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A Challenge to the Libertarian Challenge

Bret N. Bogenschneider*

The “Libertarian Challenge” to redistributive taxation was given as the syllogism: (i) Property is justified; (ii) Taxation is inconsistent with property; (iii) Therefore, redistributive taxation is unjustifiable. In this article, a challenge to the Libertarian Challenge is proposed based on the rejection of such a Libertarian definition of money as effectively equivalent to property. The value of money is further shown to be *relative* based on the holder. For example, the wealthy accumulate money *for-exchange* while the poor apply money *for-use*. Thus, to the wealthy money yields a “positional preference” in terms of the total accumulated amount relative to other wealthy persons. Taxes of course stand in opposition to such accumulations just as stated in the “Libertarian Challenge”. However, a form of redistributive taxation could be applied which would levy tax yet maintain such “positional preference” of the wealthy vis-à-vis one another in terms of total money accumulations. This approach defeats the “Libertarian Challenge” because the tax is paid proportionately out of money accumulations, but where relative property holdings are maintained between wealthy persons. Such approach also yields a Pareto optimal result where money is transferred to the poor but no wealthy person is made worse off on a relative basis.

INTRODUCTION

In the article, *Fragmenting Property*, Daniel Attas provided a definition of private property as inconsistent with redistributive taxation.¹ Attas termed such inconsistency the “Libertarian Challenge”. The Libertarian Challenge is the following syllogism: (i) Property is justified; (ii) Taxation is inconsistent with property; therefore, (iii) Redistributive taxation is unjustifiable. This article represents a response (or perhaps more aptly, *challenge*) to the Libertarian Challenge.

The current challenge to the Libertarian Challenge relates to the Libertarian definition of private property. That is, to the Libertarian, “property” is given as *equivalent* to money. Attas actually describes a person as “owning” money.² Even if true in Libertarian terms, this description is ostensibly strange since *money* is generally used to acquire *property*. Money is more appropriately defined as a value placeholder in furtherance of the *exchange* into property. Thus, redistribution via taxation represents only an indirect transfer of “property” qua money where property is taken as readily convertible into and out-of money. The terminology of Libertarianism given by Attas no longer heeds any distinction between “money” and “property”, and the payment of taxes in *money* is then given as the equivalence to the transfer of *property* itself.

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¹ Attas, D., “Fragmenting Property”, *Law and Philosophy* (2006) 25: 119-149.

² *Ibid.* at 124 (“[H]e now decides to purchase something with the money he owns”).

But, this presumption of Libertarianism does not represent what the wealthy actually do with money. The wealthy save and accumulate money. In fact, that is the definition of the term “wealthy”. If the wealthy spent the accumulated money and thereby convert it into consumer goods, then they would technically no longer be wealthy. In the modern era, the wealthy are able to accumulate hoards of money in an amount potentially beyond which can ever be converted into property, *even* gold or silver. Fiat money is much more conducive to hoarding than precious metals historically used as currency. The Libertarian theorist effectively requests as part of the Libertarian Challenge that tax jurisprudence proceed on the assumption that “property” is equivalent to “money” in order to arrive at the conclusion that redistributive taxation is not justified. This is not a viable explanation for two reasons explained further here: (i) where money serves to establish solely a positional preference between wealthy persons redistributive taxation could be designed which could maintain the relative position of the wealthy vis-à-vis each other and still redistribute to the poor; and (ii) the value of money is quantitatively different between persons so redistribution could yield a gain or loss when transferred between persons, such as from the dead to the living (who enjoy a use-value for the money).

THE CHALLENGE TO THE LIBERTARIAN CHALLENGE

The current challenge is accordingly to the definitional premise of the Libertarian Challenge in the idea of money as an absolute value placeholder for money.³ The categorization of “money” is thus more aptly taken as *relative* to the holder. Mark Hsiao summarized a functional approach to money based on its “internal” versus “external” value as follows: “When money is treated as a form of property for its use or held for its own quality, it is held for its internal values.”⁴ A conception of the relative value of money was likewise given by Jeanne Schroeder as follows:

Masculine money, which is money conceived as exchange value, is quantitative in nature. Feminine money, which is enjoyment or use value, is qualitative. Quantity as commensuration is the suppression of quality as differentiation, in the same sense that the masculine position is the denial of the feminine.⁵

³ See: Waldron, J., “The Right to Private Property” (Oxford University Press, 1988); see also: Breakey, H., “Who’s Afraid of Property Rights? Rights as Core Concepts, Coherent, Prima Facie, Situated and Specified”, *Law and Philosophy* (2014) 33: 573-603.

⁴ Hsiao, M., “A Shift in the Objective Measure of the Time Value of Money” [2015] 23 *Restitution Law Review* 92 citing Mann on the Legal Aspect of Money (Proctor, ed.) (6th ed.0 (Oxford Univ. Press, 2005), 9.

⁵ Schroeder, J., “The Midas Touch: The Lethal Effect of Wealth Maximization”, 1999 *Wisconsin Law Review* 687, 755 (1999).

The wealthy tend to accumulate money based on what Hsiao refers to as its “internal” value and the poor spend it based on its “external” value. Feminist theory similarly distinguishes between money *in-use* and money *in-exchange*.

The Libertarian Challenge can be re-interpreted along similar lines as the switching between an idea of money as held for its “internal” value. The strenuous Libertarian objections to taxation result from taxation as in a form of dialectical opposition to money accumulation. In the natural state man does not accumulate money; however, in a Libertarian society, man does so.⁶ Taxation negates such accumulation. Thus, taxation interferes directly with the conception of money as intended to be accumulated and held for-exchange.

Nonetheless, property accumulation by the wealthy in the circumstance where the reasonable money in-use needs have been exceeded, serves principally to establish a positional preference over other wealthy persons. The purpose of money accumulation in that case is thus to obtain a “positional preference” versus other persons and not to acquire *property*. In economic terms a “positional preference” refers to the relative standing of wealth accumulation versus other wealthy persons (and, at least ostensibly also in relation to the poor with little or no property accumulations).⁷ Indeed, the origin of Libertarian theory coincides with the Enlightenment era plantation society. The plantation classes established strict rank-ordering methods in the form of land holdings in acreage and slaves. This rank-ordering established the position of the plantation owner within society. That interference with rank-ordering by property holding is indeed the modern Libertarian point.⁸ By comparison, the poor do not hold money with the purpose of demonstrating relative position to other persons, but rather intend to use the money to acquire goods for consumption. The behavior of the poor in the non-discretionary spending of money is *not* merely to obtain a positional preference.

The formal challenge to the Libertarian Challenge is according the following: A “redistributive” tax does not necessarily change the relative position of the wealthy versus other wealthy persons in terms of “property” accumulation. If taxation were designed to be proportionate (based on relative wealth) a tax system could be devised which is neutral to the payor from the perspective of a ranking of persons by money held in-exchange.⁹ The redistributive function of the funds levied would accrue merely to the poor who spend the money. Such a levy of a redistributive tax on a wealth accumulator can be

⁶ Locke, J., “Second Treatise of Government” (1690), ed. by C.B. Macpherson (Hackett Publishing, 1980); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) (Clarendon Press, 1907).

⁷ Frank, R., “The Darwin Economy” (Princeton University Press, 2012).

⁸ Epstein, R., “Taxation in a Lockean World”, 4:1 *Journal of Social Philosophy and Policy* 49 (1986).

⁹ Any tax attorney or Libertarian theorist will be quick to point out some money accumulators (particularly family businesses) will be “cash poor” and unable to pay a tax in money without a forced disposition of property. Although this is true, the author finds this to be a relatively minor problem for society and easily overcome by borrowings or other means available to the wealthy. In any case, this very practical discussion between tax attorneys is beyond the scope of the current philosophic discourse.

justified within the existing definitional framework of property where there is a consumption increase to the poor that either increases overall utility¹⁰ or increases the standing of the least well off.¹¹

In economic terms, the effect of the redistributive tax could also be Pareto optimal (i.e., a situation where after-tax no person is worse off but someone is better off).¹² The Libertarian objective where societal status is obtained based exclusively on the rank-ordering of persons by accumulated wealth in society is thereby maintained and no person is made worse off from the tax on property. Any incremental consumption by the poor (i.e., money spent in-use) is funded by a proportionate tax on the wealthy (i.e., money held in-exchange) where the rank-ordering of persons by wealth is not changed. Such a Pareto-optimal approach to redistributive taxation defeats the Libertarian Challenge since the respective positional property rights are fully maintained.

QUANTITATIVE DIFFERENCES IN THE VALUATION OF MONEY

The purpose of this section is to show by logical means that the value of money is relative and that the difference is *not* merely qualitative, but *quantitative*. That is, money for-*exchange* can really be worth more or less than money for-*use*.¹³ One primary example is that money for-*use* is more valuable for persons that need certain goods for survival (and not for trade), such as food or medicine. Money in-*exchange* has a different *quantitative* value than money in-*use*. As such, the net present value within the theory of finance and taxation represents a determination of the quantitative value of money where currency represents the objective statement of value. Only entities with an infinite lifespan, de-facto immortality, and an infinite exchange horizon (such as corporations) trade money with other persons purely as in-*exchange*. Thus, the difference in money as between *exchange*-value versus *use*-value is not merely qualitative. A person who values money in-*use* values money less once all of his or her needs are satisfied, where the demand for money in-*exchange* never reaches any limit.

¹⁰ See: Kaplow, L., *The Theory of Taxation and Public Economics* (Princeton Univ. Press, 2010).

¹¹ See: John Rawls, *A Theory of Justice* (Harvard Univ. Press 1971).

¹² Pareto, V., "Manual of Political Economy" (Kelley, tr.) (1961); Mathur, V., "How Well Do We Know Pareto Optimality?" *Journal of Economic Education* 22:2 (1991) 172–78.

¹³ *Ibid* at 755 ("Market exchange requires a concept of masculine money understood as an objective metric of exchange value, then, as a tool that enables market participants to commensurate and connect different commodities. This is required precisely because the things to be exchanged are distinguishable by quality as well as by time and space. If all commodities were in fact interchangeable, one would not engage in exchange and would not need money as a universal metric of value.").

Figure 1. The Future Value of Money.

$$\text{Future Value (FV)} = \text{Present Value (PV)} \times (1+r)^N$$

$$\text{PV} = \sum \text{FV}/(1+r)^N$$

Corporation

$$\text{PV} (r, N) = \sum \text{FV}/(1+r)^N = (\text{PV}) \times (1+r)^1 + (\text{PV}) \times (1+r)^2 + (\text{PV}) \times (1+r)^3 \dots (\text{PV}) \times (1+r)^\infty$$

Individual

$$\text{PV} (r, N) = \sum \text{FV}/(1+r)^N = (\text{PV}) \times (1+r)^1 + (\text{PV}) \times (1+r)^2 + (\text{PV}) \times (1+r)^3 \dots (\text{PV}) \times (1+r)^{\text{Death}}$$

	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>	<u>Year 4</u>	
Immortal	(PV) x (1+r) ¹	(PV) x (1+r) ²	(PV) x (1+r) ³	(PV) x (1+r) ⁴	...
Mortal	(PV) x (1+r) ¹	(PV) x (1+r) ²	(PV) x (1+r) ³	Death	

Notes: The rate of return (r) represents the ability to “exchange” (or trade) in a future period under the *exchange*-value of money.

Furthermore, only living persons have the potential for a use-value of money. Although individuals are ostensibly conscious of their own death to which the use-value of money will expire, yet when it comes to money, individuals often act in open defiance of their own mortality.¹⁴ However, the *assumption of immortality* is automatically reversed in economic terms when the individual becomes *currently*-conscious of his or her own immediate or pending death. Upon the consciousness of death itself, *all* prior economic theory goes out the window, and even scrooge suddenly becomes a great humanitarian.

Thus, death, like taxes, also has the potential to negate efforts toward accumulation. The present value of money in-exchange depends on the remaining periods of exchange for finite beings.¹⁵ This leads directly to the Libertarian conception of death insofar as cognition of death is an acceptance of limited remaining periods for money exchange. As

¹⁴ Bogenschneider at 335 (“Vance explains precisely that the libertarian will dispose of wealth – in physical death. Such is a ‘natural right’. The Libertarian expressly denies that death is an aspect of man’s natural existence.... Therefore, in the defiance of any estate tax the Libertarian continues to believe in eternal life and the ability to psychologically overcome physical death in Nietzschean terms.”) (citations omitted).

¹⁵ Fisher, I., “The Theory of Interest”, NEW YORK 43 (1930); NPV (r, N) = $\sum R/(1+r)^N$.

such, the accumulator of wealth seeks out a means to overcome death itself as a barrier to further money accumulations.¹⁶ The ongoing Libertarian frustration with taxation reflects also a misplaced frustration with death itself since the accumulation of money becomes a means toward the overcoming of death. In that sense, wealth accumulation is a type of will-to-power over death.¹⁷ For this reason, an estate tax is particularly objectionable to the Libertarian because it frustrates the will of the accumulator to overcome death.

The Posnerian idea of wealth-maximization can also be understood as the rational outcome of a view of money as an end-in-itself.¹⁸ From this premise, persons with substantial accumulated wealth may seek to transfer at death an amount of money solely *commensurate with ability* to heirs of money *in-exchange*, *plus* an amount sufficient for money *in-use* even to the spendthrift heir. The remainder of the accumulated wealth must be converted from money *in-exchange* to money *in-use* prior to death (or upon death), and applied to a charitable project of some sort. This outcome is the *rationalization* of a lifetime spent in money trading upon the realization of the inevitability of death. This further represents the death-bed abandonment of an *absolute value* of money. That is, when confronted with death the Libertarian ideal of accumulating money in defiance of mortality such view is abandoned in favor of money valued in degree based on how it might be used.

