In *Reinventing the Sacred*, Kauffman presses on but does not fully engage this analogy, dedicating only a few pages to how complexity theory might apply to law. In those pages, Kauffman explains that, just like a biological organism, law is a complex system that, through self-organization, "can change dramatically in fully unexpected, unpredictable ways."[68] Kauffman notes that the law changes partly as a result of our struggle to find the Pareto optimal moral policy, and that the law changes even though the doctrine of *stare decisis* limits the alteration of precedent. Thus, Kauffman concludes that for the law as a whole to change coherently, precedents must co-evolve harmoniously from moral conflicts. But, Kauffman asks, what coordinates this harmonious co-evolution? Kauffman speculates that perhaps one day we can find a meta-law that accounts for this coordination, but even if

[64] Ibid 50.
[65] Ibid.
[66] Russ Marion, *The Edge of Organization: Chaos and Complexity Theories of Formal Social Systems* (1999).
[67] Ibid 216-17.
[68] Kauffman, above n 54, 269.

we did, "it is extremely unlikely that any such law, power law or otherwise, will predict the specifics of the evolution of the law [as a whole]."[69]

But the chaos in law is much greater than even Kauffman seems to appreciate. Not only do moral conflicts push courts to decide cases in divergent ways, but these meta-laws, the very tools that courts use to stabilize the law, are themselves unstable and subject to realignment. We can see this in Bobbitt's modalities, which are meta-laws that lawyers and courts use to anchor and stabilize constitutional interpretation. These very modalities are constantly evolving as a result of their own framework. Recall what Bartrum identified in the modalities: new hybrid-modalities – what Bartrum calls "modal metaphors" – can emerge when there is a conflict between modalities. Instead of viewing this as a linguistic process, as Bartrum sees it, we can better see its creativity, unpredictability, and mutability by viewing constitutional interpretation as a complex process by which the modalities self-organize and produce new modalities.

The various complexity theorists discussed above shed light on this process. For example, the process of modal conflicts yielding new modalities is just like Prigogine's dissipative system in thermodynamics: in both situations, the law that generally governs the interaction is no longer suitable, and in this lawless universe, the parts of the system interact to produce an unpredictable reaction that is larger than the sum of its parts. Put more concretely, whereas Bobbitt's modal approach generally governs cases in which there is no conflict between the modalities, his approach cannot govern cases involving modal conflicts. So this case is *ex ante* lawless. But the interaction of the conflicting modalities might generate a hybrid-modality that the court then uses to decide the case. This hybrid-modality is more than a sum of the conflicting modalities; it is an entirely new way of interpreting the Constitution. And as Bartrum explains in his paper, some of these hybrid-modalities somehow stick with us and become permanent fixtures in our modal system.

Kauffman's notion of Darwinian preadaptations provides further insight into this process. In our modal system, the modalities are selected to dispose of normal cases in the way in which Bobbitt contends – with lawyers and judges using individual modalities to resolve controversies. So this feature is the adaptation applicable in the normal environment of when there is no conflict among the modalities. But the feature that allows modal conflicts to produce new modalities is a Darwinian preadaptation, becoming useful only in the abnormal environment of modal conflicts.

[69] Ibid at 271.

Connolly's complexity theory also provides insight into how phenomena, whether natural or social, can resonate with one another to produce events that were *ex ante* unpredictable – even unpredictable, perhaps, by those human agents involved in the creation. Likewise, judges and lawyers can create new modalities by resolving modal conflicts, without even realizing that they have created a new method of interpreting and viewing the Constitution.

Together, these complexity theorists represent a new model of thought. Under the old model, natural and social phenomena were considered predictable, linear, and expressible in simple time-independent laws. By contrast, the new model holds that many phenomena are unpredictable, nonlinear, and expressible only in time-dependent pluralities. But it does not appear that the new model requires the wholesale abandonment of the old model. Indeed, the old model still works for equilibrium or near-equilibrium systems. So while we can still apply linear formulations to these systems, we will need to think in a less linear and more contextual way when dealing with far-from-equilibrium systems. The following section will flesh out precisely how a case involving a modal conflict can act like a near-equilibrium system, thus making complexity theory inapplicable, but how other cases involving modal conflicts will act like a far-from-equilibrium system, making complexity theory the best explanation for how the law operates.

IV. Three Types of Modal Conflicts and the Emergence of Intradoctrinalism

In cases involving modal conflicts, the modalities can interact with one another in three ways. Some modal conflicts resemble near-equilibrium systems and do not generate new modalities; some modal conflicts resemble far-from-equilibrium systems and generate hybrid-modalities; and a final category of modal conflicts are even farther from equilibrium and create new modalities altogether. In describing this final category of modal conflicts, this section identifies an emerging modality, what we might call "intradoctrinalism," the interpretation of a particular doctrine in a way that makes all of the Court's doctrines logically cohere.

The first category involves a court trumping one modality over a conflicting modality, thereby removing the conflict. This case operates similarly to a case in which there is no modal conflict, a case we can call an "equilibrium case" in which the modalities effectively cohere with each other to push the court toward a particular conclusion. So when a court resolves a modal conflict by trumping one modality over its conflicting counterpart, it operates like a "near-

equilibrium case." In such a case, complexity theory does not apply because no new modalities emerge.

A good example of this first category of modal conflict is *Lawrence v. Texas*.[70] In this case, the Supreme Court invalidated a Texas sodomy ban on the ground that it violated the constitutional right to engage in private, consensual, intimate conduct. The case raised a sharp conflict between the doctrinal and ethical modalities. The doctrinal modality clearly called for the Court to find that there is no constitutional right to engage in such conduct, because only 17 years earlier, in *Bowers v. Hardwick*,[71] the Court rejected an almost identical claim by a gay couple prosecuted for engaging in oral sex while in the privacy of the bedroom. But the ethical modality pushed the Court in *Lawrence* toward another direction. Writing for the majority, Justice Kennedy explained that a fundamental principle of the American constitutional ethos is that the government may not regulate conduct that does not harm others.[72] So the doctrinal modality commanded the Court to uphold the Texas sodomy ban, and the ethical modality mandated the Court to invalidate the ban. The Court resolved the modal conflict by trumping the ethical over the doctrinal, a move that infuriated Justice Scalia. This clearly was not a far-from-equilibrium case because the Court simply chose an already-existing modality to resolve the modal conflict.

The second category of modal conflicts likewise involves a conflict between two or more modalities, but, unlike the first type of modal conflict, this type can generate a hybrid-modality, like the "modal metaphors" discussed in Bartrum's article. Such cases operate like far-from-equilibrium systems in that we cannot predict which hybrid-modalities will emerge.

An example of a conflict between modalities is the *Muller v. Oregon* case, which as discussed above, involved an Oregon law that regulated women labourers in a way that appeared unconstitutional under the Supreme Court's governing precedents, namely, the *Lochner* case decided only a few years earlier. So the doctrinal modality called for the Court to invalidate the Oregon law. But because men in power during this time viewed women as frail and in need of governmental protection, all of the Supreme Court Justices at the time believed that the Oregon law was extremely beneficial, presenting a conflict between the doctrinal and prudential modalities. The Court reconciled this conflict by creating a new modality, what Bartrum calls doctrinal-prudentialism. Applying

[70] (2003) 539 U.S. 558.
[71] (1986) 478 U.S. 186.
[72] This ethical principle is of course traceable to John Stuart Mill's no-harm principle.

this hybrid-modality, the Court was able to uphold the prevailing *Lochner* doctrine while at the same time upholding the Oregon law. More specifically, the Court interpreted its precedents to ban unreasonable regulation of labour, and then used the prudential modality to argue that given the costs and benefits of regulating women workers, the Oregon law was reasonable and thus constitutional.

The *Muller* case acted like a far-from-equilibrium system because the conflict between the Court's doctrine and prudence prompted the Justices to view constitutional law in a different light so that it could create a way of interpreting the Constitution that had not yet existed. The doctrinal and prudential modalities resonated with one another to generate a new approach to constitutional interpretation.

A third category of modal conflicts differs from the first two in that this third category involves a conflict not between modalities but *within one modality*. Such an intramodal conflict is about as far as we can get from equilibrium because it causes the entire modal structure to collapse around one modality. This intramodal conflict creates so much tension and chaos within the law that the conflict can create a new modality altogether.

Locke v. Davey[73] provides an excellent example of this process. That case involved a Washington State program that awarded college scholarships to students who satisfied various academic and financial conditions. One student, Joshua Davey, satisfied these conditions but Washington State nevertheless denied him a scholarship because the Washington State Constitution forbids government funding of theological education and Davey sought to use the funding to train for the ministry at Northwest College, a religious school.

Davey sued the state for violating the First Amendment's Free Exercise Clause.[74] Davey had a strong free-exercise claim because of the Court's precedent, *Employment Division v. Smith*,[75] which had changed free-exercise law so that it prohibited governmental discrimination on the basis of religion. Between *Sherbert v. Verner*[76] and the *Smith* decision, a period covering almost 30 years, the free-exercise rule was that when a religious individual sought an

[73] (2004) 540 U.S. 712.
[74] Davey also claimed that the state violated the First Amendment's Free Speech Clause and the Fourteenth Amendment's Equal Protection Clause, but those claims are not relevant for our purposes here.
[75] (1990) 494 U.S. 872.
[76] (1963) 374 U.S. 398.

exemption from a law because the law burdened her religious exercise, the issue was not whether that law discriminated on the basis of religion but rather whether that burden to the individual was "substantial." If a court found the burden substantial, then the issue was whether the government had a "compelling interest" in exempting the individual from the law; if not, the individual did not need to follow the law.

But in several cases leading up to *Smith*, the Supreme Court applied this rule inconsistently, and finally, finding this standard too difficult to apply, the Court changed the rule in *Smith*. There, the Court held that the Free Exercise Clause allows the government to impose whatever types of burdens on religious activities, even so-called "substantial burdens," so long as the burden is religion-neutral and generally applicable. In other words, the only prohibition contained in the Free Exercise Clause is that the government must not discriminate on the basis of religion. So the Court in *Smith* converted the Free Exercise Clause to a non-discrimination provision, preventing the government from treating religion and non-religion differently.

Under this rule, Joshua Davey had an extremely powerful argument because Washington State, by denying him funding, clearly singled out religion for disfavoured treatment. Indeed, the state had said that Davey could use the scholarship funds to study whatever he wanted at whichever school he wanted, except he couldn't study religion at a religious school.

But there was a countervailing group of Supreme Court precedents pointing the *Davey* Court in the opposite direction. Almost 20 years before the *Smith* decision, in *Lemon v. Kurtzman*,[77] the Supreme Court ruled that government funding of religion violates the First Amendment's Establishment Clause if the funding either (1) lacks a secular purpose, (2) has the primary effect of advancing religion, or (3) entangles religious and governmental authority excessively. Throughout the 1970s and 1980s, the Court applied this *Lemon* test to invalidate several funding programs that had the effect of funding religious education. For example, in *Committee for Public Education v. Nyquist*,[78] the Supreme Court considered the constitutionality of a New York program that gave various types of aid to private schools and parents who sent their children to private schools. The Court held that the Establishment Clause prohibited New York from including religious institutions among these private schools because, by reducing expenses for the religious schools, the program would have the primary effect of supporting religion, in violation of the *Lemon*

[77] (1971) 403 U.S. 602.
[78] (1973) 413 U.S. 756.

test's second prong.

Although the Supreme Court eventually retreated from this strict application of the *Lemon* test by upholding some government programs that funded religious education, such as a Cleveland program that indirectly funded religious schools through third-party beneficiaries,[79] the *Lemon* test was still the predominant doctrine in Establishment Clause law at the time the Court decided *Davey*. Moreover, when the Court heard the *Davey* case, some of its stricter applications of the *Lemon* test, such as the *Nyquist* decision, had not been overruled and were thus binding precedents. So while it was clear in *Davey* that the Establishment Clause allowed Washington State to fund Joshua Davey's religious training, it was also clear that the Establishment Clause of the 1970s and 1980s would have prohibited such funding, and the *Lemon* test – the very doctrine that had been used to prohibit such funding in the 1970s and 1980s – was still the predominant judicial test governing the Court's Establishment Clause jurisprudence.

Thus, Joshua Davey's claim, though framed as a case about the Free Exercise Clause, was really about both Religion Clauses.[80] Indeed, it was really a battle between the Court's free-exercise precedents and its disestablishment precedents. Importantly, no legal scholars or judges seemed to anticipate these groups of precedents colliding with another. This collision was unpredictable because, before the *Davey* case, the Supreme Court had never considered whether a government's decision to fund a particular individual or activity might violate the *Smith* free-exercise doctrine. So no one thought that the Establishment Clause prohibition on government funding of religion would ultimately clash with the Free Exercise Clause prohibition on government discrimination on the basis of religion.

We can thus envision these two assemblages of precedents as two glaciers that had been still in the water for a long period of time, until a spontaneous change in wind impelled them to drift toward one another, making their collision ineluctable. Once the drift was initiated, there was no way for one set of precedents to prevail without destroying the other.

[79] *Zelman v. Simmons-Harris* (2002) 536 U.S. 639.

[80] As I have previously explained in other articles, the *Davey* case was really about both Religion Clauses, even though the case formally involved only the Free Exercise Clause. Jesse R. Merriam, *Finding a Ceiling in a Circular Room:* Locke v. Davey*, Religious Neutrality, and Federalism* (2006) 16 Temp. Pol. & Civ. Rts. L. Rev. 103.

So how did the Court resolve the matter? In a 7-2 opinion, the Court rejected Davey's claims. The Court found that Washington had imposed a minimal burden on Davey's religious exercise because this burden was just like being denied the scholarship for failing to satisfy one of the scholarship's various economic and financial conditions. Moreover, the Court ruled that Washington State had a substantial interest in enforcing the church-state separation required by its own state constitution, even if this separation exceeded what the Court had found required by the Establishment Clause. Given Davey's minimal burden and Washington state's substantial interest, the Court concluded that the state had the discretion not to fund Davey's religious training.

The Court based this ruling on a "play in the joints" principle.[81] To the frustration of many legal scholars, the Court did not outline – and still has not outlined – the contours of this principle. But the principle appears to mean that when a case presents a conflict between the Court's Establishment Clause prohibition on government funding of religion and the Free Exercise Clause prohibition of religious discrimination, the government has the discretion to choose how to navigate the boundaries. Some state governments might want to protect church-state separation more vigorously; others might want to go in the opposite direction by ensuring absolute equality between religion and non-religion. Governments may go in either direction without triggering close judicial scrutiny.

The majority's reasoning infuriated Justices Scalia and Thomas, who each wrote dissenting opinions arguing that the Free Exercise Clause doctrine required Washington State to include Davey in its scholarship program. In his dissenting opinion, Scalia argued that there was no basis in the law for this flimsy "play in the joints" principle. In fact, Scalia wrote that we can "use the term 'principle' [only] loosely, for [play in the joints] is not so much a legal principle as a refusal to apply any principle when faced with competing constitutional directives."[82]

But what Scalia and Thomas failed to appreciate is that while the "play in the joints" principle was not explicated in the Court's precedents, the principle *emerged* from a conflict between the Court's precedents. Moreover, this principle was not just a mere refusal to apply a principle, as Scalia claimed, but was rather an application of the law of contradiction. Deontic logic, the area of logic dealing with obligations, holds that it is a logical contradiction for the

[81] *Davey*, above n 73, 718.
[82] Ibid 728.

same act to be both required and prohibited.[83] That is, it is logically contradictory to prohibit that someone perform the same act that the person is required to perform. Applying this rule of deontic logic to constitutional law, the Free Exercise Clause cannot require that the government fund religious schools in a way that the Establishment Clause had at one point prohibited the government from doing.

Although the *Davey* Court of course did not cite this rule of deontic logic, there is evidence that this intuitive proposition of logic resonated with the Court's free-exercise and disestablishment doctrines to generate the "play in the joints" principle. For example, in oral argument, Justice Kennedy expressed concern about how if the Court held the Free Exercise Clause to require the inclusion of Davey in Washington's scholarship program, the Court would then run up against the Establishment Clause rationale for excluding Davey from the program. Indeed, Kennedy said to Joshua Davey's counsel that "if we decide in your favour, we necessarily commit ourselves to the proposition that an elementary and secondary school voucher program must include religious schools if it includes any other private schools . . . [and this commitment] would foreclose this Court on the voucher issue."[84]

We might call this use of a logical rule to harmonize judicial precedents an instance of "intradoctrinalism." Recall that Bartrum explained how intratextualism emerged from the combination of the structural modality, which interprets a particular constitutional provision in light of the entire document, and the textual modality, which interprets a particular constitutional provision by considering the provision's meaning to the common person. Similarly, the *Davey* court reached its decision by examining the Court's particular doctrines in light of all the Court's doctrines. That is, the Court interpreted the governing free-exercise doctrine in a way that allowed Washington's exclusion of Davey on the basis of religion, and the Court's basis for this interpretation was that the Court's still-extant disestablishment doctrine had at one point required the exclusion. So the Court interpreted a particular doctrine in a way that made all of its doctrines logically cohere.

But this intradoctrinalism is not a mere combination of modalities. Indeed, it is very different from the hybrid-modalities that Bartrum identified in his article.

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[83] *See* Stanford Encyclopedia of Philosophy, *Deontic Logic* <http://plato.stanford.edu/entries/logic-deontic/> at 30 March 2009.

[84] Transcript of Oral Argument, Davey, 540 U.S. 712 (No. 02-1315), 2003 WL 22955928,35-36 (Dec. 2, 2003). For the audio of the oral argument, see OYEZ, *Locke v. Davey* <http://www.oyez.org/oyez/resource/case/1631/audioresources> at 30 March 2009.

We can clearly see this difference in the *Davey* decision. Instead of just combining doctrinalism and structuralism in the *Davey* opinion, the Court *reconceptualized* the doctrinal and structural modalities by applying the law of contradiction to its precedents. This reconceptualization can be captured only by calling it a new modality altogether. And this new modality was triggered by the intramodal conflict that arose when the Court's free-exercise precedents collided with its disestablishment precedents. The intramodal conflict created so much chaos in the law that the Court could reconcile the conflict and decide the case only by creating a new method of interpreting the Constitution altogether.

Conclusion

This paper began by recounting the crisis in constitutional theory over what makes a court's interpretation of the Constitution a legitimate exercise of judicial power. Bobbitt's modal approach largely solved this crisis, but in the process, that approach raised two problems: How do lawyers and courts use the modalities when the modalities conflict, and how does the modal approach account for new methods of constitutional interpretation?

The answers, it seems, lie in the complexity of the modal system. The modalities provide fertile ground for new modalities to emerge and burgeon. Some modal conflicts, as we have seen, are resolved just like normal cases. But other modal conflicts are abnormal and create hybrid-modalities. And still others, like the modal conflict in the *Davey* case, are so legally chaotic that they generate new modalities altogether. Viewed in this light, the modal system is a self-organizing structure that continuously recreates itself. So we do not need to look outside that system for answers about where the modalities come from or how to reconcile modal conflicts: the answers are within the modal system itself.

Complexity theory aids us in understanding the law's unpredictability, self-referentiality, and creativity. Of course, there have already been many works on these features of the law. For example, legal philosopher Peter Suber has written about the law's reflexivity[85] and the critical legal movement has detailed the many ways in which law is indeterminate or at least vastly underdeterminate. These works all have come close to using complexity theory to explain how the law evolves and creates itself, but they have not taken that last step of placing

[85] Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* (1990).

law in the landscape of a world of becoming, an incomplete world that cannot rest still.

The legal academy, along with social scientists, should look to complexity theory to explain how courts reconcile legal conflicts. For example, scholars are currently engaging with major questions about how courts harmonize competing regulatory regimes,[86] arbitrate conflicts between the federal and state governments,[87] and manage interactions between international and national judicial bodies.[88] Complexity theory promises to shed light on all of these issues.

Complexity theory's application to law poses a serious obstacle for those legal scholars and judges who would prefer conceiving of the law as a closed and linear system. These scholars, though they must come to grips with the law's complexity and unpredictability, can at least take solace in what Prigogine calls a "narrow path" in the conclusion of his book, *The End of Certainty*. Prigogine writes that in the narrow path between strict determinism and absolute randomness, causation and indeterminacy co-exist harmoniously. Prigogine's narrow path is a world in which chance produces novelty, but determinate chains constrain the resulting creation. Perhaps the legal formalists and legal realists can similarly find such harmony, agreeing that while the constitutional modalities constrain constitutional interpretation, there is always the chance that a modal conflict will produce new modalities, engendering a new constitutional method and meaning for future generations.

[86] Robert B. Ahdieh, *Dialectical Regulation* (2006) 38 Conn. L. Rev. 863.
[87] Robert A. Schapiro, *Toward a Theory of Interactive Federalism* (2005) 91 Iowa L. Rev. 243.
[88] Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts* (2004) 79 N.Y.U.L. Rev. 2029.

SOVEREIGNTY-ITS CONCOMITANT INGREDIENTS, ITS PRAGMATIC CONSTRAINTS AND ISLAMIC JURISPRUDENCE: A CRITICAL APPRAISAL

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Abstract: The modern concept of sovereignty has had many implications and many writers have tried to deal with them in their own way according to the circumstances in which they lived and, moreover, according to the problems they wanted to address through it.

In the wake of new developments and globalisation, which is associated not only with a new 'sovereignty regime' but also with the emergence of powerful new non-territorial forms of economic and political organisation in the global domain. Globalisation in this account is, therefore, associated with a transformation an unbundling of relationship between sovereignty, territoriality and state power. The traditional conceptualisation of sovereignty was simply a transitional phase in the legal philosophy and whether thoughts of Hobbes and Austin regarding sovereignty can no longer hold feasible in our contemporary world?

The paper will try to examine the concept of 'Sovereignty', the state power and territoriality thus stand today in a more complex relation than in the epoch during which the modern nation-states were forged in the post- world war era. It will also focus on Islamic viewpoint of sovereignty; we mean the whole range of those attributes which are imperative to dominate human intelligence and rationality while laying down the guidelines for the governance.

INTRODUCTION

The modern definition of sovereignty is generally attributed to John Austin. No doubt, he was the first jurist who articulated its concept in such a manner that well suited the legal structure of England. Though written with the

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predominant consideration of British legal system, yet the phraseology which Austin used to define the term 'sovereign' and 'sovereignty' still remains a juristic reality despite all the criticisms from various quarters.

'Sovereignty' - The theory of sovereignty which Austin adopts from Hobbes' political philosophy and, to a lesser extent, from Bentham's commentaries on Blackstone is intended to serve these purposes.[1]

What makes commands rules is the element of generality in them; what makes rules Laws- in the sense of positive laws, the subject of Austin's jurisprudence - is the fact that they are direct or indirect commands of the sovereign of an independent political society .These commands are addressed to the members of that society, who are thus subjects of that sovereign.

It is essential to note that he always means by sovereign the office or institution which embodies supreme authority; never the individuals who happen to hold that office or embody that institution through their relationships at any given time. Austin's sovereign is an abstraction —the location of the ultimate power which allows the creation of law in a society. As will appear later, this point is of the greatest importance, since he has often been criticised for describing sovereignty and the source of legal authority in 'personal' terms. Undoubtedly he felt no need to labour the matter for, in the tradition of political theory which he relies on; sovereignty is explicitly 'abstract'. Hobbes writing in the context of Cromwellian England, describes sovereignty as the 'artificial soul' of 'an artificial man', the latter being the state or commonwealth. The sovereign is an office not a particular person or particular people.[2]

Though generally credited with being the pioneer in the field, John Austin can simply be considered as the jurist who developed the notion of 'sovereignty', the raw material for which had already been supplied by Jeremy Bentham and prior to him by Hobbes. Making a comparison between Bentham and Austin on this point, Joseph Raz observes;

"Sovereignty"–Bentham, 'When a number of persons', he wrote, '(whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons, of a known and certain description (whom

[1] Roger Cotterrell, *The Politics of Jurisprudence — A Critical Introduction to Legal Philosophy* 1989, (Butterworths, London and Edinburgh), 67.
[2] Ibid 67-68.

we may call governor and governors) such persons together (subjects and governors) are said to be in a state of political society.'