For persons paid by the hour the idea of money as “congealed time” also seems apropos since money is received based on hourly increments of work.¹⁹ However, the idea of money as “congealed time” only can be conceived of from within the paradigm of money *in-use*. That is, where the individual trades time for money, and then converts the money into goods, this appears to be a trade of time itself for goods. By extension, money appears to be the accumulation of all time of the workers within society. But, money itself is not “congealed time” for several reasons. First, money cannot in fact be used to purchase additional duration of life to the particular individual. Second, where the portion of money held as money *in-exchange* is taken into account on a national basis the money supply is variable as the Federal Reserve is free to add liquidity to the fiat money supply to foster *exchange*. The money supply itself represents a combination of the money valued *in-use* and money *in-exchange*. However, if all of the fiat money in the world were simultaneously converted from *in-exchange* to *in-use*, the aggregate amount would exceed

¹⁶ Bogenschneider, B., “The Will to Tax Avoidance: Nietzsche and Libertarian Jurisprudence”, [2014] *The Journal Jurisprudence* 320 (“The avoidance of income taxation involves a Will to Power against the state and over “lesser” wage-earning taxpayers. Libertarians also attempt to use money to “will” past physical death – to overcome death.”).

¹⁷ *Ibid.*

¹⁸ Posner, R., “The Economics of Jurisprudence” (Cambridge, MA: Harvard University Press, 1981); Posner, R., “The Value of Wealth: A Comment on Dworkin and Kronman”, 9 *Journal of Legal Studies* 243 (1980).

¹⁹ Schroeder at 764 (“Money is, in this sense, congealed time. Money is both time and the negation of time.”).

the amount of labor or consumer goods that could be purchased at any given time at a constant price.

IMPLICATIONS FOR PROGRESSIVE TAXATION

Progressive taxation is a corollary to redistributive taxation as contemplated by the Libertarian Challenge. From the Libertarian perspective both progressive and redistributive taxation represent interference with property rights. Progressive taxation implies the wealthy are relatively more heavily taxed with the proceeds spent on public goods, whereas redistributive taxation implies the wealthy are taxed with the proceeds redistributed to the poor.

However, one particular problem for the Libertarian analysis is that the poor are presumed to be the beneficiary of public goods. Thus, the Libertarian Challenge is at its strongest where applied to redistributive taxation implying a direct taking and redistribution of property from the rich to the poor. But, it is also the case that the wealthy (as the property-owning class) are also a beneficiary of public goods designed to enhance or defend property rights. Thus, if tax dollars are used in any particular society as a means to defend or enhance property rights, then the harm of taxation is really a matter of degree.

A more significant problem, however, can also arise under a progressive tax system with significant inequality. With inequality, a significant portion of the population may be presumed to neither own nor possess much if any property (irrespective of the reasons therefore). In this situation, the lower class has nominal grounds to object to such societal expenditures for the public goods, particularly if the poor are required to pay wage, sales and other taxes in order to survive. In such a case, one purpose of progressive taxation is to cause the poor to acquiesce to governmental expenditures for public goods under the belief that the wealthy (i.e., the property classes) pay relatively more for the good to which they derive the benefit. For this reason, the lower classes *must* believe in the existence of progressive taxation for the overall system to function. Thus, even from within Libertarian theory progressive (or redistributive) taxation would represent a suboptimal moral policy, but nonetheless with substantial pragmatic justification thereby rendering such “justified, at least in part, by the authority’s ability to realize the rule of law” under the guise of progressive taxation.²⁰

CONCLUSION

The overall tax system is not progressive merely because the statutory rates of income tax are progressive; in fact, when all of these forms of taxation are considered in addition to the income tax, including sales, gasoline or property tax and so forth, the overall *effective*

²⁰ See: Reeves, D., “Practical Reason and Legality: Instrumental Political Authority without Exclusion, 34 *Law and Philosophy* 257.

tax rates are *regressive*.²¹ Regressive taxation implies a disproportionate tax levied on the poor for the provision of public goods. If these public goods are for the defense of property rights, then regressive taxation is also re-distributive taxation but from the poor to the rich. However, even this situation can oddly still be justified under the Libertarian framework as proposed by Attas where *only property rights count*.

The parallel literature from within the discipline of taxation generally accepts the *Libertarian Challenge*, but re-focuses on the conclusion of the syllogism.²² This approach results in discourse over the potential *justifications* for redistributive taxation. In tax policy terms, this is referred to as the “welfare state”.²³ The terminology is somewhat odd insofar as it presumes a progressive *statutory* tax rate will yield higher *effective* tax rates for the wealthy. Such a presumption is necessary in the formulation of a “redistribution” function of taxation as an aspect of fiscal policy.²⁴ But, the presumption is *not* assured as a tax technical matter since the taxes collected depend on both the *tax rate* and the *tax base*. The wealthy typically obtain many forms of “income” from capital which do not necessarily become part of the *tax base*, and are thus not subjected to progressive taxation at all. In tax terms, this is referred to as “unrealized income” (meaning un-taxed income) or income upon which taxation is deferred.²⁵ Therefore, it is difficult to say in practice whether even a tax system with progressive statutory rates is in fact a redistributive tax system where property is transferred from the wealthy to the poor and not vice-versa.

In conclusion, a “proportionate tax” could be devised *where the wealthy might agree to be taxed on a relative basis to one another* perhaps based on a standardized measure of income or wealth. The tax could be designed to approximate a Pareto optimal result where the relative wealth standings of the wealthy relative to each other do not change as a result of taxation. Also, upon death, a person loses the use-value of money and a quantifiable gain may thus accrue by the transfer of money to a living person with a use-value for the money. Each of these illustrations separately answer the Libertarian Challenge in various

²¹ See: Bogenschneider, B., “The Effective Tax Rate of U.S. Persons by Income Level”, 145 *Tax Notes* 117 (Oct. 6, 2014) (“Effective Tax Rate, U.S. Persons by Income Level. Lowest Quintile to Highest Quintile: 27% 25% 24% 23% 9%”).

²² See e.g.: Miller, G., “Economic Efficiency and the Lockean Proviso”, 10 *Harvard Journal of Law and Public Policy* 401 (1987).

²³ Avi-Yonah, R., Globalization, “Tax Competition, and the Fiscal Crisis of the Welfare State”, 113 *Harvard Law Review* 7 (2000).

²⁴ Attas at 119 (“[R]edistributive theories of justice, in so far as they impose involuntary taxes, are inconsistent with property rights, and are therefore unjustifiable.”). The specific argument given by Attas in reference to the Libertarian Challenge is that all taxes are infringements of private property but not all taxes are unjustifiable.

²⁵ See: Bogenschneider, B., “Income Inequality & Regressive Taxation in the United States”, [2015] 4:3 *Interdisciplinary Journal of Economics & Business Law* 8 (“[T]he IRS tax return data compilations of Piketty & Saez reflect solely reported ‘taxable income’ and not unrealized gains that are not currently taxable and therefore not reported to the IRS at all. However, the Federal Reserve does report such ‘asset holdings gains’ in its annual reports. In tax nomenclature, these Fed holding gains constitute ‘unrealized income’. Such unrealized income is a very real and substantial form of income”).

contexts given the relative valuation of money and the potential for a Pareto optimal result of redistributive taxation.

GENDER: 'DEVELOPMENTS' IN AUSTRALIAN LAW

ALLAN ARDILL*

I INTRODUCTION

Straight after the acclaimed *Mabo*¹ decision First Australian Michael Mansell identified the development as a Trojan horse for his People with the catch-phrase 'The Court Gives an Inch but Takes another Mile'.² Can this same criticism be made of developments in gender laws over the last 20 years? This article critically assesses the way the law, in particular case law, has managed gender over the last two decades. My intention in reviewing 'developments' in gender law is not to belittle exclamations of joy but to reveal what the 'revolution does not do'.³ In doing so it is possible to critically assess the way power operates through law. As Rothwell points out when assessing whether change is revolutionary or haunted by the past it is important to focus on what is left out or deferred 'to comprehend what the revolution leaves in place'.⁴

Unlike the troubled development of native title law and the absence of any recognition of First Australian sovereignties following *Mabo*,⁵ gender law has developed considerably since the 1990s.⁶ However it still has a way to go. This is because the law regulates gender to restrict passing, it imposes controls over gender 'authenticity', it regulates gender subject to an embargo on gay marriage, and it re-institutes a sexist gender binary at the same time as it purports to abandon that binary. Therefore unlike Mansell's assessment of *Mabo*, the situation with gender has changed to be more like two steps forward and one back, as opposed to 'gives an inch and takes a mile'.

Why these cases and statutes? The cases and statutes considered below have been included because they are regarded as 'developments' in the law of gender. It is

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¹ *Mabo v Queensland* (1992) 175 CLR 1.

² Michael Mansell, 'Perspectives on Mabo: The High Court Gives An Inch But Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin* 94.

³ Phillip Rothwell, 'Unfinished Revolutions: Gaps and Conjunctions' (2012) 37(2) *Signs* 271, 271.

⁴ *Ibid.*

⁵ Chief Justice Robert French, 'Lifting the Burden of Native Title – Some Modest Proposals for Improvement' (Speech presented to Native Title Users Group, Adelaide, 9 July 2008); Susan Griffiths, 'Denial By Deflection: The implementation of illusory rights in the denial of First Nation sovereignties' (2014) 2 *Griffith Journal of Law & Human Dignity* 330; Aileen Moreton-Robinson (ed), *Sovereign subjects: Indigenous sovereignty matters* (Allen & Unwin, 2007); SBS, 'Native title laws failing: leaders', *World News*, 30 May 2012 <<http://www.sbs.com.au/news/article/1654893/Native-title-laws-failing-leaders>>; Damien Short, 'The Social Construction of Indigenous "Native Title" Land Rights in Australia' (2007) 55 *Current Sociology* 857.

⁶ See the cases discussed below; Commonwealth, Royal Commission On Human Relationships, *Final Report* (1977).

recognised that the law covered in this article may not be representative of the extent of developments in the legal regulation of gender. A comprehensive critique would require research into amongst other places the day-to-day practices of law across policing, magistrates courts, trials in lower courts and quasi-legal situations where bureaucrats exercise decision-making power according to 'law'. Still, the law that is reviewed here provides a snapshot of the broad trajectory of the legal construction of gender.

In this article gender refers to the ways in which people live their lives subject to norms, institutions, conventions, and laws that impose expectations based on beliefs about biological sex. For this reason it is not strictly concerned with women, rather the ways in which the law constructs gender. This means the article necessarily grapples with sexuality to the extent it is tethered to gender by the law. In the course of establishing that the law advances two steps forward and one back this article begins by framing gender as a social construction as opposed to a biological or cultural essence. Theorising gender in this way is consistent with the view of many who work in social theory whether or not that is a dominant paradigm. Attention is then turned to the significance of social construction for law and why a failure to understand social construction has led to at best a contradictory approach to gender and at worst to the reproduction of gender hierarchy. This is followed by a review of 'developments' in the law dealing with gender over the last two decades to argue that welcome advances still leave gender discrimination in place.

II THEORISING GENDER AS A SOCIAL CONSTRUCTION

Western thought about gender has been plagued by two dichotomies. One dichotomy regards gender as a male/female binary and the other seeks to explain difference according to a nature/nurture binary. Both dichotomies have been widely condemned as problematic and yet they persist as fundamentals in academic literature, common parlance, media, and law.⁷ In *Re Kevin* Chisholm J considered literature condemning these binaries but misunderstood social construction which attempts to critique and transcend the justifications for those binaries.⁸ Unfortunately Chisholm J assumed social construction was unnecessary to the pleaded issues before the Court. Instead his Honour thought that social construction meant abandoning sex altogether:

It is probably impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities, not medical niceties, and most people are clearly male or clearly female ...⁹

⁷ See generally, Allan Ardill, *Sociobiology and Law* (PhD Thesis, Griffith University, 2008) <<https://www120.secure.griffith.edu.au/rch/items/14656573-04df-f6f3-dab9-b37f50f0c65c/1/>>.

⁸ *Re Kevin* (2001) 28 Fam LR 158.

⁹ *Re Kevin* (2001) 28 Fam LR 158, 164 [17], quoting Douglas K Smith, 'Transsexualism, Sex Reassignment Surgery and the Law' (1971) 56 *Cornell Law Review* 963, 694–5 (the quotation incorporates part of the original author's note 9 but otherwise omits citations).

It is true that social construction treats gender as a regulatory fiction. This does not however mean it is irrelevant to a case where the law classifies sex. Social construction critically assesses gender classification as much as the explanations for binary difference. Amongst other things social construction sheds light on why the law regulates as it does and how this reproduces gender. So what is social construction?

Social construction emerged in the 1980s with an understanding that nature/biology versus nurture/culture debates were ideological, reductionist, essentialist, and fruitless. Haraway explains that social construction is associated with Second Wave feminism arising as a counter to the dominance of biological essentialist/determinist theories of the 1950s and 60s, and in the wake of ‘Simone de Beauvoir’s 1940s insight that one is not born a woman.’¹⁰ The idea that there are gender specific behaviours or universal principles of sexuality over time and across cultures was increasingly regarded as an extraordinary claim.¹¹ Instead, according to Kennelly et al:

... gender has come to be viewed by social scientists as a socially constructed institutional arrangement, with gender divisions and roles built into all major social institutions such as the economy, the family, the state, culture, religion, and the law, that is, the gendered social order. “Gendered behaviour,” in this conceptualization, refers to the ways people act based on their position within the gender structure and their interaction with others, rather than as a result of hormonal input or brain organization. We “do gender” and participate in its construction, but it is also something that is done to us as members of a gendered social order.¹²

Although social construction grew out of cultural construction it should not be confused with it.¹³ Social construction assumes that biology does not determine gender while recognising that biology cannot be severed from gender any more than culture.¹⁴ The beauty of this conceptualization is that it abandons the nature nurture dichotomy and with it the concept of a ‘coherent inner self, achieved (cultural) or innate (biological)’, and instead treats gender as a ‘regulatory fiction’.¹⁵ Social construction regards gender as the result of interaction between biology, culture, individual, place, and history.¹⁶ An interaction that may never be fully understood but what may be understood are the ways

¹⁰ Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge, 1991) 133–7.

¹¹ Julia Epstein and Kristena Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity*, (Routledge, 1991) 3; A Solomon-Godeau, ‘Male Trouble’ in *Constructing Masculinity*, M Berger, B Wallis, and S Watson (eds), (Routledge, 1995) 71.