One need only compare this passage with the following from the Province, p.l94 to realize how great Austin's debt to his master is. If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society , that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent .[3]

A vague idea had already been given by Hobbes, What is the sovereign of an independent political society? Hobbes had defined such a society as one which could defend itself, unaided, against any attack from without.[4]

Yet Austin, more than any other writer, provided the compact and systematic formulation of a conception of law which allowed an escape from the tradition-bound theory implicit in classical common law thought.[5]

SOME BASIC CHARACTERISTICS OF SOVEREIGN

Describing the basic characteristics of sovereign as enunciated by John Austin, Roger Cotterrell says;

'Some characteristics of Austin's sovereign: It must be common (that is only one sovereign can exist in any political society; the sovereign is, in that sense, indivisible although it can be made up of several components) that it must be determinate (that is, the composition of the sovereign body or the identity of the sovereign person must be clear). A further characteristic has produced more controversy than any other aspect of Austin's conception of sovereignty .That is that the sovereign is illimitable by law. This follows directly from Austin's definition of law. Every law is the direct or indirect command of the sovereign of an independent political society.'[6]

Austin provided what historical jurisprudence could not; a clear designation of the scope of legal knowledge, an orderly theory of law which allowed the legal to be distinguished from the non-legal and the logical connections between

[3] Joseph Raz , *The Concept Of a legal System - An Introduction to The Theory of Legal System*, Second Edition- 1980 (Clarendon Press –Oxford), 6.
[4] Roger Cotterrell , above n 1, 68
[5] Ibid 52.
[6] Ibid 69.

legal ideas to be made explicit. Finally he offered a way of looking at law which made legislation central rather than peripheral .Thus his legal theory recognized the reality of the modern state as a massive organization of power.[7]

One of Austin's most important successors (Hart, 1955) goes on to remark that 'within a few years of his death it was clear that his work had established the study of jurisprudence in England'. (Austin died in 1859)[8]

The basic ingredients of Austinian concept of 'sovereign' and 'sovereignty', according to Joseph Raz,
'Existence criterion - A law is a general command of a sovereign to his subjects. In contrast to Bentham (and Kelsen) Austin thinks that only general commands, i.e. those obliging to acts or forbearances of a class', are laws.'[9]

For Austin a command is defined in terms of the following six conditions: C is A's command if and only if(1) A desires some other persons to behave in a certain way (2) he has expressed this desire (3) he intends to cause harm or pain to these persons if his desire is not fulfilled; (4) he has some power to do so (5) he has expressed his intention to do so and finally (6) C expresses the content of his desire and of his intention and nothing else .In Austin's own words;
'…….But a command is distinguished from other significations of desire by this peculiarity; that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire. (Province, p.14 and p.17)'[10]

A law is part of a legal system if and only if it was enacted directly or indirectly by the sovereign of that system (Austin), or if and only if it is authorized by the basic norm of the system (Kelsen), or if and only if it ought to be recognized according to the rule of recognition of the system (Hart).These three philosophers were not concerned with the material unity of legal systems.[11]

'Austin says that sovereignty is the power of affecting others with evil or pain and of enforcing them, through fear of that evil, or fashion their conduct to one's wishes'. (Province, 24)[12]
Where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command and, therefore, imposes a duty.[13] 'Any

[7] Ibid 69.
[8] Ibid 52.
[9] Joseph Raz , above n 3, 11.
[10] Ibid 11.
[11] Joseph Raz , *The Authority of Law — Essays on law and Morality*, 1979,(Clarendon Press – Oxford), 79.
[12] Josef Raz ,above n 3,12-3

particular law may be disregarded and constantly violated, and still exist, so long as the legal system of which it is a part is on the whole obeyed.'[14]

THE PRAGMATIC CONSTRAINTS OF SOVEREIGNTY

Hobbes, Bentham, Austin and others who followed them in advocating the institution of sovereign having absolute powers within a given society might have been prompted by the political set-up of their own times. They perhaps wanted to discourage any effective challenge to the unbridled authority of the person or persons that happened to be at the helm of affairs and thus to strengthen the existing institutions.

The sovereign state thus emerges to vindicate the supremacy of the secular order against religious claims; and it forces the clerics into the position of subordinate authority from which, after the Dark Ages, it had itself so painfully emerged .It is argued by Bodin, as later by Hobbes in a period of similar disintegration, that if the state is to live there must be in every organised political community some definite authority not only itself obeyed ,but also itself beyond the reach of authority. This was the root of Hobbes' argument .The will of the state must be all or nothing. If it can be challenged the prospect of anarchy is obvious. … A sovereign people, they argued cannot suffer derogation from the effective power of their instruments. Its will must be unimpeachable if it is to direct the destinies with which it is charged .We must not forget the atmosphere, not merely in which the theory of sovereignty was born, but also in which, at the hands of each of its great exponents ,it has secured new emphasis. That has been always, from Bodin to Hegel, a period of crisis in which the state seemed likely to perish unless it could secure the unified allegiance from its members.[15]

Laski elaborates,
'Those who have most powerfully shaped the theory of sovereignty — Bodin, Hobbes, Rousseau, Bentham and Austin — were, with the exception of Austin, all of them writing before the nature of federal state had been at all fully explored Either, like Bodin, they thought in terms of unlimited power of the prince, or, like Bentham, in terms of the unlimited power of the legislature; and

[13] Ibid 13.
[14] Ibid 16.

[15] Harold J.Laski , *A Grammar Of Politics*, First published in 1925,1982,(George Allen and Unwin Publishers Ltd.), 46.

they might, like Rousseau, deny legitimacy to any act which emanated merely from a representative organ.'[16]

Bodin developed one of the most celebrated definitions of sovereignty. Sovereignty, in this account, is the untrammelled and undivided power to make laws. It is the supreme power over subjects; 'the right to impose laws generally on all subjects regardless of their consent.[17]

It was Hobbes, however, who was the first to grasp fully the nature of public power as a special kind of institution — an 'Artificial Man', defined by permanence and sovereignty, giving life and motion' to society and body public.'[18]

Further in the words of Fiona Robinson, 'As Peterson and Runyan argue, sovereign men and sovereign states are defined not by connection or relationships but by autonomy in decision-making and freedom from the power of others .Security is understood not in terms of celebrating and sustaining life, but as the capacity to be indifferent to 'others' and, if necessary, to harm them'.(Peterson and Runyan,1993,p.34) By interpreting as indifference what is normally understood as prudent non—intervention ,we begin to highlight a serious moral deficiency of both political liberalism and the so-called morality of the states'.[19]

Notwithstanding the traditional definition of sovereignty and the political compulsions that induced its general acceptance, the political climate in which we find ourselves does not permit its continuance in that form. No doubt, the sovereign bodies within the fixed geographical limits will remain and continue to be acknowledged as such but their absolutism as the supreme law-makers, totally beyond challenge from any corner, has been brought under severe strain.

Sovereignty, the state power and territoriality thus stand today in a more complex relation than in the epoch during which the modern nation-state was forged and the post-war era during which the idea of human rights too hold. Indeed, globalisation is associated not only with a new 'sovereignty regime' but also with the emergence of powerful new non-territorial forms of economic

[16]Ibid 49.

[17] David Held, *Democracy and the Global Order - From the Modern State to Cosmopolitan Governance*, 1995 (Polity Press), 39.

[18] Ibid 40.

[19] Fiona Robinson , The Limits of a Rights—Based approach to International Ethics in Human Rights in Tony Evans edited ,*Fifty Years on –A re-appraisal*, 1998, (Manchester University Press), 63.

and political organisation in the global domain, e.g. trans- national social movements, international regulatory agencies, and so on. The modern institution of territorially circumscribed sovereign rule appears somewhat anomalous juxtaposed with the trans-national organization of many aspects of contemporary economic and social life. Globalisation in this account is, therefore, associated with a transformation or to use Ruggie's term, an unbundling of relationship between sovereignty, territoriality and state power.'(Ruggie, 1993; Sassen 1996)[20]

The globalisation which has definite impact on the traditional notion of sovereignty has changed the basic character of those institutions which were hitherto regarded as the foundation of a nation's sovereign independence. Moreover, in the fast changing international atmosphere which is encountering the terrorist and nuclear threats, the global community, if it adheres strictly to the principle of non-intervention on the pretext of the collapsing edifice of sovereignty, the doom of the world is inevitable. Most pertinent in this connection are the following observations of Harold J.Laski,

'The pluralists therefore argued that, however majestic and powerful, the state in fact was only one of many associations in society, that, in experience, there were always limits to its powers, and that those were set by the relation between the purpose the state sought to fulfil and the judgment made by men of that purpose.'[21]

What ,as I think now, was right in the pluralist doctrine, were its conceptions,(1) that a purely legal theory of the state can never form the basis of an adequate philosophy of the state .(2) that the state is, in fact, no more entitled to allegiance than any other association on grounds of ethical right or political wisdom; and (3) that its sovereignty is at bottom, a concept of power made valid by the use of a coercion which, in itself, is morally neutral. Society as a complex whole is pluralistic; the united power of the state which we call sovereignty, that legal right as Bodin put it, to give orders to all and receive orders from none, is made monistic (as in the classical legal theory) by the fact that it has behind its will ,on all normal occasions, the coercive power to get its will obeyed.[22]

[20] Anthony G. Mc Grew ,Human Rights in a Global Age Corning to Terms with Globalisation, in Tony Evans edited, *Human Rights Fifty Years on — A re-appraisal*, 1998 (Manchester University Press) 193.
[21] Harold J.Laski , above n 14, XI(Introductory Chapter).
[22] Ibid Xl (Introductory Chapter).

'When a class- society in this sense is destroyed, the need for the state, as a sovereign instrument of coercion, disappears; in Marx's phrase it "withers away". As that is achieved, both the nature of authority and the law it ordains undergo a fundamental transformation."[23]

'……..The scale of modern civilisation has made the national and sovereign state an institutional expedient of which the political un-wisdom and moral danger are both manifested."[24]

The sovereignty of states is seen to be a fiction as soon as they attempt the exertion of their sovereignty. Their wills meet with one another; they can not cut a clear and direct route to their goal. Their wills meet, because their relations grow ever more intimate, and the institutions of the sovereign state fail to express the moral wants of those intimate relations.[25]

There are problems of which the impact upon humanity is too vital for any state to be felt to determine by itself what solution it will adopt. The notion of independent sovereignty, for example, leaves France free to invade Germany when and how she pleases; and the only retort that can be made is either a dissent which does not alter the fact, or a war which destroys civilization. Once we realize that the well-being of the world is, in all large issues, one and indivisible, the co-ordinate determination of them is the primary condition of social peace.[26]

In such an aspect the notion of an independent sovereign state is, on the international side, fatal to the well-being of humanity.[27]

The recent instances of how the international community is mobilised in its crusade against terrorism and the efforts to exert pressures on the nations to avert war, lest it should escalate into nuclear conflagration leading to some cataclysmic destruction, have established this reality that what Hobbes and Austin thought of sovereignty can no longer hold feasible in our contemporary world.

[23] Ibid XIII (Introductory Chapter).
[24] Ibid 587.
[25] Ibid 662.
[26] Ibid 65.
[27] Ibid 65.

THE STRUCTURAL INGREDIENTS OF SOVEREIGNTY AND ISLAMIC PERCEPTION

'Allah! There is no god but He, - the Living, the Self-subsisting Supporter of all. No slumber can seize Him, nor sleep. His are all things in the Heavens and on earth. Who is thee can intercede in His presence except as He permitted?. He knoweth what (appeareth) to His creatures as Before or After or Behind them. Nor shall they compass aught of His knowledge except as He willeth. His Throne doth extend over the heavens and the earth, and He feeleth no fatigue in guarding and preserving them. For He is the Most High, the Supreme (in glory)'[28]

It is enough, for the moment, to postulate the disappearance of state - sovereignty as the conditions without which the life of reason is impossible to states.[29]

'The developments relating to disruptive nationalism and to the all- affected idea of democracy clearly suggest, then, that important new ideas about the nature of' 'the people' may be emerging.'[30]

The above observations clearly suggest that the theories of 'state-sovereignty' and 'nationalism', despite all the claims regarding their final acceptability, are still not firmly rooted and it appears as if a time has come which is necessitating a fresh definition of these terms. Their traditional meanings and significance have collapsed under the weight of changing circumstances. The Hobbes, Locke, Bentham and Austin's definitions of 'sovereign' and 'sovereignty' might have appealed to reason at the time when the abstractions of natural law had totally confused the juristic approach but now with a radical change in the global circumstances, they are heading towards redundancy. Barry Holden observes on this point,

'The 'sovereign people' came to be identified with the nation and 'until recently at least', has accepted a given world divided into nation-states. But it is now being asked whether, in a changing world, this is any longer 'the given'. There is both a questioning of the presumed coincidence of existing nations and states

[28]The Holy Qur'an, (Abdullah Yusuf Ali trans.1938), Surah 2- Al- Baqarah, Ayat.255.
[29] Harold J.Laski, *A Grammar of Politics* , Eleventh Impression -1982 (George Allen and Unwin Ltd),65.
[30] Barry Holden ,Democratic theory and The Problem of Global Warming, in Barry Holden Edited *The Ethical Dimensions of Global Change*, First Published Great Britain in 1996 (Macmillan Press Ltd),142.

and some dissolution of the division of the world into watertight compartments.'[31]

He says further,
'However, the fact that the central democratic value — mass control of governmental activity - is re-embodied in this emerging conception gives it a definitive importance such that it can be said to re-define 'the people'. The question of who constitute the people' comes to be answered by reference to a fresh specification of which sections of the masses should do the controlling.'[32]

David Held attributes the emergence of the whole notion of sovereignty to the collapse of the established forms of the authority and it was through this new juristic notion that the vacuum could be filled up. The falling power of the Church in Europe, resulting in the clash of authority between the clergy and the aristocracy made it imperative that some new strategy be invented that should be acceptable to both as the centre of power. He writes;

'Sovereignty became a new way of thinking about an old problem; the nature of power and rule. When established forms of authority could no longer be taken for granted, it was the idea of sovereignty that provided a fresh link between political power and ruler ship. In the struggle between Church, state and community, sovereignty offered an alternative way of conceiving the legitimacy of claims to power.'[33]

The modern concept of sovereignty has had many implications and many writers have tried to deal with them in their own way according to the circumstances in which they lived and, moreover, according to the problems they wanted to address through it. Hobbes had his own way of defining it as Raymond Plant observes;

'Hobbes' account of the nature of the sovereign is concerned to draw conclusions about the necessity of the sort of power the sovereign wields from facts about human desire, particularly the desire for power , and the relationship between individuals which follow from a proper understanding of their nature.'[34]

[31] Ibid l39.
[32] Ibid 142.
[33] David Held, Democracy *and the Global Order - from the Modern State to Cosmopolitan Governance*, first ed. l995 (Polity Press), 39.
[34]Raymond Plant, *Modern Political Thought*, 1991(Basil Blackwell), 11.