¹² Ivy Kennelly, Sabine Merz and Judith Lorber, ‘What is Gender?’ (2001) 66(4) *American Sociological Review* 598, 600 (references omitted).

¹³ Carol Vance, ‘Social Construction Theory and Sexuality’ in *Constructing Masculinity*, M Berger, B Wallis, and S Watson (eds), (Routledge, 1995) 47.

¹⁴ Gill Jagger, ‘The New Materialism and Sexual Difference’ (2015) 40(2) *Signs* 321, 326.

¹⁵ Haraway, above n 10, 135.

¹⁶ Talia Mae Bettcher, ‘Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance’ (2014) 39(2) *Signs* 383, 387; Linda Nicholson (ed), *Feminist Contentions: A Philosophical Exchange* (Benhabib, Butler, Cornell, Fraser), (Routledge, 1995) 3.

in which gender difference ‘becomes a product of boundary-making practices in the intra-action between the material and the discursive’.¹⁷ Therefore the focus of social construction shifts to the ways in which power operates through gender.¹⁸ So how is power to be analysed in the regulation of gender?

Of the many approaches that have developed to assess power since the post-structural turn,¹⁹ this article adopts Feminist Standpoint Theory²⁰ and Intersectional Critique.²¹ There are several reasons for this choice. The first is that these two approaches are similar despite different origins as they both necessarily seek to change the way power operates unlike those inspired by Foucault’s genealogical approach or Derrida’s discourse analysis.²² For instance, while Foucault’s way of reading power involves an assessment of the ‘*problematizations* through which being offers itself to be, necessarily, thought – and the *practices* on the basis of which these problematizations are formed’, it is not necessarily aimed at change.²³ By contrast with discourse analysis Feminist Standpoint Theory seeks to understand and change ‘inappropriate essentializing of women and men’ and ‘concerns ... how to understand the intersectionality of race, class, gender, and other structural features of societies’.²⁴ Similarly, Intersectional Critique is concerned with ‘targeting the forces that create the outcomes, not just their static products’, namely ‘white male dominance’.²⁵

¹⁷ Jagger, above n 14, 337.

¹⁸ Bettcher, above n 16, 390.

¹⁹ See generally, the collection of articles in (2007) 10(1) *Postcolonial Studies*; Terry Eagleton, *The Function of Criticism: From the spectator to post-structuralism* (Verso, 1991); Bruce Parry, *Postcolonial Studies: A Materialist Critique* (Routledge, 2004).

²⁰ Often attributed to Dorothy Smith and Sandra Harding, but see generally: Donna Haraway, ‘Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective’ (1988) 14(3) *Feminist Studies* 575; Sandra Harding, *The Science Question in Feminism* (Cornell University Press, 1986); Nancy Hartsock, ‘The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism’ in Sandra Harding and Merrill Hintikka (eds), *Discovering Reality: feminist Perspectives on Epistemology, Metaphysics, and Philosophy of Science* (Reidel, 1983), 283–310; and Dorothy Smith, *The Everyday World as Problematic: A Feminist Sociology* (Northeastern University Press, 1987).

²¹ Often attributed to Kimberle Crenshaw in K Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *University of Chicago Legal Forum* 139. See also Patricia Collins, ‘Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought’ (1986) 33(6) *Social Problems* 14; Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30(3) *Signs* 1771; Chandra Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1986) 12(3) *Boundary 2* 333; and Shuddhabrata Sengupta, ‘I/Me/Mine – Intersectional Identities as Negotiated Minefields’ (2006) 31(3) *Signs* 629.

²² See Nick Mansfield, *Subjectivity: Theories of the self from Freud to Haraway* (Allen & Unwin, 2000) 5, 10, 39, 59–60 138, 184.

²³ Michel Foucault, *The Use of Pleasure, The History of Sexuality: Volume 2*, R Hurley (Trans) (Penguin Books, 1985) 11 (emphasis in original).

²⁴ Sandra Harding and Kathryn Norberg, ‘New Feminist Approaches to Social Science Methodologies: An Introduction’ (2005) 30(4) *Signs* 2009, 2011.

²⁵ Catharine A MacKinnon, ‘Intersectionality as Method: A Note’ (2013) 38(4) *Signs* 1019, 1023.

There is no intention here to be dismissive of the vast respected scholarship that has followed Foucault and Derrida, such as the work of Butler,²⁶ amongst many others, rather it is a question of the suitability of method in terms of the subject matter and the objective of this article.²⁷ The subject matter and objective of this article coincide around addressing legal power through the legal construction of gender and its intersections with marriage, family, sexuality, and transgender bodies.²⁸ Why these intersections and not others, such as race and class, is because ‘the most extreme cases of reality enforcement tend to occur where there is a maximal intermeshing of oppressions’ and this tends to be around the transgender body.²⁹ This is not to trivialise other areas of law that feature as intersections such as violence against women. On the contrary, what the law says about the transgender body also speaks to other intersections as this article will show below.

For present purposes what is important is recognising as Mackinnon has that while the law ‘truly gets it’ at times, in the main the ‘law is replete with missed intersectional opportunities.’³⁰ As will be shown below, Australian law has not understood intersectionality, and even if it did, it would not be able to address it short of transformation which is at the heart of Feminist Standpoint Theory (*FST*) and Intersectional Critique (*IC*) as opposed to Foucault’s genealogy.³¹ Both of these more critical approaches ‘attempt to understand how, in a networked world, each of our individual circumstances connects to form larger patterns of oppression and liberty.’³² They ‘embrace the complexities of compoundedness’ by recognising individual struggles not as singular issues but part of a system that reifies oppression as anomalous while importing ‘a descriptive and normative view of a society that reinforces the status quo’.³³

Unlike legal positivism, *FST* and *IC* assume that both the parties to a dispute as well as the way the law approaches that dispute are moments of power inequality. For this reason they are referred to collectively below as *FST* despite their genealogical differences. In order to understand power inequality without contributing to it or to be able to address it requires two steps using *FST*. The first is to consider the power relations from the vantage-point of the most marginalised group according to an intersectional analysis of the situation.³⁴ The second step is for the lawyer, legislator, or judge to reflect on their privilege in relation to that particular situation. It follows that in the review of the cases and law below this article, unlike orthodox legal analysis:

²⁶ See, eg, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990).

²⁷ Sinisa Malešević, “Rehabilitating Ideology after Poststructuralism” in Sinisa Malešević and Iain MacKenzie (eds.) *Ideology After Poststructuralism* (Pluto Press, 2002) 99.

²⁸ Patricia Collins, ‘Comment on Hekman’s “Truth and Method: Feminist Standpoint Theory Revisited”’: Where’s the Power?’ (1997) 22(2) *Signs* 375, 376.

²⁹ Bettcher, above n 16, 395.

³⁰ MacKinnon, above n 25, 1022.

³¹ Crenshaw, above n 21, 148.

³² Sengupta, above n 21, 637.

³³ Crenshaw, above n 21, 166–7.

³⁴ Harding and Norberg, above n 24, 2011.

... prioritizes “studying up” – studying the powerful, their institutions, policies, and practices instead of focusing only on those whom the powerful govern. By studying up, [we] can identify the conceptual practices of power and how they shape daily social relations.³⁵

In moments of adjudication this means questioning how power was exercised as a moment of discretion taking into account the relative power of the participants (the judge and the parties) and recognising that privilege impairs the capacity to read power. As Sprague contends, to do otherwise, and to pretend privilege is not involved ‘is, from this perspective, intellectually irresponsible, as well as politically naive.’³⁶ Because gender hierarchies are continuously reproduced and legitimised through the legal system together with a myriad of social practices and institutions, including the self, law must justify itself in this capacity.³⁷ To justify means being faithful to positive law on some occasions and on others to draw upon natural law. Always discretionary, regardless of apparent constraints, this inevitably leads to contradiction.³⁸ Not important by itself, contradiction can reveal the ways in which power is exercised.

So for example, Fletcher observes that in the struggle over reproduction men may have failed to force women to continue pregnancy they have succeeded in managing when a women may opt of pregnancy.³⁹ Similarly, while women have won rights to participate in public, private responsibility persists on individual women once children are born.⁴⁰ This means amongst other things that as men have gained more rights to children following birth, women are still primarily accountable for child-rearing within a labour structure that expects men to provide financial care and women to provide actual care.⁴¹

A reading of recent Australian law shows not only the contradictory nature of gender regulation it also reveals the ways in which gender is subject to heterosexist structures while lurking in the background is a fear of the homosexual. This includes the use of stereotypes to reach decisions regarded as advances, strict control over gender passing and authenticity when liberalising law, and the reproduction of a gender binary while dismissing it at the same time. What this critique shows is that the law is able to impress the values of equality while at the same time actually reproducing inequality in terms of gender. Each claim is fleshed out below.

³⁵ Ibid.

³⁶ Joey Sprague, ‘Comment on Walby’s “Against Epistemological Chasms: The Science Question in Feminism Revisited”’: Structured Knowledge and strategic Methodology’ (2001) 26(2) *Signs* 527, 534.

³⁷ Mansfield, above n 22, 6–7.

³⁸ Duncan Kennedy, ‘Freedom and Constraint in Adjudication’ (1986) 36 *Journal of Legal Education* 518.

³⁹ Ruth Fletcher, ‘Legal Forms and Reproductive Norms’ (2003) 12 *Social & Legal Studies* 217, 234, 235.

⁴⁰ Ibid 235.

⁴¹ Ibid.

III CONTRADICTION

Contradiction is fundamental to law and turns up whenever you scratch below the surface.⁴² Of particular relevance to gender, Sharpe claimed in his sustained research on transgender jurisprudence that:

While law portrays itself as certain, predictable, coherent and ordered and views the transgender body as the locus of dissonance, ambiguity and contradiction, [instead] it is the body of law, not transgender bodies, that more accurately fits that description.⁴³

More than a decade later Sharpe's assessment holds true as the cases discussed show. What matters about contradictions though, is the capacity for them to reveal something about the ways power manifests. For instance several scholars⁴⁴ welcomed the High Court approach to gender taken in *AB v Western Australia*⁴⁵ asserting that it, 'provides us with a compelling reminder of the law's capacity to engage and champion legislative recognition of changes in how society views itself.'⁴⁶ The decision was also regarded as 'a defining moment', that it 'represents a significant advancement in administrative law', and:

[i]t provides decision-makers with greater clarity about when transsexuals should be legally recognised as their chosen sex rather than the sex of their birth, particularly in circumstances where there has been no gender reassignment surgery.⁴⁷

This positive assessment is understandable given the long struggle to achieve this much. Not only was the biological determinism of *Corbett*⁴⁸ left behind, the legal emphasis on surgery was starting to look vulnerable. Regardless, that decision and the complex Australian legislative framework also raise scope for concern.⁴⁹

Amongst other things, it will be shown below, that this decision abandons the gender binary only to reimpose it by turning to social stereotypes in an attempt to regulate

⁴² See, eg, Lon Fuller, 'Reason and Fiat in Case Law' (1946) 59 *Harvard LR* 376; Robert W Gordon, 'Paradoxical Property' in J Brewer and S Staves (eds) *Early Modern Conceptions of Property* (Routledge, 1995) 95; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685.

⁴³ Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law*, (Cavendish Publishing, 2002) 4.

⁴⁴ See eg, Laura Grenfell and Anne Hewitt, 'Gender Regulation: Restrictive, Facilitative or Transformative Laws?' (2012) 34 *Sydney Law Review* 761, 761, 778; Olivia Rundle, 'High Court interprets WA provisions for legal recognition of reassigned gender' (2012) February *Australian Health Law Bulletin* 182, 184; Penelope Scheffer and Julia Tonkin, 'Legal Recognition of Gender: When is a man a man?' (2012) 20 *Australian Journal Administrative Law* 16.

⁴⁵ *AB v Western Australia* (2011) 244 CLR 390.

⁴⁶ Scheffer and Tonkin, above n 44, 16.

⁴⁷ *Ibid* 18.

⁴⁸ *Corbett v Corbett* [1971] P 83.

⁴⁹ See generally, Grenfell and Hewitt, above n 44; Mary Keyes, 'The formal recognition of sex identity' (2014) 28 *Australian Journal of Family Law* 266.

flippant as opposed to genuine passing. In addition, the legislation considered in that case, while regarded as progressive, is also restrictive. Across Australia this same legislation regulating gender is not only complicated by jurisdiction, it is written to maintain the prohibition on gay marriage and to restrict gender passing.⁵⁰ Amongst other things *AB v Western Australia* illustrates that incremental improvement to the law is embedded into a regime that already discriminates systemically. Commenting on this phenomenon, Fletcher points out that as social struggles are won, legal forms make that ‘social development more palatable by integrating it into an already existing pattern of regulation.’⁵¹ That pattern of regulation privileges patriarchy and heterosexuality.

Another form of contradiction concerns the discretion and willingness of law to do justice in individual moments and refuse it in others. This tends to occur in situations where gender and sexuality are tethered. A notable example is the prohibition against marriage equality and its place in social reproduction. While the law has decriminalised homosexuality, taken steps toward equality on several legislative fronts, and recognised gay families in case-law, it has also regressed following the 2004 Howard government amendments to the *Marriage Act 1961* (Cth) and a myriad of state laws buttressing that Act.⁵² Following the legal advances and shifts in public opinion supporting marriage equality, and apparently concerned with that trend,⁵³ the Howard government expressly reduced marriage to that between a man and a woman.⁵⁴ So it was no real surprise later that the High Court struck down the *Marriage Equality (Same Sex) Act 2013* (ACT) when it decided *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

In a unanimous decision the High Court ruled that the Territory marriage equality law was inconsistent with the Commonwealth law according to s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). The judgement commenced with a declaration that the case would be decided according to law not morality, and ‘[t]he only issue which this Court can decide is a legal issue.’⁵⁵ It followed that there was no scope for ending discrimination in the matter before the court. Nor was there scope for the possibility that because the Commonwealth law was concerned with marriage between a man and a woman, a state or territory law would not be inconsistent if it regulated same sex

⁵⁰ See Keyes, above n 49, 275.