John Austin who is generally credited with having given one of the most precise and accurate definitions of sovereignty was also motivated by the political situation prevailing in England during his lifetime. His definition has been the most controversial one in the sense that whether the sovereign of his imagination is the absolute law-giver, not controlled by any other consideration. Many jurists conclude that the concentration of all powers in the hands of sovereign, to the exclusion of all other factors, is outside the Austinian hypothesis. For example Roger Cotterrell observes;

'First, Austin does not suggest the sovereign is free of limitations but only legal limitations. Thus positive morality (reflected in public opinion, widespread moral or political expectations and ultimately the threat of rebellions) may provide important constraints. Secondly, most of Austin's discussion of sovereignty relate primarily to the conditions of representative democracies. (Especially Britain and the United States) Thirdly, Austin's concept of delegation by the sovereign is used by him to express the possibility (which has become a reality in most complex modem industrialised societies) of very extensive dispersion of legislative, adjudicative, and administrative authority with the overall hierarchical framework of a centralised state.'

Austin's sovereignty is not a legal but a pre-legal notion. It is the logical correlate of an assumed factual obedience. (Manning 1933: 192,202) It is not "a specified organ" or complex of organs, but it means that individual or collectively at whose pleasure the Constitution is changed or subsists intact. (C.A.W. Manning, 1933:192)[35]

Discussing the views of Rousseau about sovereignty, Martin, J. Walsh observes, it should be observed that the 'sovereign' means, in Rousseau, not the monarch or the government, but the community in its collective and legislative capacity.

'The social contract can be stated in the following words. Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.' This act of association creates a moral and collective body, which is called the state' when passive, the 'sovereign when active, and a power' in relation to other bodies like itself'[36]

[35]Roger Cotterrell, *The Politics of Jurisprudence -A Critical Introduction to Legal Philosophy*, 1989, (Butterworths) 70.

[36] Martin. J. Walsh, *A History of Philosophy*, 1985,(Geoffrey Chapman London), 670.

Making an elaborate observation about the theory of Jean-Jacques Rousseau, Ian Adams observes,

'Jean-Jacques Rousseau (1712-78): His argument was that what distinguishes the human from the animal was not that humans have reason, but the fact that human beings are capable of moral choice and, therefore, men must be free in order to exercise that choice. If people are not free, or if their freedom is restricted, then their humanity is being denied and they are being treated as sub-human, as slaves or animals.'

Rousseau then went on to insist that if people had to live according to laws they did not make themselves, then they are not free, they are slaves. It made little difference if a law-making body had been elected by the people, since it was still other people making the laws; those subject to them were still denied the freedom which was their natural right as human beings. On Rousseau's theory, vast majority of us living in today's liberal democracies are denied their rightful freedom and, therefore, 'slaves'.

If everyone voted according to what they knew was the common good, and not their own interests, then the laws passed would be valid and binding; in obeying them everyone would be free because they would be obeying themselves. These laws would be, as he put it, an expression of the 'GENERAL WILL'.

He only wishes that the GENERAL WILL is always right and that 'the voice of the people is the voice of God'. But apart from these theoretical difficulties, Rousseau's notion of an assembly of all citizens is clearly not possible in modern states…'[37]

Commenting on Rousseau, Bertrand Russell, says, (Jean Jacques Rousseau - 1712-78) The social contract involves that whoever refuses to obey the general will shall be forced to do so. 'This means nothing less than that he will be forced to be free'..... The conception of being forced to be free' is very metaphysical…'[38]

In the wake of the developments that have been taking place, especially after the First World War, which have witnessed the emergence of the written constitutions working with the internal dynamics of law, it appears that the

[37] Ian Adams, *Political ideology today*, 1993, Manchester University Press, 20-21.
[38] Bertrand Russell, *History of Western Philosophy and Its Connection with Political and Social Circumstances From the Earliest Times to the Present Day*, 1955,(George Allen and Unwin London) ,671.

traditional conceptualisation of sovereignty was simply a transitional phase in the legal philosophy. The first such assault on sovereignty came from the Pure Theory of Law as expounded by Hans Kelsen who evaluated legal theory, not in terms of sovereign and its subjects, but as an integrated structure of the hierarchy of norms. Discussing Kelsen, Roger Cotterrell observes,

The pure theory of law dissolves away the state's legitimacy as a potential agency of intolerance. It insists that the state is properly seen as merely the effect of the structure of norms governing the relationships of individual human beings. For Kelsen the doctrine of sovereignty is harmful precisely because it asserts the existence of a supreme entity above law.

Equally, the pure theory of law does its best to dissolve away the nation, as a supreme entity, too. Kelsen argues that the logic of the pure theory leads to the recognition of International law as a single supreme legal system; one in which the norms presented as the basic norms of national or municipal legal system, now appear in a new light as subordinate norms within the international legal order whose validity is ultimately governed by a basic norm of International law.[39]

The great fanfare which marked the advent of the sovereignty, as we presently understand it, is gradually fading away. There was a time when the emergence of the British Parliament as an omnipotent sovereign body was heralded in legal philosophy as a landmark development but now it is being considered as having produced a negative impact on individual freedom F.A. Hayek writes on this development. "The triumphant claim of the British Parliament to have become sovereign, and so able to govern subject to no law, may prove to have been the death-knell of both individual freedom and democracy."[40]

In the context of the sovereign's unlimited powers, Joseph Raz, while quoting Robert Paul Wolff, observes,

'Robert Paul Wolff, to take one well-known example says that authority is the right to command, and correlatively, the right to be obeyed.' (Robert Paul Wolff- In Defence of Anarchism. New York, 1970.p.4)[41]

[39] Roger Cotterrell, *The Politics of Jurisprudence , A Critical Introduction to Legal Philosophy*, 1989, (Butterworths), 115.
[40] F.A. Hayek, New *Studies in Philosophy, Politics, Economics and the History of Ideas,* first published in 1978, 1990 ,(Routledge),154.
[41] Joseph Raz, *The Authority of Law - Essays on Law and Morality*, 1979 (Clarendon Press- Oxford), 11.

David Held, while explicating the various structural ingredients of sovereignty, writes, 'The idea of state sovereignty was the source of the idea of impersonal state power. But it was also the legitimating framework of a centralised power system in which all social groups in the long run wanted a stake. How elements of both state and popular sovereignty were to be combined coherently remained far from settled.'[42]

If sovereignty is the rightful capacity to take political decisions and to enact the law within a given community with some degree of finality, it must be entrenched in certain rules and institutions from which it cannot free itself.[43]

CONCLUSION

Coming to Islamic conception, the most important thing is that the concept of sovereignty as inferred from the attributes of Allah bears many similarities to the modern concepts. Not only that, but it appears that Islamic concept is the progenitor of the whole philosophical conceptualisation regarding the definitions of sovereignty. The wordings of *Kalima*:[44] the first declaration of faith- that 'There is no god but Allah and Muhammad is His Messenger bear a strong proximity to the Austinian theory that 'If a determinate human superior, not in the habit of obedience to a like superior' and to Kelsen's theory of' the hierarchy of norms', meaning thereby that the Grundnorm is the justification for all subordinate norms whereas no norm can be used to justify the existence of Grundnorm. It is self-subsisting. All the conceptual aspects of sovereignty, its positive and negative implications, as found in Austin and Kelsen's theories are present in the *Kalima.* The following verses are most relevant to understand the Islamic philosophy of Divine Sovereignty;

'O ye who believe! Spend out of the (bounties). We have provided for you, before the Day comes when no bargaining (will avail), nor friendship, nor intercession. Those who reject Faith, they are the wrong-doers.'[45]

'Allah! There is no God but He, - the Living, the Self-subsisting, Supporter of all. No slumber can seize Him, nor sleep. His are all things in the Heavens and• on earth. Who is thee can intercede in His presence except as He permitteth? He knoweth what (appeareth) to His creatures as Before or After or Behind

[42] David Held, *Democracy and The Global order from the Modern State to cosmopolitan Governance*, first published – 1995,(Polity Press),46.
[43] Ibid 157.
[44] Explanation of the word 'Kalima:' There is no god only Allah and Muhammad is the messenger of Allah
[45] The Holy Qur'an, (Abdullah Yusuf Ali trans 1938),Surah. 2-Al- Baqarah, Ayat. 254.

them. Nor shall they compass aught of His knowledge except as He willeth. His Throne doth extend over the heavens and the earth, and He feeleth no fatigue in guarding and preserving them. For He is the Most High, the Supreme (in glory).'[46]

'Whatever is in the Heavens and on Earth, doth declare the praises and glory of Allah, - the Sovereign, the Holy One, the Exalted in Might, the Wise. It is He Who has sent amongst the unlettered a messenger from among themselves , to rehearse to them His Signs, to purify them, and to instruct them in the Book and Wisdom, - although they had been, before in the manifest error'.[47]

'Whatever is in the heavens and on earth, doth declare the Praises and Glory of Allah: to Him belongs dominion, and to Him belongs praise: and he has power over all things.'[48]

In the present context, it is not only necessary that the existence of the ultimate authority as the last grundnorm must be established but the form of that authority is equally important. The authority, from the viewpoint of the faith may be taken as the Creator or Sustainer of the entire universe, but this aspect of the Authority is not enough to fulfil the need for which we discuss it from the juristic angle. In law the supposition of such an authority assumes a totally different dimension. When in jurisprudence we discuss this concept of authority, we mean the whole range of those attributes which are imperative to dominate human intelligence and rationality while laying down the guidelines for the governance.

[46] *Ibid.* 255.
[47] *Ibid.* Surah, 62- al-Jumuah, Ayat. 1-2.
[48] *Ibid.* Surah, 64- at - Taghabun, Ayat, 1.

ANCIENT CONSTITUTIONALISM: SIR EDWARD COKE'S CONTRIBUTION TO THE ANGLO-AMERICAN LEGAL TRADITION

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Bacon and Shakespeare: what they were to philosophy and literature, Coke was to the common law.[1]

—J. H. Baker

I. Introduction

In his book *The Revolt of the Masses*, Jose Ortega y Gasset commented that American society could not long survive any catastrophe to European society.[2] Over seventy years after it was written, this remains to be true, and especially true with respect to Great Britain. The American civil order is the descendent of institutions and ideas that arose in Great Britain. Indeed, as Russell Kirk has observed, through Britain, "Americans are part of a great continuity and essence."[3] This great continuity includes a common religious heritage, a common history, and a common pattern of law and politics.

However, with the ascendancy of the United States in world affairs, there seems also to have been a rise in a provinciality of place and time amongst Americans—an ignorance of the inherited order that we have received. On this point Dr. Louis B. Wright has written,

> For better or worse, we have inherited the fundamental qualities in our culture from the British. For that reason we need to take a long perspective of our history, a perspective which views America from at least the period of the first Tudor monarchs and lets us see the gradual development of our common civilization, its transmission across the

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[1] J.H. Baker, *An Introduction to English Legal History* (1971) 236.

[2] (1932, 1994 ed) 135.

[3] Russell Kirk, *Redeeming the Time*, (1998) 16.