⁵¹ Fletcher, above n 39, 233.

⁵² *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 32B(1)(c), 32B(2)(c), 32D(3), 32DA(1)(d), 32DA (2)(d), 32DC(3); *Births, Deaths and Marriages Registration Act* (NT) s 28B(1)(c); *Births, Deaths and Marriages Registration Act 2003* (Qld) s 22; *Sexual Reassignment Act 1988* (SA) s 7(10); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A(1)(c); *Births, Deaths and Marriages Registration (Amendment) Act 2004* (Vic) ss 30A(1), 30C(3), 30E(1), 30F(6); *Gender Reassignment Act 2000* (WA) s 15(3).

⁵³ Michael Kirby, ‘Marriage Equality: What Sexual Minorities Can Learn From Gender Equality’ (2013-4) 34 *Adelaide Law Review* 141, 144.

⁵⁴ *Marriage Amendment Act 2004* (Cth), s 3, Sch 1, item 1. See also, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31459-65; Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, 26503-73.

⁵⁵ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 452.

marriage. Instead, the Commonwealth law was exhaustive of marriage law rendering the entire ACT law inconsistent and of no legal effect.⁵⁶ The High Court reasoned that ‘if the federal Parliament can make a national law providing for same sex marriage, and has provided that the *only* form of marriage shall be between a man and a woman, the two laws cannot operate concurrently’.⁵⁷

Parkinson and Aroney identify an important contradiction concerning this case. They point out that while the result was unsurprising following the Howard amendments, it was achieved through surprising reasoning. What was surprising was that ‘the court based its decision on a premise’ that none of the parties (the Commonwealth, the Australian Capital Territory nor the amicus curiae, Australian Marriage Equality) had argued.⁵⁸ In other words the High Court did not need to consider whether the Constitution would allow parliament to legislate for marriage equality to decide the case as it was pleaded. It merely needed to determine whether the ACT law was inconsistent with the *Marriage Act* and to what extent.

Therefore the High Court went beyond what it needed to decide when it declared that the marriage power in the constitution included the capacity for same-sex marriage. As a result the High Court struck down the Territory law recognising same sex marriage and on the other hand it declared that under the Australian Constitution, in s 51(xx), “‘marriage’ is a term which includes a marriage between persons of the same sex’.⁵⁹ This shows that the Court was determined to appear to be concerned with equality while at the same time dismissing it in the case at hand.

A contradiction because the Court claimed it was restricted by law and unable to produce equality. Instead equality was a matter for the legislature not the Court. Yet, as will be shown later, in cases where sexuality was not as important such as *AB v WA* and *Norrie*, unlike the decision here, the Court exercised discretion to afford a beneficial interpretation of the particular statutes to achieve justice.⁶⁰ These contradictions reveal the discretion involved during the exercise of power in situations governing social reproduction.

Despite the liberalisation of law in relation to sexuality, in this instance the law was shown to be reticent in terms of ending marriage discrimination. Even if Federal Parliament does legislate to end marriage discrimination, this will not automatically remove restrictions contained in the various state acts prohibiting a change of gender

⁵⁶ Ibid 453.

⁵⁷ Ibid 454 (original emphasis).

⁵⁸ Patrick Parkinson and Nicholas Aroney, ‘The territory of marriage: Constitutional law, marriage law and family policy in the ACT same sex marriage case’ (2014) 28 *Australian Journal of Family Law* 160, 161

⁵⁹ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 463.

⁶⁰ *AB v Western Australia* (2011) 244 CLR 390, 397, 402; *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490, 495. Both discussed below.

where a person is married.⁶¹ This will depend on the will of each state parliament. The pervasive, subtle and insidious network of laws, policies and procedures will remain despite any change to the *Marriage Act* and, notwithstanding the optimism recently expressed by the Human Rights Commission.⁶² After all, marriage has historically been identified as both a site of privilege in terms of property and class and a site of oppression for women. In this sense same-sex marriage risks reproducing ‘norms of family formation that feminist, decolonial, and antiracist movements have fought to dismantle for centuries’.⁶³ As Spade argues:

Terms like “marriage equality” ... expose the limitations of the framework. Marriage is fundamentally about inequality—about privileging and incentivizing certain family structures and making those who live outside them more vulnerable. Single-axis demands for equality in lesbian and gay rights politics, then, come to look more like demands for the racial and class privilege of a narrow sector of lesbians and gay men to be restored so that they might pass their wealth on as they choose when they die, shield it from taxation, call the police to protect it, and endorse or join invading armies to expand it.⁶⁴

Until latent sexism, homophobia, and transphobia are understood and addressed systemically, the law will reproduce them. In particular, in situations such as gender recognition and parenting disputes where the law harbours at best difficulty in grappling with the gender sexuality nexus, and at worst a fear of homosexuality. These situations are considered next in the course of a review of cases regarded as developments.

IV STEREOTYPING GENDER

A Sexism

With the exception of *U v U*⁶⁵ the cases reviewed below were all regarded as steps forward in terms of gender. Although this case is not an example of progress it illustrates the presence of sexist stereotyping in Australia’s highest court. In *U v U* the primary-carer mother was not allowed to relocate to her home country at the behest of an application

⁶¹ *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 32B(1)(c), 32B(2)(c), 32D(3), 32DA(1)(d), 32DA (2)(d), 32DC(3); *Births, Deaths and Marriages Registration Act* (NT) s 28B(1)(c); *Births, Deaths and Marriages Registration Act 2003* (Qld) s 22; *Sexual Reassignment Act 1988* (SA) s 7(10); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A(1)(c); *Births, Deaths and Marriages Registration (Amendment) Act 2004* (Vic) ss 30A(1), 30C(3), 30E(1), 30F(6); *Gender Reassignment Act 2000* (WA) s 15(3).

⁶² Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights, National Consultation Report*, 2015, 2 <<https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual>>.

⁶³ Dean Spade, ‘Intersectional Resistance and Law Reform’ (2013) 38(4) *Signs* 1031, 1041-2.

⁶⁴ *Ibid* 1042.

⁶⁵ *U v U* (2002) 191 ALR 289.

by an abusive father who did not want responsibility for parenting. The High Court found that the mother was selfish for wanting to relocate to pursue her career in India. Even though she was prepared to meet the costs of travel for the father to visit the child in India, she would earn a large professional income (rather than being unemployed in Australia), and the child would benefit from relationships with the mother and father's extended family as opposed to virtual isolation from extended family members by remaining in Australia. The High Court held that it was free to impose whatever it considered was in the best interests of the child. According to Hayne J:

... it would confine the Court's inquiry to what the parents suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents.⁶⁶

And this was not an anomalous component of the reasoning in *U v U* because sexism was also present in the joint judgement of Gummow and Callinan JJ:

The appellant's primary focus is on her own emotional needs and not those of the child, whereas the respondent is more "child-focused". The mother is a highly intelligent and articulate woman. During the relationship she was assertive.⁶⁷

These stereotypes about the mother's character were otherwise unsubstantiated.⁶⁸ There was no corresponding assessment of the father's character and in circumstances where there was evidence of his violence toward the mother. The use of stereotypes in this way can be shown to be present in cases even where the decision is regarded as appropriate or an advance. *Re Kevin*⁶⁹ is one such case.

B Recognising Social Sexism

This case was regarded⁷⁰ as an escape from the shadow of biological determinism cast by *Corbett v Corbett*.⁷¹ In *Re Kevin* the court considered whether a post-operative female to male transsexual was a man for the purposes of Australian marriage law. As mentioned

⁶⁶ Ibid 326.

⁶⁷ Ibid 300.

⁶⁸ Ibid 296 (Gaudron J).

⁶⁹ (2001) 28 Fam LR 158.

⁷⁰ Jake Blight, 'Transsexual Marriage: Meaning of the Term "Marriage"' (2002) 27(2) *Alternative Law Journal* 92; Donna Cooper, 'For Richer for Poorer, in Sickness and in Health: Should Australia Embrace Same-Sex Marriage?' (2005) 19 *Australian Journal of Family Law* 153; Grenfell and Hewitt, above n 44; Margaret Otlowski, 'What is the harm in it anyway?: Re Kevin and the recognition of transsexual marriage' (2002) 16 *Australian Journal of Family Law* 146.

⁷¹ *Corbett v Corbett* [1971] P 83.

above, Chisholm J carefully reviewed the literature and critically assessed the reasoning in *Corbett* only to reinscribe gender stereotypes.

Although Chisholm J recognised the deficiency of biological determinism he dismissed the salience of social construction and this meant his reasoning would necessarily reproduce gender according to stereotypes.⁷² In the absence of social construction any turn away from the biological is a turn to the cultural. In either case essentialising according to gender stereotypes is inevitable, even where the turn is toward a biosocial⁷³ compromise.⁷⁴ Only social construction avoids essentialising gender according to stereotypes because it rejects the biology culture dichotomy, sees gender as complex, dynamic, and fundamentally about the power of labelling.

Recall that Chisholm J mentioned social construction only to dismiss it as synonymous with suggesting the abolition of gender altogether, and on the basis that each ‘party made submissions on the basis that Kevin is either a man or a woman.’⁷⁵ True this was the way the case was pleaded. However, it was pleaded this way not just because Kevin wanted to be recognised by the state as a man, but because the law could not hear him in any other way, and especially once social construction was rejected. For Kevin the desirability of achieving legal recognition as a man through stereotypes based on a gender binary cannot be questioned. Only Kevin knows what it is like to be Kevin.

What can and should be questioned is the way the law constructed gender here. Not only did it construct gender using sexist stereotypes, it also fixed gender. Yet it is well known that gender behaviours are fluid and not fixed. In other words:

... what is masculine for a scientist in a high-tech corporation and in an inner-city gang have little to do with one another ... What is considered feminine and womanly for one group of women ... is simply an untenable description of women in other cultures ... Beyond that, of course, there is no one gender role for any given person. The same woman might be a vicious litigator and a nurturing mother. The cut-throat financial trader might be a tender caretaker to his dying lover.⁷⁶

Gender varies according to stereotypes in different ways in different contexts. Yet the approach taken in *Re Kevin* and endorsed on appeal in the full federal court universalises and naturalises a fixed notion of gender according to sexist stereotypes.⁷⁷ At first instance

⁷² *Re Kevin* (2001) 28 Fam LR 158, 163-4 [17].

⁷³ See, eg, J Richard Udry, ‘Biological Limits of Gender Construction’ (2000) 65(3) *American Sociological Review* 443.

⁷⁴ Barbara Risman, ‘Calling the Bluff of Value-Free Science’ (2001) 66(4) *American Sociological Review* 605, 606-8.

⁷⁵ *Re Kevin* (2001) 28 Fam LR 158, 163-4 [17].

⁷⁶ Risman, above n 74, 607.

⁷⁷ *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1, 56-7.

the court accepted the subjective evidence of Kevin,⁷⁸ his medical and psychiatric histories,⁷⁹ and the ‘evidence of 39 witnesses’.⁸⁰ The evidence provided by the 39 witnesses comprised of 23 family and friends of Kevin and 16 others who were either his work colleagues or acquaintances.⁸¹ To illustrate the nature of the non-medical and psychiatric evidence consider the following three examples extracted from the 35 paragraphs mentioned by the Judge:

He would physically defend them, at school and elsewhere, after his father had left the family home. He did some of the physical tasks his father had done, such as mowing the lawns and doing household repairs. His mother gave him “boys’ presents” such as footballs and cars, and made boy’s clothing for him.⁸²

And:

He was harassed at times at school because of his male attitude and appearance. He wore a jacket of the type worn by boys, and students mocked him, saying he was a girl, and asking why he dressed like that. Arguments would sometimes develop into fighting, at which he was adept. ...⁸³

And quoting Kevin’s father-in-law:

... my singular impression of him has been that he is definitely masculine in his thinking and manner. This opinion was formed particularly by my observations of Kevin in his interaction with Jennifer ..., his aptitude in respect of home maintenance and building work and ...⁸⁴

Clearly, these observations and witness anecdotes are structured around a sexist gender binary. Indeed Chisholm J concedes as much yet still accepted them as evidence that Kevin was regarded as a man:

A list of the things they noticed might suggest a stereotypical view of being a man. Perhaps it is, for example, a heterosexual model. Not all men might fit that stereotype. There are no doubt different ways of being a man. But these witnesses are not constructing models or trying to formulate criteria. They are describing what they see in Kevin. And what they see is a man.⁸⁵

⁷⁸ *Re Kevin* (2001) 28 Fam LR 158, 165 [22] – 168 [38]

⁷⁹ *Ibid* 168 [39] – 169 [46].

⁸⁰ *Ibid* 169 [47] - 172 [66].

⁸¹ *Ibid* 169 [47] - 172 [66].

⁸² *Ibid* 166 [25].

⁸³ *Ibid* 166 [26].

⁸⁴ *Ibid* 171 [61].

⁸⁵ *Ibid* 172 [69].

On the contrary, the witnesses were constructing a model of gender and they were formulating criteria for that gender model. They were reproducing a sexist gender binary whether that was known to them or not. In addition, as Bennett contends, the irony is that turning to cultural recognition has the capacity to undermine the importance of a transsexual person's subjective experience, by 'bringing ... extensive and intrusive legal interrogatory pressure to bear on their lives, and the requirement that they conform to narrow, stereotypical models of sex.'⁸⁶

Justice Chisholm accepted as evidence what he need not have emphasised given the strength of the documentary evidence. This documentary evidence provided suitable evidence of how Kevin was regarded since he 'was eligible to receive an Australian passport showing his changed name and stating his sex as male', 'has been treated as a man for a variety of legal and social purposes, including his employer, Medicare, the Tax Office and other public authorities, banks, and clubs'.⁸⁷ By remaining trapped within a nature/nurture polarisation the reasoning in *Re Kevin* fails to grasp the subtle but crucial difference between social construction and cultural construction with the result that sexist stereotypes were normalised, naturalised and reproduced. What Lukacs would describe as reification.⁸⁸ Reification is an ideological process whereby something created by human action is treated instead as a product of nature – it becomes so normal it is said to take on a life of its own appearing to be something else.⁸⁹

It must be conceded, however, that from Kevin's perspective and the standpoint of other transgender people who choose to conform to or acquiesce to gender stereotypes, the decision is a success. As Currah points out, gender stereotypes 'have powerful social and legal effects, effects that are both enabling and disempowering'.⁹⁰ For Currah gender essentialism is not only coercive it also provides scope for helpful legal strategies:

... despite academic desires to deconstruct and [at 33] move away from notions of essentialism in legal discourse, identity-based claims remain more intelligible in the way they link identities to bodies, and so often produce better results.⁹¹

The point being made is that opposing gender essentialism in every situation will have negative effects for some trans people and would have produced injustice in cases where applicants successfully argued the authenticity of their gender.⁹² Still this aspect of the law

⁸⁶ Theodore Bennett, 'Transsexualism and the Consideration of Social Factors Within Sex' (2013-4) 34 *Adelaide Law Review* 379, 380.

⁸⁷ *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158, 167.

⁸⁸ See generally, Georg Lukacs, *History and Class Consciousness: Studies in Marxist Dialectics*, Translated by R Livingstone (Merlin Press, 1971).

⁸⁹ *Ibid* 83 and further forward.

⁹⁰ Paisley Currah, 'The Transgender Rights Imaginary' (2003) 4 *Georgetown Journal of Gender & Law* 705, 715.

⁹¹ Paisley Currah, 'Gender Pluralisms: Under the Transgender Umbrella' (2005) 1 *Feminist and Queer Legal Theory Convergences and - An Uncomfortable Conversation* 18, 32-3.

⁹² Spade, above n 63, 1039.

remains controversial and is considered later. For present purposes it should be clear that the law does embrace sexist stereotypes.

On appeal the Full Family Court affirmed the reasoning of Chisolm J.⁹³ The Court accepted the proposition that ‘marriage is a matter of status and is not for the spouses alone to decide’.⁹⁴ Also, ‘it affects society and is a question of public policy’, and therefore ‘it appears to us to be clearly relevant to receive evidence as to how Kevin and Jennifer are perceived by the community in which they live’.⁹⁵ Therefore, by not critically assessing the evidence admitted at first instance the gendered stereotypes have been embraced. To date no Australian court has found it necessary to question the stereotypes accepted as *evidence* in *Re Kevin*.

V REPRODUCING A GENDER BINARY

If *U v U* and *Re Kevin* drew upon sexist stereotypes to construct gender, more recent cases have reproduced a gender binary while dismissing it at the same time. This is what happened in *AB and AH v Western Australia*, a case concerning gender reassignment for the purposes of Western Australian law.⁹⁶ There two people identified by their birth certificates as female, lived as men and had undergone ‘gender reassignment procedures’. The two men had decided not to have a hysterectomy because neither considered it necessary to their sense of male identity, both were infertile while receiving testosterone therapy, both had suffered the effects of surgery in the past, and both believed that their internal organs might be beneficial for phalloplasty surgery in the future. Section 14(1) of the *Gender Reassignment Act 2000* (WA) allowed a person to apply to the Gender Reassignment Board for the issue of a recognition certificate of their ‘corrected’ gender but the Board refused to grant certificates for the sole reason that each applicant had retained a female reproductive system. The State Administrative Tribunal allowed appeals from those refusals and the Court of Appeal of the Supreme Court of Western Australia set aside those decisions and reinstated the decisions of the Board.

In allowing the appeal and declaring that the certificates should have been issued, the High Court held that for the purposes of the *Act* the physical characteristics by which a person was identified as male or female were confined to external physical characteristics. Again, much of this decision is to be applauded. The High Court rejected the strict biological test laid down by *Corbett* and noted the discrimination endured by people

⁹³ *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1.

⁹⁴ *Ibid* 56.

⁹⁵ *Ibid*.

⁹⁶ *AB v Western Australia* (2011) 244 CLR 390; *Gender Reassignment Act 2000* (WA).
(2017) J. Juris. 33

caught within an imposed gender binary, and importantly rejected the notion of a gender tipping point used by the Full Court.⁹⁷

This otherwise careful argument suffers from normative/hegemonic stereotypes about masculinity and sexuality. A fully functional man was taken to be one capable of penile penetration and a fully functional woman of being penetrated by a penis.⁹⁸ Still, the High Court deserves credit for making it clear that fully functional was not a requirement of the *Act*. Rather, '[t]he options thus provided by the *Act* do not lend support for a view that a person must take all possible steps, including with respect to their sexual organs, to become as male or female as possible'.⁹⁹ Nor did the *Act* require any notion of bodily sufficiency. This approach is preferable despite the stereotypes about functional gender and sexuality in reaching that conclusion. It was also welcome because the High Court used a purposive and beneficial interpretation of the Western Australian law.¹⁰⁰

What is of concern about the decision is threefold. Firstly, the decision did not address the problem of sexist stereotypes posed by *Re Kevin*. This was despite the fact that *Re Kevin* was mentioned in the Full Court of the Supreme Court of Western Australia and before the High Court. The Full Court treated *Re Kevin* as an authority for the proposition that Australian law recognises post-operative as opposed to pre-operative transsexuals¹⁰¹ and the High Court regarded it as representing the importance of social recognition.¹⁰² Secondly, by not questioning the use of social recognition the High Court reproduced a gender binary despite claiming to abandon it.

According to the High Court the real inquiry in this case concerned the adoption of a gender lifestyle required by s 15(1)(b)(ii).¹⁰³ Section 15(1)(b)(ii) should be read with s 3 to concern the way others might identify the person:

The question it raises is what gender the person exhibits to other members of society, by reference to the gender characteristics they now have and to their lifestyle. That conclusion would be reached by reference to the person's appearance and behaviour, amongst other things. It does not require detailed knowledge of their bodily state.¹⁰⁴

In rejecting 'sufficiency' the High Court preferred social recognition, '[that] is to say, by reference to what other members of society would perceive the person's gender to be'.¹⁰⁵

⁹⁷ *AB v Western Australia* (2011) 244 CLR 390, 403-4.

⁹⁸ *Ibid* 404.

⁹⁹ *Ibid* 404.

¹⁰⁰ *Ibid* 396-7.

¹⁰¹ *Western Australia v AH* (2010) 41 WAR 431, 432; 450.

¹⁰² *AB v Western Australia* (2011) 244 CLR 390, 393.

¹⁰³ *Ibid* 403.

¹⁰⁴ *Ibid* 405.

¹⁰⁵ *Ibid* 405.

By turning to social recognition not only is there the propensity for reinforcing sexist stereotypes, as noted above, it undermines the importance of self-identification. In addition, this approach reproduces a gender binary. It reproduces a binary based on contemporary stereotypes whether sexist or not. The High Court accepted the gender binary as constructed by the Board and uncontested by counsel for Western Australia.¹⁰⁶ It referred specifically to the finding of the Board that the men were male because:

They have undergone clitoral growth and have the voices, body shapes, musculature, hair distribution, general appearance and demeanour by virtue of which a person is identified as male. They have acquired characteristics that are consistent with being male, and inconsistent with being female, to the extent that only an internal medical examination would disclose what remains of their female gender characteristics. Insofar as what remains of their female gender characteristics has been altered to such an extent that it no longer functions, it is no longer a female gender characteristic.¹⁰⁷

By contrast with contemporary gender norms and stereotypes, what was considered masculine among elites of the 18th century, wigs, make-up, and tights, is today seen as unique to that time, class and culture. The point is that gender is dynamic and not universal. As such the law reproduces a gender binary based on contemporary norms and stereotypes about gender at the same moment it pronounces the binary as coercive.

Thirdly, *AB v Western Australia* framed transgender people within a medical/scientific regime because the *Gender Reassignment Act 2000* (WA) requires an applicant to have undergone a ‘reassignment procedure’.¹⁰⁸ A ‘reassignment procedure’ is defined as ‘... a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person’, and the expression ‘gender characteristics’ is defined as, ‘... the physical characteristics by virtue of which a person is identified as male or female’.¹⁰⁹ Before a gender certificate can be issued by the Board it must be satisfied that the applicant:

(i) believes that his or her true gender is the gender to which the person has been reassigned’ and (ii) has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and (iii) has received proper counselling in relation to his or her gender identity.¹¹⁰

Therefore it is unsurprising that the High Court noted and accepted the type of evidence presented to the tribunal was of a scientific medical nature:

¹⁰⁶ Ibid 406.

¹⁰⁷ Ibid 400.

¹⁰⁸ *Gender Reassignment Act 2000* (WA) s 14.

¹⁰⁹ Ibid s 3.

¹¹⁰ Ibid s 15(1)(b).

Each identified as a male from an early age and was diagnosed as suffering from a gender identity disorder, or gender dysphoria. The *Diagnostic and Statistical Manual of Mental Disorders*, to which the Tribunal referred (32), explains that the term “gender dysphoria” denotes “strong and persistent feelings of discomfort with one’s assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex” (33).¹¹¹

Just why this medical/psychiatric threshold is imposed by law-makers to recognise a change of gender identity is deeply connected with the topic of gender passing and homosexual panic which are pursued later. For now it is necessary to point out that this threshold has several undesirable consequences.

To begin with it classifies transgender people as abnormal rather than normal and only cured by surgical and psychiatric intervention according to law. It re-asserts the notion of a gender binary in the sense that male and female are normal and transgender is abnormal. While this may be appropriate for some transgender people it is offensive to others. Here ‘transgender’ is distinguished from ‘cisgender’ since the latter denotes ‘people who are born with a psychological sex identification that is congruent with their physiological sex identity markers’;¹¹² whereas ‘transgender’ is used here to include intersex, transsexual and transgender people.¹¹³ The medicalisation and legal regulation of gender identity inevitably means that ‘the issues raised by intersex or transgender persons who claim nonbinary identities have typically been backgrounded within Australian law.’¹¹⁴ For example, it may exclude ‘those trans women’s subcultures where sex work is a dominant presence, genital reconstruction surgery will not necessarily be a desired goal, since this may well cause the loss of a crucial source of income.’¹¹⁵ Because sex reassignment, counselling and legal procedures are expensive, it exacerbates the intersections between transgender discrimination and race and class. Intersections the law is not good at reconciling as shown below.

In its most recent decision in this area of law, in *Registrar of Births Deaths and Marriages (NSW) v Norrie* (‘*Norrie*’), the High Court commenced its judgement with the declaration that ‘[n]ot all human beings can be classified by sex as either male or female’.¹¹⁶ At issue here was whether it was within the Registrar’s power to record in the New South Wales Register that the sex of the respondent, Norrie, was, as she said in her application, ‘non-

¹¹¹ *AB v Western Australia* (2011) 244 CLR 390, 399. Notes (32) & (33) respectively were: (32) *AB & AH v Gender Reassignment Board (WA)* (2009) 65 SR (WA) 1, 10 [63]; (33) American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed (text rev) (2000), 535.

¹¹² Bennett, above n 86, 397.

¹¹³ Theodore Bennett, “‘No Man’s Land’: Non-Binary Sex Identification in Australian Law and Policy” (2014) 37(3) *UNSW Law Journal* 847, 852-3.

¹¹⁴ *Ibid* 854.

¹¹⁵ Bettcher, above n 16, 401.

¹¹⁶ *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490, 492 (French CJ, Hayne, Kiefel, Bell and Keane JJ).

specific’ under the *Births, Deaths and Marriages Registration Act 1995* (NSW). In another laudable decision, the High Court said this ‘question should be answered in the affirmative’.¹¹⁷

It was a laudable decision because it did justice for Norrie when the *Act* appeared to presume a gender binary and yet the High Court chose not to defer to the NSW Parliament instead preferring a beneficial interpretation of the *Act*. The *Act* referred to ‘opposite sex’ in s 32A and made no mention of the term ‘transgender’ that featured in amending legislation inserting that word into Part 3A of the *Anti-Discrimination Act*, but did not do so in the *Act* at hand.¹¹⁸ Before analysing the reasoning it is useful to consider the facts.

Amongst other things, the *Births, Deaths and Marriages Registration Act 1995* (NSW) provided for in its objects ‘the recording of changes of sex’ in registers ‘for recording and preserving information’ about ‘changes of name and changes of sex in perpetuity’.¹¹⁹ Pursuant to s 43(1) of the *Act*, the Registrar is compelled to maintain registers containing ‘registrable events’ and s 4(1) provides that a change of sex is a registrable event. Because

Norrie was not born in NSW section 32DA allowed such a person to apply to register that person’s sex. Amongst other jurisdictional thresholds, under s 32DA(1) registration is possible provided the person is ‘not married’, and ‘has undergone a sex affirmation procedure’. Notably the expression ‘perpetuity’ in the objects and ‘not married’¹²⁰ throughout the *Act* is aimed at preventing passing and maintaining heterosexual marriage respectively, both points that are considered properly later.

The key phrase for present purposes was ‘sex affirmation procedure’ which is defined as ‘a surgical procedure involving the alteration of a person’s reproductive organs carried out: (a) for the purpose of assisting a person to be considered to be a member of the *opposite* sex, or (b) to correct or eliminate ambiguities relating to the sex of the person.’¹²¹ Norrie sought to be registered as ‘non-specific’ and initially the Registrar approved the application in writing. Later, however the Registrar took a different position advising Norrie that her Recognised Details (Change of Sex) Certificate was invalid and a Change of Name Certificate was re-issued recording Norrie’s sex as ‘not stated’. Norrie applied for a review of the decision in the Administrative Decisions Tribunal of New South Wales which found that even though Norrie did not identify as a man or woman or believe that the sex affirmation procedure had resolved her gender ambiguity, the *Act*

¹¹⁷ *Norrie* (2014) 250 CLR 490, 493.

¹¹⁸ *Ibid* 498.

¹¹⁹ *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 3(c), (d).

¹²⁰ *Ibid* s 32DA(1)(d), s 32DC(3).