> Atlantic, and its expansion and modification as it was adapted to conditions in the Western Hemisphere. We should not overlook other influences which have affected American life . . . [b]ut we must always remember that such was the vigor of the British culture that it assimilated all others . . . we cannot escape the inheritance which has given us some of our sturdiest and most lasting qualities.[4]

Perhaps responding to Wright's call, in recent decades legal historians have produced a considerable amount of scholarship emphasizing the role of a constitutional theory called *ancient constitutionalism* in the Anglo-American legal culture.[5]

Early on in their struggle with Great Britain, at least in the years before 1774, the colonists primarily based their claims on "the seventeenth-century English constitution of customary restraints on arbitrary power;"[6] an inextricable part of Sir Edward Coke's legal career. The colonists perceived their situation as parallel to the struggle against the Stuart centralization in the seventeenth century—issues like taxation without consent particularly lent themselves to this analogy.[7] Many even adopted the ideological patois of English Whiggerery, calling themselves "whigs" and their loyalist adversaries "tories."[8]

Moreover, one of the key elements of whig constitutionalism was that the Crown's authority was limited by the *ancient constitution*, which was defined by custom and had existed, as Coke put it, from "time out of mind as man."[9] Therefore, when colonial lawyers spoke of the "constitution," or of "fundamental rights," it was to this immemorial body of constitutional theory they referred.[10] Indeed, it is in the judicial career of Coke, the lawyer most admired and most often cited by the early Americans, where the identifiable

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[4] Louis B. Wright, *Culture on the Moving Frontier* (1955) 83.

[5] A simple internet search of the respective oeuvres of J.G.A. Pocock and John Phillip Reid for starters would provide a curious reader with many pages to peruse.

[6] John Phillip Reid, *In Defiance of the Law: The Standing Army Controversy, The Two Constitutions, and the Coming of the American Revolution* (1981) 3.

[7] Michael W. McConnell 'Tradition and Constitutionalism Before the Constitution' (1998) *University of Illinois Law Review* 173, 176.

[8] Ibid.

[9] Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke V.I* (2003) 62.

[10] McConnell, above n 7, 177.

features of ancient constitutionalism can be seen.[11] The unifying factor between the colonists and Coke was that both struggled with whether the sovereign possessed the authority to abrogate the privileges and liberties traditionally belonging to the people. When combating the presumptions of the king, Coke needed to find an authority higher than the king. What he found were the "immemorial laws and customs of the people of England," which were reflected in the common laws of the realm and constituted the ancient constitution, reaching back to when King Canute, England's Viking king, pledged to govern by the customs of King Edgar and before.[12] As one scholar explains, "Coke brought the idea of 'fundamental law' into the courts of England" and what made it fundamental was precisely its antiquity and character as ancient custom."[13]

This essay aims to be a brief *apologia* and introduction to the theory of ancient constitutionalism. Part II discusses traces this school of thought from its alleged roots in Anglo-Saxon society to King John's historic meeting with the barons at Runnymede, and ends with some thoughts on how the early American legal argot reflects the influence of ancient constitutional principles tempered and developed over the centuries. Part III focuses on Sir Edward Coke, and why he is considered by many scholars to be the father of ancient constitutionalism, using *The Case of Proclamations*, *Calvin's Case*, and the *Prohibitions del Roy* as examples. Part IV concludes with some thoughts on history, change, and the law. Given the breadth and quantity of the issues germane to such a study, this essay does not seek to arrive at definitive or exhaustive answers, but instead intends to analyze some of the major characteristics of this element of Coke's career and the Anglo-American legal order.

II. The Ancient Constitution, Magna Carta, and the American Constitution

Sir James Clarke Holt, the great medieval historian, asked, "Was there an ancient constitution?"[14] His answer was a sardonic, "No."[15]

11 Ibid.
12 Ibid. 178.
13 Ibid.
14 J.C. Holt, 'The Ancient Constitution in Medieval England' in Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law* (1993) 22.
15 Ibid.

The inquiry does not end here, however, because Holt provided a historian's answer, and not a lawyer's. For Holt and historians in general, the ancient constitution is a fiction and means nothing. By contrast, the Magna Carta, was a real historic event, and meant something in 1215, and means something to historians today.[16] However, lawyers once had a different opinion of the ancient constitution. In the seventeenth-century lawyers believed that this abstraction was no more a fiction than the Magna Carta, or any other historical event. It was relied upon and defended, and became an identifiable part of English legal culture. Its influence can be seen in the Magna Carta, and in the Anglo-American legal order today.

A. The Ancient Constitution

In his seminal work on the common law, J.G.A. Pocock argues that legal and political discourse in early seventeenth century England was shaped in large part by a reverence for its ancient constitution. Pocock describes it as a *mentalité,* which he defines as a "deep seated unconscious habit of mind," common to England's lettered classes and especially its common lawyers.[17] The essential element of this *mentalité* was a faith in the rule of law. In particular, "it was a belief that England had always been governed with reference to its own 'ancient constitution,' to a set of principles—the common law—which had existed unchanged from the beginning of time."[18]

Common law lawyers were conservative and self satisfied—at least those in the mould of Coke. They had a poor sense of actual history and for the most part believed that that English law had remained impervious to substantial change over time. The fundamentals of common law had emerged fully before the memory of man, or from "time out of mind of man."[19] Without a doubt, the common law's primary attribute was the consistency and continuity it provided. The common law had developed in response to particular English needs, and, ergo, English lawyers were indifferent to other legal

16 Ibid.

17 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (2d ed., 1987) 178.

18 James Hart and Richard J. Ross, 'The Ancient Constitution in the Old World and the New' in Francis J. Bremer and Lynn A. Botelho (eds) *The World of John Winthrop: Essays on England and New England 1588-1649* (2005) 287.

19 Sheppard above n 9, 62.

traditions, which could do very little to solve English problems.[20] In sum, the time-tested common law had been so successful in governing English society that it had come to represent "an authoritative and infallible frame of reference for resolving the political [and legal] controversies of the age."[21]

Ancient constitutionalism is commonly attributed to Sir Edward Coke, because although belief in the ancient constitution permeated English legal culture in the early seventeenth-century, no one argued the position more forcefully and persuasively than Coke. Additionally, some scholars have suggested that while most seventeenth-century lawyers were certainly resistant to changes in the law; it was because they did not want to create uncertainty, rather than an inordinate faith in their immutable legal tradition.[22] Most understood that changes had occurred in the past and that the law would continue to change in the future.

However, seventeenth-century lawyers *did* posit a fairly consistent vision of an ancient constitution, which possessed, as the sixteenth-century lawyer Christopher St. German explained, "dyverse generall Customes" which were in line with natural law (*lex orta est cum mente divina*) and which had always been "good and necessarye for the common welth of all the realme."[23]

This constitutional order was believed to have pre-existed and endured William the Conqueror's assumption of the English throne in 1066, and was generally understood as the political structure of Anglo-Saxon society, the origins of which are traceable to the mythology of prehistoric Germany. As one scholar explains,

> [The ancient constitution] was the norm of governance... of the Anglos, the Saxons, and the Jutes when they were said by ancient constitutionalists to have been free people living under elected kings vested with limited power and confined by the rule of customary law.[24]

Latin charters referring to the use of the jury, Chancery, sheriffs,

[20] Pocock. above n 17, 36.
[21] Hart and Ross, above n 18, 289.
[22] Glenn Burgess, *The Politics of the Ancient Constitution* (1992) 20-27.
[23] James S. Hart, *The Rule of Law, 1603-1660: Crowns, Courts and Judges* (2003) 15.
[24] John Phillip Reid 'Law and History' 27 *Loyola of Los Angeles Law Review* (1993) 193, 206.

escheat for treason, and other juridical elements "prove that the common Law of England had been time out of minde [sic] of man before the Conquest, and was not altered or changed by the Conqueror."[25]

As such, the ancient constitution was considered to accurately reflect the values and ideals of the English people. On this point Sir John Davies stated that it was, "so framed and fitted to the nature and disposition of [the English] people . . . it is connatural to the Nation, so as it cannot possibly be ruled by any other law."[26] It was also considered to be inherently just; therefore it provided a standard against which all behaviour—especially political behaviour—could be measured.[27] Responsible governing in England was government conducted in conformity with the common law—that was the essence of the ancient constitution. All other propositions were foreign and suspicious, or at the very least, incongruent with the history and character of the English polity.[28]

Indeed, this quality is what enabled it to be used to advocate for certain legal principles or institutions even if abolished by the Crown or rendered invalid via non-usage.[29] Even constitutional customs of long standing did not necessarily take priority over the immutability of a doctrine fundamental to the ancient constitution. The underlying principles of the ancient constitution were ably described by Sir John Fortescue in his highly influential treatise, *De Laudibus Legum Angliae*, which was written *circa* 1470. In it, Fortescue contrasts royal rule, which he overtly associates with civil law and France, with political rule, which he considers distinctly English; the fundamental difference being the amount of power allotted to the monarch:

> For the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political. If he were to

[25] Edward Coke, *Le Tierce Part des Reportes del Edward Coke* (1602) as quoted in Daniel J. Hulsebosch 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence' 21 *Law & History Review* (2003) 439, 465.
[26] Burgess, above n 22, 52.
[27] Alan Cromartie 'The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England' (1999) 163 *Past & Present* 79.
[28] Hart and Ross, above n 18, 291.
[29] See generally Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law* (1993) 104-115.

> rule over them with a power only royal, he could be able to change the laws of the realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state that "what pleased the prince has the force of law." But it is far otherwise with the king ruling his people politically, because he himself is not able to change the laws without the assent of his subjects nor to burden an unwilling people with strange impositions, so that, ruled by laws that they themselves desire, they freely enjoy their goods, and are despoiled neither by their own king nor any other.[30]

In sum, immutable principles—whose origins and functions were often unknown—composed the ancient constitution and were always available as a standard to check the authority of the sovereign and correct legal errors. Even if there were considerable departures from constitutional norms, like the Tudor and Stuart centralization in Coke's time, they could be categorized as changes in form, not amounting to substantial change.[31] As one eighteenth century legal scholar explained, "[W]hile the Fountain Constitution stands Secure, any various Runnings of the Rivulets are no Breach of the Constitution."[32] Recent practices or changing customs did not matter, what mattered were the timeless first principles of ancient constitutionalism. That fact made the ancient constitution available as a perpetual standard when arguments were made for amending the rivulets of legal error.

B. Magna Carta: Personification of the Ancient Constitution

It has been nearly 800 years since King John met with the barons at Runnymede to agree to the terms of what came to be known as Magna Carta. Over the centuries, the ideals of that venerable document have formed a cornerstone of much of our modern jurisprudence, and indeed, our constitutionalism. One noteworthy provision states:

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30 Peter C. Herman, *"Bastard Children of Tyranny": The Ancient Constitution and Fulke Greville's A Dedication to Sir Philip Sidney* (2002) Renaissance Quarterly, <http://www.thefreelibrary.com/%22Bastard+children+of+tyranny%22:+The+Ancient+Constitution+and+Fulke...-a093027997> at 22 September 2002.

31 Reid, above n 20, 208.

32 Ibid.

No freeman shall be taken or imprisoned or be disseised of his freehold, or liberties or free customs or be outlawed or exiled or in any wise destroyed . . . but by . . . the law of the land.[33]

In the Magna Carta's decree of "law of the land," scholars argue that we find the roots of the Anglo-American concept of "due process of law."[34] Moreover, implicit in the Magna Carta is the principle that today we call "the rule of law."[35] One cannot overemphasize that the fact that King John—unwillingly to be sure—was forced to sign the document was a precedent for later generations' arguments that no individual is above the law. For example, Parliament invoked this sonorous precedent when denying the pretensions of Stuart kings in seventeenth-century England, and in America, it was employed by the Supreme Court to place limits on presidential claims of privilege in *United States v. Nixon*.[36]

Perhaps Dr. Johnson summarized it best,

> [t]he contents of the Magna Carta [are] the undoubted inheritance of England, being their antient and approved laws; so antient, that they seem to be of the same standing with the nation . . .[T]hey passed through all the British, Roman, Danish, Saxon, and Norman times, with little or no alteration in the main.[37]

Johnson meant to propagate a principle of constitutional law with this statement, not teach a history lesson. Similarly, in 1744 the Connecticut legislature was told in an annual election sermon that,

The Rights of Magna Charta depend not on the Will of the Prince, or the Will of the Legislature . . . they are the inherent natural Rights of Englishmen: secured and confirmed they may be by the Legislature, but not derived from nor dependent on their Will.[38]

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[33] John Alder, *Constitutional and Administrative Law* (2007) 153.

[34] Indeed, by the end of the fourteenth century, "due process of law" and "law of the land" were largely interchangeable. See A.E. Dick Howard, *Magna Carta: Text and Commentary* (rev. ed. 1998).

[35] See Alder, above n 20, 149 et seq.

[36] *United States v. Nixon* 418 U.S. 683, 713 (1974).

[37] Samuel Johnson, *A History and Defence of Magna Charta* (1769, 1881 ed) 3-4.

[38] Elisha Williams, 'The Essential Rights of Protestants. A Seasonal Plea for the Liberty of Conscience, and the Right of Private Judgment, in Matters of Religion, Without any Controul from Human Authority. Being a Letter, from a Gentleman

Thirty-two years later, this would be the legal principle upon which Americans would fight their revolution.