¹²¹ *Ibid* s 32A (emphasis added).

only provided for registration according to a gender binary. Therefore it was not open to the Registrar to register Norrie's sex as 'non-specific'.¹²²

An appeal to the Court of Appeal NSW was successful and so the Registrar appealed on two grounds.¹²³ The first ground was that the *Act* assumed a gender binary and if an intermediate category was intended it would have been expressly provided. The Registrar pointed to amending legislation which had expressly inserted the word 'transgender' into Part 3A of the *Anti-Discrimination Act*, but did not do so in Part 5A of the *Act* at hand.¹²⁴ The second argument was a policy based proposition that to include another category for registration would create 'unacceptable confusion'.¹²⁵

Despite the binary restriction implicit in s 32, the High Court was able to do justice in the circumstances of the case. To achieve this result the Court relied on four propositions. The first was that 'a sex affirmation procedure is defined by reference to its purpose, not its outcome', adding that s 32DA(1)(c) 'does not refer to a "successful" sex affirmation procedure'.¹²⁶ This followed the approach already taken in *AB v Western Australia*.¹²⁷ Secondly, the Court held that the function of the Registrar is a restricted and limited decision-making role that excludes 'the resolution of medical questions or the formation of a view about the outcome of a sex affirmation procedure'.¹²⁸ Thirdly, the Court held that although s 32DA is headed 'Application to register change of sex', s 32DA(1) expressly provided 'for the registration of the person's sex' rather than 'a change of sex'.¹²⁹ Had it not been for this specific detail the Norrie case may well have had a different outcome. Although the fourth proposition relied on by the High Court tended to clinch justice for Norrie because 1996 amendments to the *Act* at hand also amended the *Anti-discrimination Act 1977* (NSW). Those amendments recognised 'transgender persons' in the latter *Act* as persons of 'indeterminate sex', without introducing this category into the *Act* under consideration.¹³⁰ This allowed the High Court to rule that there was 'express legislative recognition of the existence of persons of "indeterminate sex"'.¹³¹ In doing so the High Court accepted part of the Norrie submission 'that it would be to record misinformation in the Register to classify her as male or female'.¹³² However, the High Court ruled that the Norrie contention that 'registration of categories of sex

¹²² *Norrie v Registry of Births, Deaths and Marriages (NSW)* [2011] NSWADT 102, [54].

¹²³ *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145.

¹²⁴ *Norrie* (2014) 250 CLR 490, 498.

¹²⁵ *Ibid.*

¹²⁶ *Ibid* 495.

¹²⁷ (2011) 244 CLR 390, 403-4.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Norrie* (2014) 250 CLR 490, 495.

¹³¹ *Ibid* 496.

¹³² *Ibid* 498.

such as “transgender” and “intersex” is within the scope of the Registrar’s powers under s 32DC’ went ‘too far’.¹³³ Rather:

The Registrar’s submission that the Act recognises only male or female as registrable classes of sex must be accepted. But to accept that submission does not mean that the Act requires that this classification can apply, or is to be applied, to everyone.¹³⁴

The High Court ruled the Registrar should not have refused to register the change as ‘non-specific’ preferring Norrie’s sex as ‘not stated’.¹³⁵ The *Act* may be construed to recognise that a person’s sex is indeterminate, but it was unnecessary to contemplate the existence of specific categories of sex ‘given that the Act recognises that a person’s sex may be neither male nor female’.¹³⁶ In other words the gender binary stands unless that is unacceptable to a particular person in which case the Registrar can register that person as ‘non-specific’ provided this is in accord with s 32DC.¹³⁷ So on the one hand the High Court was able to recognise gender diversity and able to reject the universal application of a gender binary. On the other hand it reasserted a gender binary that excluded non-binary gender categories. Lastly, the fact that *Re Kevin* was raised in argument¹³⁸ and not reviewed leaves unquestioned the capacity for the reproduction of a gender binary according to stereotypes as it was back in 2001 when *Re Kevin* was decided.

VI GENDER SEXUALITY NEXUS

So far the law has been shown to be at best contradictory when dealing with gender. It declares an allegiance with equality while simultaneously managing to discriminate against those who do not fit a heterosexist ideal. In particular the law has drawn upon sexist stereotypes when it abandoned biological determinism, and it re-imposed a gender binary while declaring the gender binary to be discriminatory. The preceding analysis has also mentioned problems the law has with homosexuality, and when grappling with gender sexuality intersections, and these issues are addressed now.

A Gender and Homosexuality - phobia to discrimination

In *Re Kevin* Chisholm J declared ‘the case does not raise any issue about homosexual relationships and marriage’, adding in the footnote that Ormrod J had not determined the *Corbett* case using a biological test with a fear of homosexuality lurking in the background.¹³⁹ It can be added that homophobia alone cannot explain the decisions in

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid 501.

¹³⁶ Ibid 499.

¹³⁷ Ibid 498.

¹³⁸ By counsel for the Registrar, *Norrie* (2014) 250 CLR 490, 492.

¹³⁹ *Re Kevin* [2001] 28 Fam LR 158, 164 [20].

the cases above. It is also likely that homophobia is dwarfed by an historical fear of gender passing.¹⁴⁰ Gender passing would render the law impotent as a regulatory regime so crucial to a society characterised by hierarchy on the basis of gender.¹⁴¹ However, it is also improbable to assert that homophobia is altogether absent in Australian law.

Homophobia might be expected to linger in Australian law given the relatively short span of time since the abolition of homosexuality.¹⁴² Around the same time the last Australian state was resisting the decriminalisation of homosexuality the Family Court heard *Re A and J* (1995) 19 Fam LR 260. The case was not a legal development and is only mentioned to benchmark homophobia as well as the centrality of heterosexual patriarchy at that time. In contrast with *U v U* discussed above, where the primary carer mother sought to relocate to resume her career, here the father sought to relocate to South Australia to save the cost of paying rent following the sale of the matrimonial home in Ballarat.¹⁴³

Following their separation the parents shared equally the parenting of their child until the father sought to relocate prompting each parent to seek custody. The trial judge found that the mother's lesbian relationship was not a negative factor. Still the child needed to have the balancing role of a 'husband figure' for the benefit of his 'emotional development', because in the circumstances, that tipped the balance in what was otherwise an evenly balanced case.¹⁴⁴ Here homosexuality was unnatural but tolerable provided the boy had the natural balancing influence of a heterosexual patriarchal figure. If the situation is reversed the discrimination is made more apparent since if it were the lesbian mother moving interstate it is unlikely she would get primary responsibility for the child for the sake of 'balanced emotional development'.¹⁴⁵ Instead, as happened in *U v U*, the mother is more likely to be seen as 'selfish'.¹⁴⁶ Whereas here the father's decision to relocate was seen as reasonable despite its deleterious effects on the child in terms of changing environments and severing the close relationship the child would have with his mother.¹⁴⁷

Arguably family law has moved away from this culture but discrimination in the domains of transgender law and marriage law persist. As Keyes explains, 'every jurisdiction except the Australian Capital Territory' prevents a change of sex to be registered where the

¹⁴⁰ See generally, R Trumbach, 'London's Sapphists: From Three Sexes to Four Genders in the Making of Modern culture' in Epstein and Straub (eds), above n 11, 112–41.

¹⁴¹ J Shapiro, 'Transexualism: Reflections on the Persistence of Gender and the Mutability of Sex' in Epstein and Straub (eds), above n 11, 270.

¹⁴² Australian Human Rights Commission, *Resilient Individuals*, above n 62, 63.

¹⁴³ *Re A and J* (1995) 19 Fam LR 260, 270: 'The husband was able to secure accommodation in South Australia at little or no cost.'

¹⁴⁴ *Ibid* 265.

¹⁴⁵ Juliet Behrens, 'U v U: The High Court on Relocation' (2003) 27 *Melbourne University Law Review* 572, 577–8.

¹⁴⁶ Patricia Easteal, Juliet Behrens and Lisa Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14(3) *Australian Journal of Family Law* 234, 240.

¹⁴⁷ *Re A and J* (1995) 19 Fam LR 260, 270.

person is already married arguably to avoid offending the heterosexual requirement in the *Marriage Act*.¹⁴⁸

In 2002 Sharpe wrote that the law remained homophobic in particular areas of law such as marriage.¹⁴⁹ As recently as 2011, in *AB v Western Australia*, the High Court confined the scope of the decision so it would have no bearing on same-sex marriage. Wanting the case to stand for no more than a beneficial interpretation of a Western Australian statute, the High Court cited New Zealand authority for the proposition that ‘whilst courts could deal with some legal situations involving the reassignment of gender, they could [at 397] not make a declaration as to the gender of a person which would bind persons who were not parties to the proceedings.’¹⁵⁰ Instead, legislation would be necessary.¹⁵¹ Similarly, in 2014, in *Norrie*, in wholly rejecting the Registrar’s ‘confusion’ argument the High Court noted the centrality of the Commonwealth *Marriage Act*:

The submission made on behalf of the Registrar that ... unacceptable confusion would ensue if the Act recognised more than two categories of sex or an ‘uncategorised’ sex should be rejected. The difficulty foreshadowed by this argument could only arise in cases where other legislation requires that a person is classified as male or female for the purpose of legal relations. ... The chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage, as defined in the fashion found in s 5(1) of the *Marriage Act 1961* (Cth).¹⁵²

Norrie also shows that the law is less concerned with gender stability when heterosexual marriage is not at stake.

Therefore, while the law develops the law also entrenches heterosexual marriage whether by judicial discretion, or by virtue of the Commonwealth *Marriage Act* and the corresponding exceptions contained in the State laws regulating gender recognition. In case this criticism is thought of as picking the low-hanging fruit, the fact is that the so-called homosexual advance defence still exists in some jurisdictions and according to the Australian Human Rights Commission many administrative, legal and policy areas still need significant reform.¹⁵³ Therefore, if the law is no longer homophobic, it still participates in discrimination with the normative effect that inevitably has on homophobia throughout society.¹⁵⁴

¹⁴⁸ Keyes, above n 49, 275.

¹⁴⁹ Sharpe, above n 43, 5.

¹⁵⁰ *AB v Western Australia* (2011) 244 CLR 390, 396-7, citing McMullin J in *Re T* [1975] 2 NZLR 449, 452-3.

¹⁵¹ *Ibid* 397.

¹⁵² *Norrie* (2014) 250 CLR 490, 500.

¹⁵³ Australian Human Rights Commission, *Resilient Individuals*, above n 62, 64-6.

¹⁵⁴ See, eg, Brenna Harding, ‘Same-sex Citizenry: The growing pains of a teenage daughter’ (2013) 1(1) *Griffith Journal of Law & Human Dignity* 55; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31463 (Michael Organ MP).

B Gender Sexuality Intersections

Re A and J was also an example of the law's inability to grapple with intersectionality. There the mother was discriminated against as both a woman and a lesbian. Seven years later when *Re Patrick*¹⁵⁵ was decided the Family Court was conscious of avoiding discrimination on the basis of sexuality. Consequently, *Re Patrick* was applauded as 'remarkable in that it signalled a break with the well-documented international legal non-recognition of lesbian nonbiological parents.'¹⁵⁶ Again the law was seen as progressive. This time because it recognised the legitimacy of homosexual families¹⁵⁷ but at the same time it was also a loss for lesbian women generally and in particular Patrick's parents. Like *Re A and J*, the gender sexuality intersection proved insurmountable.

In *Re Patrick* the court privileged patriarchy and stereotyped the lesbian parents as irrational. Under the rubric of the best interests of the child, Guest J recognised an increasing parental role for the sperm donor against the wishes of the parents.¹⁵⁸ The birth mother and co-parent had brought proceedings to restrict contact between the sperm donor and the child to twice a year after falling out with him over a consent agreement.¹⁵⁹ While the sperm donor sought to incrementally increase his contact from fortnightly Sunday contact to ultimately include overnight stays, alternate weekends and half of school holidays by the time the child was three.¹⁶⁰ As a question of law Guest J was required by the *Family Law Act* to do what was in Patrick's best interests according to s 60E.¹⁶¹ To determine the best interests of Patrick the Court had to consider the matters specified in s 68F(2) together with any relevant matters in s 60B.¹⁶² In short, this required consideration of:

(b) the nature of the relationship of the child with each of the child's parents and with other persons; [and] ... (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs ...¹⁶³

Section 60B aims to promote a child's relationship with both parents unless that is likely to be contrary to the child's best interests. As the law stood s 60B was superfluous here

¹⁵⁵ *Re Patrick* (2002) 28 Fam LR 579.

¹⁵⁶ Deborah Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court' (2004) 18

International Journal of Law, Policy and the Family 76, 76 (original references omitted).

¹⁵⁷ *Re Patrick* (2002) 28 Fam LR 579, 650 [323].

¹⁵⁸ *Ibid* 653-4 [336].

¹⁵⁹ *Ibid* 583 [5].

¹⁶⁰ *Ibid* 582 [4].

¹⁶¹ *Family Law Act No 53 of 1975* as amended, taking into account amendments up to Act No 159 of 2001, 8 Nov 2001.

¹⁶² *Re Patrick* (2002) 28 Fam LR 579, 590 [40].

¹⁶³ *Family Law Act No 53 of 1975*, s 68F(2).

since the mother's partner, whom Guest J correctly recognised as 'co-parent',¹⁶⁴ could be contrasted with the sperm donor for the purposes of applying the relevant criteria in s 68F(2).¹⁶⁵ Despite this, Guest J opted to name the sperm donor as 'father' contrary to the wishes of the mother and her partner:

... the donor (to whom I shall refer as the father, which is not a statement of law) entered into an agreement with the mother and the co-parent to provide genetic material for the purpose of artificially inseminating the mother.¹⁶⁶

Three factors seemed to influence this discretion. The first factor was the importance placed on the agreement between the parties. The second factor was Guest J's desire to respect diverse forms of family.¹⁶⁷ The third factor was Guest J's empathy for the sperm donor coupled with a privileging of the importance of biology:

To be Patrick's biological father in the circumstances as found by me and yet denied by bare statutory definition appropriate nomenclature as one of his 'parents' in my view sits awkwardly with the provisions of an Act which regulates family law in this country. It falls seamlessly from the expert evidence ... that the mother and her committed lesbian partner in their homo-nuclear relationship are the child's 'parents', but that a similar and appropriate recognition is not accorded to the biological father.¹⁶⁸

Justice Guest spoke of the donor's suitability as a role model in the future development of Patrick commenting that 'the child bears his genetic blue print', he has 'actively, solicitously and patiently contributed to his conception,' and despite hostility from the mother 'considerable credit should be accorded to the father for his patience and sensitivity'.¹⁶⁹ Justice Guest added that the statutory failure to appropriately recognise the donor's biological status as a parent was nevertheless ameliorated by the best interests of the child.¹⁷⁰ However, this emphasis on the sperm donor's role necessarily being in the best interests of the child was and is a view mandated more by patriarchal ideology about what is normal and natural than it is mandated by the *Act*. Had the parents been a heterosexual couple Guest J would not have regarded the donor as a father. Once that election was made it elevated the status of the sperm donor in terms of applying statutory criteria, it threatened the status of the actual parents, and it had a bearing on the characterisation of the evidence.

¹⁶⁴ *Family Law Act No 53 of 1975*, s 60H(4) deemed Patrick to be the child of the biological mother and her partner.

¹⁶⁵ *Re Patrick* (2002) 28 Fam LR 579, 590 [40], citing *Re B and B: Family Law Reform Act 1975* (1997) FLC 92-755 at [9.54].

¹⁶⁶ *Ibid* 581 [2].

¹⁶⁷ *Ibid* 645 [300], 652 [330].

¹⁶⁸ *Ibid* 647 [307].

¹⁶⁹ *Ibid* 638 [263], 640 [274], 640 [275].

¹⁷⁰ *Ibid* 647 [308].

Justice Guest also had to weigh up contradictory evidence remarking that ‘given the antithetical evidence of the parties in their ... affidavits, credibility would be an important issue for my determination.’¹⁷¹ He was mindful that he would need to ‘make appropriate allowance for any anxiety or tension that a witness may understandably experience when giving their evidence.’¹⁷² Unfortunately, the way Guest J framed the case treating the donor as a father contrary to the wishes of the actual parents coloured his assessment of the evidence. Under the circumstances Guest J did not ‘make appropriate allowance for any anxiety or tension’ he perceived in the co-parents.

The reason for this was that a key concern for many feminist lesbian households is the battle to live independently of patriarchal norms and control. As Millbank pointed out before this case was heard:

Lesbians have generally appeared in litigation defensively, almost exclusively as mothers defending their fitness in child custody proceedings with ex-husbands or in welfare proceedings brought against them by the state. Through 1995 and 1996, a number of cases appeared in which women were the litigants, using the courts to seek access to benefits or rights from former partners (such as spousal or child support) or from the state (such as marriage or adoption rights). ... all of these actions are about contesting meaning; the meaning of family.¹⁷³

Patriarchal norms and control may be invisible to men unaware of the ubiquity and apparent naturalness of this power, but that power is all too obvious for those on the receiving end of it.

Justice Guest did not understand the lived oppression experienced by lesbian parents.¹⁷⁴ Although he did acknowledge this briefly, it is clear throughout the judgement as a whole that he had a limited understanding of the gravity of this aspect of the case.¹⁷⁵ As Crenshaw points out, in cases where there are competing marginalised interests courts generally speaking have not been able to grapple with the intersectional complexity.¹⁷⁶ *Re Patrick* is unfortunately a good illustration.

Justice Guest disregarded the relevance of sexuality to the conflict and how that might impact on the evidence and behaviour of the co-parents. He declared ‘[t]he issue of their homosexuality is, in my view, irrelevant’,¹⁷⁷ and the case before him was ‘not dissimilar

¹⁷¹ Ibid 591 [44].

¹⁷² Ibid 591 [44].

¹⁷³ Jenni Millbank, ‘Which, then, would be the “husband” and which the “wife”? Some Introductory Thoughts on Contesting “the family” in Court’ (1996) 3 *Murdoch University Electronic Journal of Law* 1 – 11, at 2 (references omitted).

¹⁷⁴ Crenshaw, above n 21, 140.

¹⁷⁵ *Re Patrick* (2002) 28 Fam LR 579, 597 [77].

¹⁷⁶ Crenshaw, above n 21, 148.

¹⁷⁷ *Re Patrick* (2002) 28 Fam LR 579, 651 [325].

from that arising in traditional heterosexual family disputes and decided daily by the Court' and 'It is not unique'.¹⁷⁸ Yet not only was the power differential based on gender and sexuality central to the case, the Judge's subjectivity concerning the gender sexuality intersection determined the outcome. The sperm donor was privileged on the basis of his gender and the discrimination based on the sexuality of the parents was ignored.

This explains why the co-parents were condemned by the judge for making 'philosophical and ideological bases upon which [they] predicated their case'.¹⁷⁹ At the same time the donor was not regarded as presenting an ideological argument that a family is better off having a fatherly figure. The co-parents, however, were being 'irrational' and 'ideological' defying patriarchal authority while the sperm donor was:

... calm and reasoned in the giving of his oral evidence ... I found him to be both credible and persuasive. ... He was not controlled by dogma, did not search for hidden motives, but applied himself consistently with the best interests of Patrick as the paramount consideration.¹⁸⁰

This is apophatic - the denial that sexuality was important but ultimately the case turned on sexuality and its intersection with gender. This appears to be a recurrent theme in cases dealing with the parental rights of lesbian mothers in Australia and elsewhere; A declared judicial denial of the relevance of sexuality that proves to be a material factor in those decisions.¹⁸¹

In *Re Patrick* this meant that the mother and her partner's understandable fears, and lived reality, that their family was subordinated in a patriarchal world were interpreted as 'philosophical and ideological'.¹⁸² Their endeavours to shelter their marginalised but healthy family from an imposing sperm donor asserting the rights of a traditional father¹⁸³ were treated as 'irrational',¹⁸⁴ even though the mother's narrative had the support of expert witnesses.¹⁸⁵ From a lesbian feminist standpoint it was no less plausible to regard the donor's submission¹⁸⁶ as ideological.¹⁸⁷

¹⁷⁸ Ibid 651 [326].

¹⁷⁹ Ibid 599-600 [88].

¹⁸⁰ Ibid 595 [64].

¹⁸¹ See, eg, Suzanna Danuta Walters, 'From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, why Can't a Woman Be More Like a Fag?)' (1996) 21(4) *Signs* 830; Susan Boyd, 'What is a "Normal" Family? C v C (A Minor) (Custody: Appeal)' (1992) 55 *Modern Law Review* 269, 271.

¹⁸² *Re Patrick* (2002) 28 Fam LR 579, 599 [88].

¹⁸³ Ibid 639 [270]: 'They, but in particular the mother, have been obsessed with the fact that he is not to have any role in Patrick's life in a natural, ordinary, parental and fatherly manner.'

¹⁸⁴ Ibid 595 [63], 597 [73], 603 [102], 616 [158], 621 [183], 638 [266], 639 [270].

¹⁸⁵ Ibid 618 [168], 619 [169]-[175], 620 [179]-[180], 625 [205] – 626 [209].

¹⁸⁶ Ibid 598 [78]: 'From what I have both heard and read, it is doubtless true that children can be happily raised within a homo-nuclear family, but the difference here is that the father desires and has always desired to play an active and fatherly role in the life of his son.'

Indeed a FST approach would have had an ethical advantage because it would oblige the Judge to reflect on his own privilege relative to those involved in the case and to take account of the asymmetrical power between a man and two women who were by comparison multiply disadvantaged.¹⁸⁸ It would have meant that the evidence was assessed by means other than intuition according to a privileged standpoint. Had the evidence been assessed this way it would have been possible to concur with the mother, the experts, and the literature¹⁸⁹ to read *Re Patrick* as a story where the sperm donor progressively demanded (perhaps bullied using manipulation) more influence in the child's life.¹⁹⁰ Importantly, it would have been an approach consistent with the Judge's promise 'to make appropriate allowance for any anxiety or tension' on the part of the witnesses. By ignoring the power differential, Guest J found that the parents were 'icy', 'mistaken', 'irrational', 'ideological', 'risible', 'unreasonable', 'fanciful' and less reliable witnesses than the donor.¹⁹¹ While the donor was commended for his 'patience and sensitivity', 'goodwill', 'sacrifice and concession' and his application was 'carefully considered', and he was a 'sensitive', 'precise and credible' witness, 'not controlled by dogma' and he was 'calm and reasoned'.¹⁹²

The FST argument being made here is that ultimately the judge had to choose between two rival views of family given that it was clear that Patrick was prospering within his lesbian family structure.¹⁹³ What *Re Patrick* shows is that on an alternate reading informed by FST, a patriarchal view of the gender sexuality nexus was imposed onto an otherwise healthy lesbian family with devastating consequences.¹⁹⁴

Judges will continue to struggle with gender sexuality intersections so long as they discount power as a relevant factor. These situations will rarely involve an absence of power even if this is not immediately apparent. Only Feminist Standpoint Theory and Intersectional Critique are capable of grappling with this intersection without exacerbating or reproducing inequality of power. Another place where power deserves more scrutiny concerns the state's right to control gender authenticity and gender passing. Here the right to determine the categories and to decide who is in and who is not is taken for granted rather than justified as legitimate or necessary.

¹⁸⁷ Asha Achuthan, Ranjita Biswas, Anup Kumar Dhar, *Lesbian Standpoint* (Sanhati, 2007) 39-45; Margaret Davies, 'Lesbian Separatism and Legal Positivism' (1998) 13 *Canadian Journal of Law and Society* 1, 16-17.

¹⁸⁸ Allan Ardill, 'Australian Sovereignty, Indigenous Standpoint Theory and Feminist Standpoint Theory: First Peoples' Sovereignties Matter' (2013) 22(2) *Griffith Law Review* 315, 325-29, 332-37.

¹⁸⁹ Boyd, above n 181; Danuta Walters, above n 181; Millbank, above n 173.

¹⁹⁰ *Re Patrick* (2002) 28 Fam LR 579, 597 [75]: 'She saw his contact with Patrick as being 'intrusive' upon her relationship with the co-parent "... because he's enacting a parental role" and then went on to add that he was utilising contact to collect affidavit material for court purposes.'

¹⁹¹ *Ibid* 591 [47], 592 [48], 595 [64], 597 [73], 599 [88], 603 [102], 638 [263], 639 [272], 640 [275].

¹⁹² *Ibid* 580, 595 [64], 597 [73], 601 [99], 603 [102], 638 [263], 640 [275], 640 [278].

¹⁹³ *Family Law Act No 53 of 1975*, s 68F(2).

¹⁹⁴ Phil McCrory, 'Obituary Dwayne Campbell 1960-2002', *Anarchist Age Weekly Review No 512* (online) 19-25 August 2002 <<http://ainfos.ca/02/aug/ainfos00298.html>>.

VII PASSING AND AUTHENTICITY

A consistent theme in the cases analysed, and implicit in the statutes, is the control over gender passing and a concern with gender authenticity, even when liberalising the law.¹⁹⁵ This control is not unique to law since people must pass according to gender norms, not just transgender people.¹⁹⁶ But the stakes are higher for transgender people with discrimination, economic disadvantage, and violence against trans-people arguably the worst of any group in society.¹⁹⁷ In addition, because ‘trans people are constructed as frauds’ by law and popular culture, ‘some trans people respond by appealing to gender realness.’¹⁹⁸ Therefore it is important to respect self-determination and individual autonomy even if it seems at odds with the abolition of a coercive gender binary.¹⁹⁹

While the High Court has mentioned the importance of individual gender subjectivity it also continues to enforce coercive gender stability.²⁰⁰ Australia is no different to other jurisdictions in this respect and as others have observed there is a judicial concern with passing and authenticity whether that is mandated by statute or not.²⁰¹ Trumbach has shown that since the 1700s the law has maintained a gender binary hierarchy, and that policing sexuality was a necessary incidence to that objective.²⁰² Gender and sexuality have been inextricably and historically bound because men have sought to control women’s sexuality and because homophobia has had a bearing on gender authenticity and passing.²⁰³ So too have race and class had a bearing on gender in terms of miscegenation in both the United States²⁰⁴ and Australia.²⁰⁵ Gender therefore is policed both directly and indirectly. Direct regulation enforces a binary and restricts passing while

¹⁹⁵ *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32B; *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30A; *Sexual Reassignment Act 1988* (SA), s 7; *Births, Deaths and Marriages Registration Act 2003* (Qld), s 23; *Gender Reassignment Act 2000* (WA), s 17; *Births, Deaths and Marriages Registration Act 1999* (Tas), s 28A; *Births, Deaths and Marriages Registration Act 1996* (NT), s 28B; *Births, Deaths and Marriages Registration Act 1997* (ACT), s 24.

¹⁹⁶ Judith Shapiro, ‘Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex’ in Epstein and Straub (eds), above n 11, 257.

¹⁹⁷ Australian Human Rights Commission, *Resilient Individuals*, above n 62, 15; Currah, above n 91, 23-4.

¹⁹⁸ Bettcher, above n 16, 398.

¹⁹⁹ Currah, above n 91; Laura Langely, ‘Self-determination in a gender fundamentalist state: Toward legal liberation of transgender identities’ (2006-2007) 12 *Texas Journal on Civil Liberties and Civil Rights* 101.

²⁰⁰ *AB v Western Australia* (2011) 244 CLR 390, 402.

²⁰¹ See generally, L Camille Herbert, ‘Transforming Transsexual and Transgender Rights’ (2008-9) 15 *William and Mary Journal of Women and the Law* 535; Langely, above n 199.

²⁰² Randolph Trumbach, ‘London’s Sapphists: From Three Sexes to Four Genders in the Making of Modern culture’ in Epstein and Straub (eds), above n 11, 112, 129–30.

²⁰³ Sharpe, above n 43, 133.

²⁰⁴ Keith Sealing, ‘Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation’ (1999-2000) 5 *Michigan Journal Race & Law* 559.

²⁰⁵ Raymond Evans, *Fighting Words: Writing about Race* (University of Queensland Press, 1999) 42, 43, 75, 81-2, 131, 153-58, 161-62, 206, 212; Commonwealth, Royal Commission Into Aboriginal Deaths In Custody, *National Report* (1991) vol 2, [10.7.12]; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986), Chapter 3 [25].

indirect regulation tends to be concerned with factors intersecting with gender such as class, race and sexuality.