C. The American Constitution

Thomas Jefferson wrote, "In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."[39] The American Constitution was intended—and has successfully operated—to restrain political power: to prevent any person or clique from permanently dominating the government of the country. Indeed, William Gladstone, the great Victorian statesman, famously declared,

[A]s the British Constitution is most subtile organism which had proceeded from the womb and the long gestation of progressive history, so the American Constituion is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man.[40]

One of the great premises of American political theory is that all just authority comes from the people, under God. The people delegate to the government an amount of power that they deem prudent, and reserve for themselves all other powers and rights. Russell Kirk described this arrangement in his book *The American Cause*,

> [T]he American political system, first of all, is a system of limited, delegated powers, entrusted to political officers and representatives and leaders for certain well-defined public purposes.[41]

For over two centuries the system has been a success: America has neither endured dictatorial rule, nor tolerated violent social disorder.

Perhaps the most prominent ancient constitutional principle is the concept of the original contract between the English people and

in the Massachusetts Bay to his Friend in Connecticut' (1744), 65 (quoted in Reid above n 24, 193).

39 Thomas Jefferson, 'Draft of the Kentucky Resolutions' (1798) in Scott J. Hammond et al, *Classics of American Political and Constitutional Thought: Origins through the Civil War* (2007) 667.

40 Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (2006) 162.

41 Russell Kirk, *The American Cause* (1957) 68.

their ruler.[42] As we have seen, the concept was personified by the Magna Carta and it was certainly in the minds of the colonists during the controversy between Great Britain and the thirteen colonies. For example, shortly before the Stamp Act was enacted the Massachusetts colonists complained,

> [O]ur forefathers have told us that they should never have left the land of their nativity, and fled to these ends of the earth, triumph'd over dangers, encountered difficulties innumerable, and suffer'd hardships unparrel'd, but for the sake of securely enjoying civil and religious liberty, and that the same might be transmitted safe to their posterity.[43]

The theory of contract was an element of constitutionalism restricting the power of the monarch stretching back, "from time out of mind as man."[44]

In the eighteenth century it was popular knowledge that Charles I had been executed for violating his compact with the English and Scottish people. At the end of his trial, the head of the court told the king:

> There is a contract and a bargain made between the King and his people, and your oath is taken: and certainly Sir, the bond is reciprocal . . . Sir, if this bond be once broken, farewell sovereignty![45]

With this in mind, the colonists believed that the king had not only broken "the original contract with his three kingdoms, "but he also violated the original contract of the settlement and government of [the] colonies."[46]

Notwithstanding that the contract was implied, it was such a reality to the eighteenth-century American legal mind that in practice it was treated as a readily proven instrument. The source of government, as one commentator explains, "is covered by the Veil of Antiquity,

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42 Reid, above n 20, 212.

43 Ibid. (quoting 'Instructions of the Town of Weymouth,' *Boston Evening-Post,* October 21, 1765, 2).

44 Sheppard, above n 9, 62.

45 Stephen C. Manganiello, The Concise Encyclopedia of the Revolutions and Wars of England, Scotland, and Ireland 1639-1660 (2004) 252.

46 See Reid, above n 41, 2.

and is differently traced by the Fancies of different men; but, of the colonies, the Evidence is as clear and unequivocal as of any other fact."[47] During the revolutionary controversy, the colonists would readily employ legal arguments based upon history and custom, and it is likely that the notion of the contract between lord and subjects was appealed to more than any other doctrine. This and other doctrines emerging from antiquity serve to inform a *l'esprit des constitutions* in the English and American legal systems. The framers of the American Constitution could not avoid being influence by the customs that were so much a part of English common law.

III. Sir Edward Coke

Unlike John Locke, James Harrington, and the pantheon of other legal philosophers that every undergraduate studies in political science courses, Coke's primary focus was not on politics and law in general, but on English politics and law in particular. His aim was to identify the traits that gave English law its character. Accordingly, the more general philosophical consequences of his analyses were almost always subordinate to highly specific legal questions, which were viewed in historical terms.

Coke's legal philosophy was not only centred upon English law, but on a particular branch of English law, the common law. He was not concerned with developing theories on Canon law, as applied in the English ecclesiastical courts, or on the mixture of Romano-English rules and procedures often employed in other English courts. This is not to say that Coke was not familiar with these other branches of English law, he certainly was, however he made a point of ignoring them as foreign law. Throughout his legal career Coke virulently defended the position that the law of the land meant only the English common law, and not "the law of Chancery, Ecclesiastical Law, the Law of Admirality . . . the Law of the Merchants, the Martial Law, and the Law of the State."[48]

Coke also attempted to present the common law as a self-contained system in his *Institutes*.[49] To be sure, it was no accident that he

[47] Ibid. 216-217.
[48] J.W. Gough, *Fundamental Law in English Constitutional History* (1955) 61.
[49] Harold J. Berman 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 103 *Yale Law Journal* 1651, 1680.

copied the title from Emperor Justinian's famous code.[50] Professor Richard Helgerson has argued that Coke, who owned a glossed copy of Justinian, sought to systematize the English common law so that it would appear to be "Roman" and therefore usher the genuine article into obscurity.[51] "Coke's very insularity," Helgerson states, "his myopic insistence on the uninterrupted Englishness of English law, was the product of a persistent awareness of a rival system of law against which English law had to defend itself and define itself. Coke was insular not by ignorance but by ideological necessity."[52] However, this ideological insularity was shared "by an entire generation of Elizabethan and Jacobean writers seeking to establish English "nationhood."[53] It was Sir Edward's brilliance, and indeed his cantankerous nature that put him in the position to develop a legal theory that would achieve this in large part.

A. Theory in Action: Case of the Proclamations, Calvin's Case, and Prohibitions del Roy

One of Coke's more famous cases is *The Case of Proclamations*, a case considered by scholars to be "an important forerunner of our separation of legislative from executive power and hence of an aspect of due process."[54] Coke, while in conference with the Privy Council stated, "the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."[55] The issue arose when King James I sought an opinion on his authority to promulgate proclamations restricting new buildings in and about London and to regulate the trade of starch, which was in high demand because the fashion of the day was to wear ruffed collars, which needed starch to remain stiff.[56] James I believed that in both cases the authority to make the proclamations was well within the ambit of the prerogative powers of the monarch, i.e., the monarch possessed the power to pass the proclamations absolutely, without Parliamentary approval.

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50 *The Institutes of Justinian* is available in English at <http://www.fordham.edu/halsall/basis/535institutes.html>

51 Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (1992) 71.

52 Ibid.

53 Ibid.

54 McConnell, above n 7, 177.

55 Sheppard, above n 9, 487.

56 Ibid. 486.

Lord Chancellor Ellesmere, arguing on behalf of the king, stated,

> in cases in which there is no authority and [precedent], to leave it to the King to order in it according to his wisdome, and for the good of his Subjects, or otherwise the King would be no more than the Duke of Venice . . . [and that] the Physitian was not always bound to a president, but to apply his Medecine according to the quality of the disease.[57]

Ellesmere's view of the law was antipodal to Coke's. He believed that the *fons et origo* of all law, including the common law, was in the will of the sovereign.[58] For example, in *Calvin's Case*, Ellesmere rejected the idea that the law was above the monarch, criticizing the "new-risen philosophers" daring to declare that, "kings have no more power than the people from whom they take their temporal jurisdiction."[59] To Ellesmere, those who were entertaining questions of whether kings or people first made law were participating in near treasonous activities. Succinctly, "[t]he monarch is the law. *Rex est lex loquens*, the king is the law speaking."[60] Therefore, if the authority of the law has its source in the king, who is God's representative on earth, then it is no stretch of the imagination to hold that the king has power over the law.

Coke, on the other hand, considered the monarch's prerogative to be a product of the law of the land, and not intrinsic to the monarch. In *The Case of the Proclamations* he stated that, "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.[61] Coke defended his position by characteristically delving into the records, and using the "ancient and continual forms of indictments" retorted that all indictments,

> Conclude with the words, against the law and custom of England, *Contra legem et consuetudinem Angliae;* or against law and statutes, *Contra leges et statua.* But I never heard of an indictment to conclude, *Contra regiam proclamationem*; against

[57] Ibid 487.
[58] McConnell, above n 7, 178.
[59] Catherine Drinker Bowen, *The Lion and the Throne* (1956) 300.
[60] Ibid.
[61] Sheppard, above n 9, 488.

> the king's proclamation.[62]

Coke's position has tremendous significance: the rights of the people consist of their customary privileges and practices, and these may be amended only with the consent of their elected representatives.[63]

The crux of the divide between Ellesmere and Coke was how custom relates to command. As we have seen, Coke viewed the authority of custom as wholly independent of any command of the king and his prerogative, unless the representatives of the people consent. This was *the* theme of Coke's jurisprudence.

Coke would also cross swords with Lord Chancellor Ellesmere over the custom's relationship with reason. At first glance, this relationship might seem to be a non-issue because a law that has been left on the books for a long period of time arguably has the acceptance of society as a guarantee of its wisdom. The weight of tradition is particularly acute in the common law, which is composed of the "wisdom of generations, as a result not of philosophical reflexion [*sic*] but of the accumulations and refinements of experience."[64] In *Calvin's Case*, Sir Edward explained his position,

> we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein, the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto . . . [N]o man ought to take upon him to be wiser than the laws.[65]

However, Coke did recognize that in theory tradition and abstract

[62] Bowen above n 59, 322.
[63] McConnell, above n 7, 178
[64] Pocock above n 17, 35.
[65] Sheppard, above n 9, 173.

reason could come into conflict, and when it did, he naturally believed that tradition was supreme.

Scholars note that in his judicial opinions Coke never "bolster[ed] his case by speculating about the reasons for common law rules."[66] As a judge, he was absolutely unwilling to use abstract reason as a standpoint for any position regarding the common law, and rarely broke down the well-settled customs of the common law to the abstract principles that might appear to be their foundation. For Coke, the antiquity of a precedent was enough to prove its wisdom; nothing more was necessary.

Calvin's Case is a salient example of how unwilling Coke was to apply abstract reason. The issue of this case, also known as the case of the *postnati*, was whether individuals born in Scotland after James VI (who was himself a Scot) acceded the English throne were aliens in England and therefore barred from holding real property.[67] Such a case had never been decided before, because no foreign king had ever inherited the English crown.[68] However, even in a case of first impression, where it would seem reasonable to most to apply some variant of abstract reason or natural law, Coke perused the records to find an answer. Famously stating that "out of the old fields must come the new corn," Coke dredged up a 200-year old precedent from the days when the kings of England hailed from Gascony, France. Precedent provided the grounds for his decision that Robert Calvin should not be considered an alien even though he was not born in the kingdom of England.[69] Thus it can be said that to Coke, the common law was omniscient. The historian Charles Gray has noted that "[a] solution to the problem of the 'case of first impression is implicit in this picture: it does not exist in England . . . [the common law] is like an infinitely experienced man, who has been everywhere, seen everything, [and] heard it all before."[70]

Even when Lord Chancellor Ellesmere engaged Coke in an argument over whether the role of abstract reason was necessary in

66 McConnell, above n 7, 178; See also James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (1992).
67 Charles Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke in Culture and Politics from Puritanism to the Enlightenment* (1980) 25.
68 Ibid. at 28.
69 Sheppard, above n 9 at 173.
70 Gray, above n 67, 29.

a hypothetical case where existing legal authorities do not resolve the issues, Coke was unwavering. Ellesmere posited that in such a case judges could employ abstract reason, which he understood as the aptitude that all men have to varying degree.[71] Coke disagreed, responding that what judges must use is an "artificial reason," a skill requiring "long study and experience" with the common law.[72] Gray defines "artificial reason" this way:

> The expression artificial reason suggests a substitute for reason—an artifice that does a job better than the natural faculty. In some contexts, this sense predominates. The artifice is simply the law: there are cases for which a lawyer can draw a solution from positive legal sources. Such a legal solution will be better than the solution an ideally wise person would reach with only natural reason to depend on. That is true because the law is a collective product, a repository of many wise men's thinking about related problems over a long stretch of time.[73]

Artificial reason, then, is reasoning within the law, and not a way to bring in novel premises that exist outside of the common law tradition.

Coke had a practical rationale for his position. He well understood Ellesmere's maxim, r*ex est lex loquens*, and recognized that if cases could be decided by the reasoning of men untrained in the law, then the law was subject to the demands of the king. If artificial reason was not used to decide cases then the opinions of judges, who possess authority because of their thorough knowledge of the law, have no more authority than anyone else.

The diametrically opposed positions of Coke, "conservative defender of the old common law," and Ellesmere, "personification of the King in judgment and stout defender of the royal prerogative," came to a head during a dramatic meeting with James I

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[71] John Underwood Lewis, 'Sir Edward Coke (1552-1634): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory in Law Liberty and Parliament' in Allen D. Boyer (ed), *Selected Essays on the Writings of Sir Edward Coke*, (2004) 107; See Also Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (1986).

[72] Sheppard, above n 9, 481.

[73] Gray, above n 67, 31.

in 1608, labeled the *Prohibitions del Roy* in Coke's *Reports*.[74] The king had called a conference of bishops, and judges to resolve a dispute over the jurisdictions of the Court of Common Pleas (where Coke was Chief Justice) and the Ecclesiastical High Commission. Coke had incensed the clergy by issuing writs of prohibition that prevented the church from collecting tithes that were arguably repealed via oral contracts.[75] During the conference, Coke naturally defended his position by using precedent, in response to which James thundered that, "[c]ommon-law judges were like papists who quoted scripture and then put it to their own interpretation, to be received unquestioned . . . [similarly] judges allege statutes, reserving the exposition thereof to themselves."[76] And, likely sensing an opportunity to checkmate Coke in a rapidly deteriorating encounter, an unidentified adversary inserted the issue of King James' judicial authority to decide such cases stating,

> [w]here there is not express authority in law, the King may himself decide it in his royal person; the Judges are but delegates of the King . . . and the King may take what causes he shall please . . . and determine them himself. And the Archibishop said: that this was clear in divinity, that such authority belongs to the King by the Word of God in the Scripture.[77]

Coke answered that under the common law, James was not permitted to decide these questions, lecturing that "the King cannot take any cause out of any courts and give judgment upon it himself."[78]

King James became frustrated with Coke, telling him that he had spoken "foolishly" and said that as supreme head of justice, he would "ever protect the common law."[79] This prompted Coke to express his fervently held view that ancient common law exists to protect the king, which James considered "traitorous speech."[80]

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74 Sir John Baker, 'The Common Lawyers and the Chancery' in Allen D. Boyer (ed), *Law Liberty and Parliament: Selected essays on the Writings of Sir Edward Coke* (2004) 256.
75 Sheppard, above n 9, 479; Bowen, above n 59, 303.
76 Bowen, above n 59, 303.
77 Ibid. 304; See also Sheppard above n 9, 478.
78 Ibid.
79 Ibid.
80 Ibid.

James, shaking his fist, added that, "he thought the Law was founded upon Reason, and that he and others had Reason as well as the Judges."[81] Coke would not budge, and although he could admit that the king was endowed with "excellent science and great endowments of nature," James was untrained in the law and therefore could not exercise artificial reason.[82]

The episode ended with James flying into a rage and Coke falling "flat on all fower; humbly beseeching his majestie to take compassion on him and to pardon him."[83] Only the intervention of Robert Cecil, the Lord Treasurer and Coke's uncle by marriage, spared him from an extended stay in the Tower.

To be fair, James and Ellesmere were not being completely unreasonable.[84] After all, if law is to be determined by reason, there is no necessity to refer to the opinions of judges. Judges are no more wise or reasonable than other men. However, a judge's claim to be heard is his knowledge of the law. If cases were considered on a particular judge's abstract reason and not on what the law is, they would lose their claim to more authoritative decision-making. This was why Coke immersed himself in precedents and emphatically held that the common law provided all the answers.[85]

B. Coke's Version of History

Sir Edward's research of the common law was so thorough that his *Reports* and his *Institutes* were regularly cited for centuries after his death. Notwithstanding this use, however, today it is clear that his passion for the common law was such that his history sometimes

[81] Ibid.
[82] Ibid. 305.
[83] Ibid.
[84] So reasonable in fact, that none other than Thomas Hobbes would later wage a diatribe against Coke's position in *A Dialogue Between a Philosopher and a Student of the Common Laws of England*. Here, Hobbes famously posits that "it is not wisdom, but Authority that makes the Law . . .[N]one can make a Law but he that hath the Legislative Power." [Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (1681, 1997 ed), 16] Indeed, Hobbes was a defender of absolutism, but a cogent argument can be (and was) made for Ellesmere's position, which is important to note when considering Coke's struggle.
[85] William E. Conklin, *In Defence of Fundamental Rights* (1979) 17; See Also Allen D. Boyer, '"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review' (1997) 39 *Boston College Law Review* 43, 61.

became intertwined with mythology and legend.[86] Dr. Pocock describes Coke's idea of proof this way:

> [Coke] took everything in the records of the common law to be immemorial, and treated every piece of evidence in those records as a declaration of what was already immemorial; so that the beginning of the records of the king's courts in the twelfth century was proof, not that those courts began at that time, but of their great antiquity, and it was usual and—given the presumptions—logical to add that if the earlier records had not been lost or stolen, they would prove the existence of the courts in times earlier still. But at however remote a date the series of records had begun, the common-law mind would still have taken their beginning as proof that at the time the laws were already immemorial; since *jus non scriptum* must by definition be older than the oldest written records.[87]

This understanding of proof is terribly amusing today, especially when reading Coke's claims that the sources of English law can be traced beyond King Arthur to Greek speaking Druids.[88]

While modern historians have had a bit of fun at Coke's expense because by today's standards his historical positions often flirt with the implausible, such beliefs were not an oddity of Coke's jurisprudence or a self-serving endeavour dreamed up to frustrate the king. In Coke's age the idea that law is custom, and that the most fundamental of laws are long-standing custom, was an inextricable part of the common-law mind.[89] If the source of individual rights is a benevolent monarch, then that same monarch, or a less charitable successor, possesses the right to revoke them. On the other hand, if rights are derived from long-standing practice,

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[86] Sir William Holdsworth, *A History of English Law V. 5* (1903, 1972 ed) 459. (Holdsworth was on many occasions critical of Coke's "literary" rendition of certain encounters.).

[87] Pocock, above n 17, 37.

[88] Sheppard, above n 9, 62.

[89] See e.g., Donald R. Kelley, *The Historical Imagination in Early Britain: History, Rhetoric, and Fiction* (1997); Consider also continental legal thinkers that held similarly dubious historical opinions: Claude Joly, Francois Hotman, Pietro de Gregorio, and Antoine Loisel etc.; See also Sarah Hanley 'The Jurisprudence of the Arrets: Marital Union, Civil Society, and State Formation in France, 1550 – 1650' (2003) *21 Law & History Review* 1.

and not the will of a monarch, no monarch can be said to possess the right to revoke them. Coke believed that only changes in practice traceable over long periods of time could change custom. The ancient constitution was the apparatus that Coke could used to "argue that the laws of the land were so ancient as to be the product of no one's will, and to appeal to the almost universally respected doctrine that law should be above will."[90]

Using the fictitious theory of ancient constitutionalism, Coke established some of the vital principles of the Anglo-American legal system: trial by jury, the foundations of judicial review, no taxation without consent, the reaffirmation of habeas corpus, and the approval of the legislature for the executive creation of new offences. Most scholars agree that when the American colonists used the term "constitution" in their controversy with Britain up to and during the Revolution, Coke's theory was what they were invoking.[91] As one commentator explains, "the values of the ancient constitution were properly a colonial birthright," notwithstanding "the brief American experience."[92]

The legacy of Coke's can be clearly seen in the work of founding father James Wilson, whose reverence for history can be summarized in the following statement, "[One who knows history] already knows mankind in theory, and, for this reason, will be in less danger of being deceived by them in practice."[93] Wilson, a native Scot, was educated at the universities of St. Andrews and Edinburgh before immigrating to Pennsylvania in 1765, in the midst of the Stamp Act crisis. After briefly teaching Latin at what would become the University of Pennsylvania, Wilson studied the law under John Dickinson and would begin his own practice in Reading, Pennsylvania in 1768. As a student of the law he read Coke's *Institutes*, Blackstone's *Commentaries*, and was also fond of Sidney, Rapin, and Bolingbroke. A good lawyer, Wilson believed,

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[90] Pocock, above n 17, 51.

[91] John Philip Reid, *The Concept of Liberty in the Age of the American Revolution* (1988) 10; McConnell, above n 7, 186; Pocock above n 17, 37; See Also W.H. Greenleaf, *Order, Empiricism, and Politics: Two Traditions of English Legal Thought* (1964).

[92] Stanley Katz, 'The American Constitution: A Revolutionary Interpretation' in Richard Beeman et al, *Beyond Confederation: Origins of the Constitution and American National Identity* (1987) 36; See also Christopher W. Brooks, *Communities and Courts in Britain* (1998) 226.

[93] Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (1998) 144.

> must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws: and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced.[94]

Wilson's approach to history was that of a careful lawyer, and his approach to politics that of a careful historian.

In 1774, Wilson published a work entitled, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament.* In it, Wilson would expend a considerable amount of ink discussing the history of the legal rights of Englishmen living in the American colonies: "We have committed no crimes to forfeit [our rights as Englishmen and] we have too much spirit to resign them. We will leave our posterity as free as our ancestors left us."[95] Wilson notes that the American colonies were not conquered, but settled at private expense under royal charters. This being the case, Englishmen coming to America carried with them the fundamental British constitutional right of a representative government. Moreover, this right was inextricable from "one of the most ancient maxims of the English law . . . that no freeman can be taxed at pleasure."[96]

A discussion of *Calvin's Case* would follow in which Wilson highlighted the court's holding that allegiance to the King was personal, not national, and therefore the subjects of each dominion enjoyed their own laws and natural rights. As Ireland has its own parliament, English statutes do not bind it, and therefore Irish subjects are connected to England only through the King. This was the same arrangement that Wilson thought necessary for the American colonies, "[I]f the inhabitants of Ireland are not bound by

[94] Kermit L. Hall and Mark David Hall eds., *Collected Works of James Wilson V.I* (2007) 458.
[95] Ibid 4.
[96] Ibid. 13.

acts of parliament made in England, *a fortiori*, the inhabitants of the American colonies are not bound by them."[97]

Wilson consistently expressed his high regard for the English constitution, considering it an integral part of "the glorious fabric of Britain's liberty."[98] He believed that England's great achievement would only increase its lustre while Parliament and Crown played their respective roles. Additionally, Wilson felt that England's constitutional future would be brighter if Parliament were in more frequent communication with the people to whom it was responsible.[99] However, Americans were not represented in Parliament. Americans had their own assemblies, and accordingly, Wilson could see no constitutional reason for the Parliament in Westminster to dictate to the colonial legislatures.

In a speech delivered during the Convention for the Province of Pennsylvania in 1775, a convention called to consider the proposals of the First Continental Congress, Wilson again brought his listeners attention to the historical correctness of America's case. Wilson began by asking his listeners,

> Why is [American] opposition to the illegal attempts of their govenours represented under the falsest colours, and placed in the most ungracious point of view? This opposition, when exhibited in its true light, and when viewed, with unjaundiced eyes, from a proper situation, and at a proper distance, stands confessed the lovely offspring of freedom. It breathes the spirit of its parent.[100]

Moreover, Colonial resistance, Wilson continued, was derived from the same spirit of the English constitution that guided "the convention of the barons at [Runnymeade], where the tyranny of John was checked, and the magna charta was signed . . ."[101]Indeed, Wilson declared that it was the right of British subjects to resist tyranny, a right "secured to them both by the letter and the spirit of

97 Ibid. 20.
98 Colbourn above n 93, 148.
99 Ibid.
100 Hall above n 94, 32.
101 Ibid. 132.

the British constitution, by which the measures and the conditions of their obedience are appointed."[102]

The speech then moved on to a brief discussion of the difference between an abuse of the royal prerogative and royal tyranny. The American colonies, Wilson argued, were absolutely loyal to the King. However, history showed many instances of the king forgetting his constitutional character and following the counsel of scheming ministers.[103] Wilson suggests that it would do well for George III to remember such "examples of English history."[104] As well as that,

> [l]iberty is, by the constitution, of equal stability, of equal antiquity, and of equal authority with the prerogative. The duties of the king and those of the subject are plainly reciprocal: they can be violated on neither side, unless they be performed on the other. The law is the common standard, by which excesses of prerogative as well as excesses of liberty are to be regulated and reformed.[105]

Within the next year, Wilson was a member of the Second Continental Congress, where be and his colleagues stated that they were prepared to fight the fight for "the virtuous Principles of our Ancestors."[106] In his *Address to the Inhabitants of the Colonies*, published in February 1776, Wilson writes that,

> [h]istory, we believe, cannot furnish an Example of Trust, higher and more important than that, which we have received from your Hands . . . The Calamities, which threaten us, would be attended with a total Loss of those Constitutions, formed upon the Venerable Model of British Liberty, which have been long our Pride and Felicity. To avert those *Calamities* we are under the disagreeable Necessity of making temporary Deviations from those *Constitutions*.[107]

[102] Ibid. 141.
[103] Ibid. 38; See also Colbourn above n 93, 150.
[104] Colbourn above n 93, 150.
[105] Hall above n 94, 40.
[106] Colbourn above n 93, 151.
[107] Hall above n 94, 146.

Disavowing accusations of carrying on war for the purpose of independence, Wilson, writing for his fellow congressmen states, "that what we aim at, and what we are entrusted by you to pursue, *is the Defence and the Re-establishment of the constitutional Rights of the Colonies.*"[108] Soon, however, Wilson's more irenic approach would be washed away by the tide of the radical solution found in Thomas Paine's influential *Common Sense*. And indeed, when the vote for the Declaration of Independence arrived, a reluctant Wilson cast his vote in favour of the document declaring "the United Colonies FREE and INDEPENDENT STATES."[109]

American independence being a settled issue, Wilson later would focus his considerable talents on penning the definitive treatise on law in America. He began this project by drafting a number of lectures that would eventually fill fifty-two notebooks.[110] One main theme of the lectures was to emphasize law as a historical science and to suggest law's superiority to speculative philosophy. Wilson was not interested in "imaginary laws for imaginary commonwealths; he was interested in man, the record of his government and his significance for the independent United States."[111]

On December 15, 1790, James Wilson presented the first lecture of his series on American law to,

> the President of the United States, with his lady—also the Vice-President, and both houses of Congress, the President and both houses of the Legislature of Pennsylvania, together with a great number of ladies and gentlemen . . . the whole comprising a most brilliant and respectable audience.[112]

Wasting no time in establishing his historical perspective on law, the introductory lecture—indeed all of the lectures—are filled with a pantheon of notable leaders and minds: Alexander the Great, Thucydides, Jean-Jacques Rousseau, Sir William Blackstone among others. Also, Wilson was keen to highlight what America owed to its Anglo-Saxon ancestors.

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108 Ibid. 53.
109 Colbourn above n 93, 151.
110 Hall above n 94, 401.
111 Colbourn above n 93, 152.
112 Hall above n 94, 403.

In his view, a "respect for law, [and a] tenacity for liberty" were indelible marks on the character of the Anglo-Saxon race.[113] Liberally quoting Tacitus, Wilson explored the Germanic forefathers of Americans, who lived as a free people and created their own laws.[114] There had been, Wilson claimed, a confederacy among the various Anglo-Saxon kingdoms from which developed a *wittenagemote*, or council comprised of chosen leaders that met regularly and administered the law throughout the kingdom.[115] Additionally, citing Nathaniel Bacon's *Discourse of the Uniformity of the Government of England*, Wilson describes the Anglo-Saxon government and character as such,

> The Saxons were called freemen, because they were born free from all yoke of arbitrary power, and from all laws of compulsion, except those which were made by their voluntary consent: for all freemen have votes in making and executing the general laws. The freedom of a Saxon consisted in the three following particulars. 1.In the ownership of what he had. 2.In voting upon any law, by which his person of property could be affected. 3.In possessing a share in that judiciary power, by which the laws were applied.[116]

The ancient Saxon monarch's power depended entirely upon the consent of the people, and Wilson approvingly quoted the English jurist John Selden's statement that the Saxon King was "the choicest of the chosen."[117]

Considering the plight of the newly independent America, the Anglo-Saxon system of governing was a useful example of Wilson's belief in the people as the source of political authority.[118] Also, he agreed with the Whig historians who maligned William the Conqueror and the Normans for introducing feudalism and attempting to eradicate the "Saxon law of liberty."[119] Echoing Sir Edward Coke, Wilson's position was that the Magna Charta was

113 Colbourn above n 93, 152.
114 Ibid.
115 Says Tacitus, "Eliguntur in iisdem consiliis principes, qui jura per pagosvicosque reddunt."
116 Hall above n 94, 831.
117 Colbourn above n 93, 152.
118 Ibid.
119 Ibid.

"declaratory of the principal grounds of the fundamental laws of England."[120] On Coke's work specifically, Wilson once commented that the *Institutes* are "a cabinet richly stored with jewels of law." He next added a question that would likely receive the approval of centuries of law students, "but are not those jewels strewed about in endless and bewildering confusion?"[121]

Wilson shared Coke's interest in the common law because it crossed the Atlantic with the American colonists,

> The common law, as now received in America, bears, in its principles, and in many more of its more minute particulars, a stronger and a fairer resemblance to the common law as it was improved under the Saxon, than that law, as it was disfigured under the Norman government.[122]

Furthermore, when describing the formation of the American constitution, Wilson states that its "venerable frame may be considered as of Saxon architecture."[123]

Along with Wilson, many of the founding generation believed that the underlying theme of American law should not be innovation, but continuity because, "a wise and well tempered system must owe much to experience."[124] It was by looking to the days before the Normans had wrecked the Saxon system that this would be achieved. Therefore, as the Saxon *witenagemont* met regularly, so would the Congress of the United States have a regular schedule of meetings which could not be cancelled at the whim of the executive as was allowed in England.[125] Properly understood, Wilson's position was that the American constitution and legal order was a return to what he considered was English law in its purest sense: ancient Saxon law.

Throughout his lectures Wilson spends a considerable amount of time discussing the executive branch of government. He firmly believed that the ancient Saxons had elected their monarchs, and used this premise to praise the American presidency as "a renewal,

120 Ibid.
121 Ibid.
122 Hall above n 94, 76.
123 Ibid. 769.
124 Colbourn above n 93, 153.
125 Colbourn above n 93, 154.

in this particular, of the ancient English constitution."[126] For example, the restrictions on the American executive pleased Wilson, especially the power of waging war, which was given to the American Congress. In Saxon times waging war was within the ambit of the *witenagemote*, and keeping this great power out of the hands of the American President seemed logical from Wilson's historical perspective. In a statement that rings of Coke's influence Wilson states that, "the most significant, and the most effectual source of the law is custom" because custom "involves in it internal evidence, of the strongest kind, that the law has been introduced by common consent; and that this consent rests upon the most solid basis—experience as well as opinion"[127] That the new nation had such good sense only highlighted the fact that the Saxons and their American descendants shared much in common.

And, without a doubt, James Wilson believed that a cardinal virtue of the United States was its admiration of its Saxon predecessors, "We have found, and we shall find, that our national government is recommended by the antiquity, as well as by the excellence, of some of its leading principles."[128]

IV. Conclusion: History, Change, and the Law

As a matter of practical application, ancient constitutionalism would have been unworkable if it absolutely removed the English legal system of any ability to change in response to the myriad of issues that arise within a nation. However, an integral part of the theory is that the king cannot alter the common law rights of the people without the consent of their Parliamentary representatives. Consequently, a principle with its base in fundamental rights was moulded into the idea of separation of powers: the idea (as seen in the first sentence of Article I section I of the U.S. Constitution) that the power to create or modify law is reserved to the legislature.[129]

Which begs the question: Does the ancient constitution protect the powers of Parliament or the rights of the people? In Coke's time,

126 Ibid.

127 James Wilson, 'Of the Study of Law in the United States' (1791), in R.G. McCloskey, (ed), *I The Works of James Wilson* (1967) 69.

128 Colbourn above n 93, 154.

129 "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

when the Stuart kings were expanding their powers, this ambiguity went unnoticed. However, scholars have noted that Coke's ancient constitutionalism developed in two ways.[130] If the role of Parliament was emphasized, the theory could lead to the idea of parliamentary supremacy. On the other hand, if fundamental rights were emphasized, the theory could lead to a "rights-based constitutionalism in which the powers of parliament as well as of the King were restricted."[131] The British followed the course of parliamentary supremacy, and by the time of the Stamp Act crisis of 1765, the British could believe that the consent of the people via Parliament barred any constitutional objection the colonists could have to taxation.[132]

American constitutionalism took a different route. In America, the core of constitutionalism was the protection of rights, and therefore, any system of government that failed to secure those rights was objectionable.[133] The colonists understood the immemorial principles of the ancient constitution as allowing change in their customary rights pursuant to the common law only with the consent of their own representatives.[134] As they were not represented in Parliament, the principle of parliamentary supremacy was inapplicable to them. Moreover, by custom and practice going back to the settlement of New England, the colonies were represented through their colonial assemblies, and therefore the ancient constitution implied—to them—that the powers of taxation and of creating and modifying the law rested in these assemblies.[135] Consequently, the colonies were functionally independent from Parliament even before the Declaration of Independence. This autonomy from Parliament is likely what Thomas Jefferson had in mind when he said, "As to the people or Parliament of England, we had always been independent of them."[136]

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130 See e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967) 177; See also Bernard Bailyn ed.,*1 Pamphlets of the American Revolution, 1750-1776* (1965) 412 et seq.

131 McConnell above n 7, 189.

132 Bailyn, above n 96, 30.

133 Ibid.

134 Reid, above n 92, 10.

135 Ibid; See also Bailyn, above n 130.

136 Thomas Jefferson, 'The Autobiography of Thomas Jefferson' (1821), in Adrienne Koch & William Peden (eds), *The Life and Selected Writings of Thomas Jefferson* (1944) 17.

The arguments of the American colonists against the mother country, *mirabile dictu*, paralleled the arguments against Stuart absolutism in the previous century. Americans shared Coke's position that rights are not secure if they were given by the grace of the sovereign. Samuel Hopkins of Rhode Island declared, "[Americans] do not hold [their] rights as a privilege granted them, nor enjoy them as a grace and favour bestowed, but possess them as an inherent, indefeasible right."[137] Again, if rights did not have a source prior to and distinct from a benevolent sovereign, they could be taken away at any time.[138]

The purpose of the Revolution was not to create new rights, but to defend and secure the rights that were already possessed. Therefore, the Founding Fathers adhered to a theory of rights rooted in the customs and experience of the American people. The common law was the vehicle that brought ancient constitutionalism to America; not the set of often arcane and technical legal doctrines that flourished in the courts of England, but what Dr. Pocock has called "the common law mind," i.e., the commitment to the idea that the most legitimate source of law is longstanding legal practice, which gradually adapts to a changing world.[139] Americans would make changes to the common law as the young nation developed, but remained firmly committed to their understanding that rights and liberties are not the result of legislative action, but of custom.

Today, constitutional law and common law are studied as different areas of law, but at the founding they were understood to be intertwined.[140] This melding of what seem to be separate areas of law is, perhaps, hard to understand in a legal culture where the

[137] John Philip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (1986) 67.

[138] Ibid. at 70 (Reid explains that the legal imperative of this constitutional theory lay in the reality that granted rights are precarious, for what is given can be revoked. This was a reality to which Americans paid close heed. Throughout their history, Americans had fought attempts to leave them dependent upon rights conferred instead of rights inherited.); See also Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England* in *American Law and The Constitutional Order: Historical Perspectives* (1978) 29.

[139] J.G.A. Pocock, *Conceptual Change and the Constitution* (1988) 57; See generally Jeremy Black, *George III: America's Last King* (2006).

[140] See Bailyn, above n 130, 30; See also Jeremy Black, "'Rule Britannia!" All Empires Are Not Created Equal' (2008) 49 *Modern Age* 4, 520 (2008).

Supreme Court is the primary expositor of issues like free speech and equal protection, and statutory law can erase common law theories (which no longer have a sense of permanence at all). However, the American system, with its checks and balances, coequal branches, and bicameralism was designed to frustrate change, and therefore naturally leans in favour of long-established rights, duties, and customs.

Coke died in 1634, and while many scholars have criticized his jurisprudence since then, he nonetheless endures as a venerable figure in the Anglo-American legal tradition, and the personification of immutable, immemorial law. The poet Robert Codrington wrote an elegy for Coke soon after his death, which celebrates his legal career and in its verses transport Coke into a world of myth and fantasy. Few can argue that this is a suitable way to remember Coke, who during his juridical career so often called upon iconic figures like King Arthur and Moses to buttress his arguments and support the theory of the ancient constitution. Here is part of Codrington's first stanza,

> The Nymphes that haunt the neighboring woods and hilles,
> That guard the valleys, and that guide the Rilles,
> Resound, his losse and honourd name and show
> The boundless Rage of their impatient woe
> In so distracting and so sadde a cry,
> As if with him the Northern World did dye.[141]

In fact, rather than die with Coke's death, common law in England and around the world would flourish, due in large part to his brilliance, persistence, and imagination. It would serve Americans well to remember Sir Edward Coke, and the legal tradition his memory embodies.

[141] Robert Codrington, *Elegy on Sir Edward Coke* 1634 British Library Manuscripts 37484 at 9b-10a as quoted in Paul Raffield, 'Contract, Custom, and the Common Weal' (2005) 17 *Law and Literature* 69, 70.