It is policed indirectly because the law has historically connected gender with other indices of privilege and disadvantage.²⁰⁶ If there are to be categories at all and ones involving the allocation of resources, or privileges, then the law can be expected to resist passing.²⁰⁷ Capitalist production has been based on power and work privileges for hetero men and the privatisation of family (reproduction, child-rearing, aged-care, etc.) as the concern of women.²⁰⁸ If people are able to pass between genders then hetero-male privilege is threatened. Since the early days of capitalism, this fear of passing meant that if individuals went back and forth between genders they were guilty of sodomy.²⁰⁹

A fear of gender passing remains present in the new millennium too. It is implicit in the reasoning in all the transgender cases. For example in *Re Kevin* Chisholm J alludes to the concern with authenticity remarking:

It shows him living a life that those around him perceive as a man's life. They see him and think of him as a man, doing what men do. They do not see him as a woman pretending to be a man. They do not pretend that he is a man, while believing he is not.²¹⁰

To require gender authenticity is one way of controlling gender passing. Another way is to pronounce the undesirability of allowing passing at individual whim and this form of judicial control was clear in *Re Kevin*:

... it may not be a legitimate solution to the problem to say, in effect, that the law should simply recognise at any given time whatever sex a person chooses.²¹¹

And:

... it would be wrong for marriage law to embrace a definition that would make one's sex a matter of personal preference or choice. One of the reasons that the three-point biological criterion in *Corbett* has found favour is, I think, that it provides a permanent and clear answer to the question whether a transsexual is a man or a woman, and avoids any risk that the law might enable a person to change from a man to a woman at will. This is also, I think, why some judges have been

²⁰⁶ Patricia Yancey Martin, 'Gender As Social Institution' (2003-4) 82(4) *Social Forces* 1249, 1263.

²⁰⁷ Paisley Currah, 'The Transgender Rights Imaginary' (2003) 4 *Georgetown Journal of Gender & Law* 705, 718.

²⁰⁸ Shulamith Firestone, *The Dialectic of Sex: The case for Feminist Revolution* (Granada Publishing, 1972).

²⁰⁹ Randolph Trumbach, 'London's Sapphists: From Three Sexes to Four Genders in the Making of Modern culture' in Epstein and Straub (eds), above n 11, 120.

²¹⁰ *Re Kevin* (2001) 28 Fam LR 158, 172 [68].

²¹¹ *Ibid* 219 [280].

reluctant to incorporate “psychological” criteria, lest the person’s sex vary according to his or her feelings or beliefs at particular times.²¹²

Since *Re Kevin* was decided extra-legal developments have taken place. Firstly, an increasing volume of popular culture exploring trans issues has loosened the grip of the binary hegemony even if the bulk of that literature is simplistic/stereotypical, and what Hutson describes as a single-story cisgender patriarchal narrative.²¹³ Secondly, international standards²¹⁴ have been developed, the Human Rights Commission has produced the Sex Files Report²¹⁵ and Resilient Individuals,²¹⁶ and the Commonwealth has introduced administrative Guidelines.²¹⁷ Collectively these promote self-identification and the de-emphasis of gender except where otherwise necessary.²¹⁸ However, Bennett explains that while ‘the importance of sex to legal relations between persons may have diminished, there remain a number of areas in which a person’s sex identification is extremely important.’²¹⁹ Spade too recognises that there will be occasions where sex will matter.²²⁰ For example measures to protect women from violence, where there is an epidemiological difference in the provision of services based on sex, and for affirmative action. In other words sex might be recorded where the need comes from the person rather than to serve state bureaucracy or surveillance.²²¹

De-emphasising sex, according to Bennett, ‘would be in keeping with the general trajectory of Australian law’, and adding:

Indeed, in *NSW Registrar v Norrie*, the High Court recognised that ‘[f]or the most part, the sex of the individuals concerned is irrelevant to legal relations’, and that ‘[t]he chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage’.[108]²²²

Yet despite this trend toward gender de-emphasis both statutes and case law control passing and encourage gender ‘authenticity’.

²¹² Ibid 221 [293].

²¹³ Emma Hutson, ‘Passing: Beyond the Single Story Narrative’ (Paper presented at the Trans Studies Now Conference 2015, University of Sussex, Brighton, 12th June 2015) 3.

²¹⁴ *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) (‘Yogyakarta Principles’) Principles 1D, 3B, 6F, 19.

²¹⁵ Australian Human Rights Commission, *Sex Files: The legal recognition of sex in documents and government records, The sex and gender diversity project Concluding Paper*, 2009.

²¹⁶ Australian Human Rights Commission, *Resilient Individuals*, above n 62.

²¹⁷ Australian Government Guidelines on the Recognition of Sex and Gender (July 2013) <<http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>>.

²¹⁸ Bennett, above n 113, 865, quoting *Sex Files Report*, 3.

²¹⁹ Ibid 864.

²²⁰ Dean Spade, ‘Documenting Gender’ (2007-8) 59 *Hastings Law Journal* 731, 808.

²²¹ Bennett, above n 113, 863-4; Spade, above n 220, 819.

²²² Bennett, above n 113, 863. Original note read: [108] (2014) 250 CLR 490, 500 [42].

In *AB v Western Australia* the High Court noted that the ‘Tribunal was mindful of the possibility that the appellants could not be said, with absolute certainty, to be permanently infertile’.²²³ However, the Tribunal’s concern about passing was addressed because it ‘accepted that the reversion rate of female to male transsexuals was rare’.²²⁴ The Tribunal accepted that the appellants had done ‘everything medically available’, short of hysterectomy and phalloplasty, ‘so as to be identified as male’.²²⁵ Therefore the Tribunal did not impose the extra requirement that ‘each [appellant] go even further and undergo a hysterectomy in these circumstances’ because that ‘would seem to serve the purpose only of requiring further proof of their conviction’.²²⁶

Clearly the Tribunal was conscious of needless scrutiny of passing and authenticity. Unlike the Western Australian Court of Appeal which overturned the Tribunal’s decision authenticity was central.²²⁷ There the majority implied a need for authenticity into s15(1)(b):

On the view which I take of the meaning to be given to “physical characteristics”, it would extend to all of those characteristics which have a bearing upon the identification of the applicant as either male or female. Many of those characteristics would not be visible to the casual observer, especially if the applicant is clothed. The terms of the Act provide no basis for restricting the characteristics properly taken into account to those that might be seen by the casual observer or bystander.²²⁸

This approach suspends individual privacy in favour of a public right to know some ‘truth’ about that person’s nakedness and internal biological state. It constructs gender according to a truth fraud dichotomy.

Even though both appellants appeared as men and lived as men this was insufficient. According to the Chief Justice the relevant physical characteristics required by the *Act* could not be met by the applicants in this case:

Each of AB and AH, possess none of the genital and reproductive characteristics of a male, and retain virtually all of the external genital characteristics and internal reproductive organs of a female. They would not be identified, according to accepted community standards and expectations, as members of the male gender.²²⁹

²²³ *AB v Western Australia* (2011) 244 CLR 390, 399.

²²⁴ *Ibid* 400.

²²⁵ *Ibid* 400.

²²⁶ *Ibid* 400.

²²⁷ *Western Australia v AH* (2010) 41 WAR 431.

²²⁸ *Ibid* 457 [110] (with whom Pullin JA concurred).

²²⁹ *Ibid* 458 [115] (with whom Pullin JA concurred).

While for Pullin JA although both AB and AH each had ‘a number of physical characteristics which by community standards would be associated with members of the male gender’ this would not be sufficient. Instead:

... identification according to community standards requires all relevant information to be considered. The word “identify” means to recognise or establish or prove to be as asserted ... In my opinion, information about not only external but also internal physical characteristics is relevant to such identification.²³⁰

Authenticity is not mentioned in the *Act*.²³¹ The only mandatory ‘commitment’ to gender comes from the requirement that an applicant for a gender reassignment certificate has undergone a medical procedure.²³² Otherwise the *Act* requires that the Board is satisfied about an applicant’s belief in their true gender, that the applicant has adopted that gender lifestyle, and has received ‘proper counselling in relation to his or her gender identity.’²³³

The WA Court of Appeal held that a purposive reading of the Act was not helpful and instead what mattered was a balancing of all the relevant factors indicative of one gender rather than another.²³⁴ Future intentions did not matter rather the current state of physicality.²³⁵ From these propositions it followed for the Majority that because each person still had the ‘external genital appearance and internal reproductive organs’, ‘associated with membership of the female sex’ but for the effects of testosterone treatment, they could not be regarded as men according to ‘community standards’.²³⁶

The High Court preferred a purposive construction in over-turning the decision of the Court of Appeal.²³⁷ It said that it was generally accepted that ‘that beneficial and remedial legislation is to be given a “fair, large and liberal” interpretation’.²³⁸ However, even though the *Act* here was intended to alleviate ‘suffering and the discrimination’ which may be experienced ‘by providing legal recognition of the person’s perception of their gender’, ‘a person’s belief about their gender is but one requirement’.²³⁹ The High Court pointed out the *Act* required as a minimum that an applicant for a gender recognition certificate had undergone medical treatment ‘to evidence the commitment by the person to the gender to which the person seeks [at 403] reassignment.’²⁴⁰ In other words, there ought not be a fear of casual passing or the imposition of additional thresholds of

²³⁰ Ibid 460 [125].

²³¹ See especially *Gender Reassignment Act 2000* (WA), s 15.

²³² Ibid s 14(1).

²³³ Ibid s 15(1)(b).

²³⁴ *Western Australia v AH* (2010) 41 WAR 431, [103], [105]

²³⁵ Ibid [106].

²³⁶ Ibid [114]

²³⁷ *AB v Western Australia* (2011) 244 CLR 390, 402.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid 402-3.

authenticity if a person has endured the ordeal of sustained medical intervention. According to the High Court an absence of commitment to a gender was the problem for the applicant two decades earlier in *Secretary, Department of Social Security v SRA*.²⁴¹ Presumably casual passing and authenticity were no longer important other than the minimum required by the legislature under statute. Here the minimum requirement under s 14 was for medical procedures aimed at gender reassignment read with s 15(1)(b). As mentioned earlier the *Act* is silent as to the need to facilitate social control over authenticity because s 15(1)(b) states:

- (b) the Board is satisfied that the person —
 - (i) believes that his or her true gender is the gender to which the person has been reassigned; and
 - (ii) has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and
 - (iii) has received proper counselling in relation to his or her gender identity.

Despite this, and the fact that the High Court had held that a beneficial and purposive interpretation was warranted, the need for social recognition was read into s 15(1)(b). The High Court said that social recognition concerns the way others might identify the person and in doing so rejected the notion of a tipping point of physical characteristics required by the Court of Appeal majority.²⁴²

This means that social recognition will be used to police authenticity and control passing. Perhaps a better way to give effect to a beneficial interpretation would be to drop social recognition because it is not expressly required by s 15 anyway. Instead s 15 requires the applicant to believe in their gender, adopt the lifestyle and gender characteristics, and have received ‘proper’ identity counselling. All matters between the applicant and their health professionals. What this shows is that until the state and the courts abandon the regulation of gender, legal reasoning will inevitably be plagued with the need to justify why individual liberty should not prevail and instead why the law should supervise gender normativity.

VIII CONCLUSION - RECONCILING DEVELOPMENTS

Unlike the revolution in law that was the *Mabo Case*, and the subsequent backlash and regression of law affecting native title, the situation with gender over the last 20 years has been different. Gender law has slowly but surely improved at the margins. Arguably its

²⁴¹ Ibid 403, citing (1993) 43 FCR 299.

²⁴² Ibid 403.

revolutionary moments were legislative in the form of the *Family Law Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth) and since then reform has been incremental as this article has shown. However, gender law still has a long way to go. This is because the law regulates gender to restrict passing by requiring social recognition, it imposes controls over gender ‘authenticity’, it regulates gender subject to an embargo on gay marriage, and it re-institutes a sexist gender binary at the same time as it purports to abandon that binary.

This criticism, that advances in law are incomplete, can be levelled at ‘advances’ in cases such as *Re Kevin*²⁴³ (abandoned biological determinism), *Re Patrick*²⁴⁴ (apparent recognition of diverse family forms), *AB v Western Australia*²⁴⁵ (rejection of the gender binary), and *Norrie*²⁴⁶ (recognition that gender binary does not apply to all people).

There are two reasons why the law advances and at the same time leaves justice incomplete. The first reason is that reform is embedded into a structure that systemically discriminates on the basis of patriarchy. In other words the law will continue to closely regulate gender identity because amongst other things, political economy is based on power and work privileges for men and the privatisation of family (reproduction, child-rearing, aged-care, etc.) as the concern of women. If people are able to pass between genders the privilege of belonging to one gender as opposed to another would collapse. It also means that even if the Commonwealth prohibition on gay marriage is removed it is unlikely that homophobia and a fear of passing can be extricated from the regulation of gender. Related to this is the second reason. The second reason is that until the law understands and embraces the notion that gender is a social construction it will inevitably reproduce gender hierarchy.

Therefore unlike Mansell’s assessment of *Mabo*, the situation with gender has changed over the last 20 years to be more like two steps forward and one back, as opposed to ‘gives an inch and takes a mile’.

²⁴³ *Re Kevin* (2001) 165 FLR 404.

²⁴⁴ *Re Patrick* (2002) 28 Fam LR 579.

²⁴⁵ *AB v Western Australia* (2011) 244 CLR 390.

²⁴⁶ *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490.

Constitutional Culture, Constitutional Parchment and Constitutional Stickiness: Matching the Formal and the Informal

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Abstract

Most countries in the world teeter between too little government and too much, or between Anarchy and Leviathan. This paper employs a formal-informal paradigm to study constitutional stickiness, failure and success – with a particular emphasis on the congruence between the underlying constitutional culture and the formal constitutional parchment. The theory is then illustrated by examples of constitutional success and failure: after World War Two, the Philippines adopted an idealistic constitution that failed, whereas Japan tailored foreign ideals to local realities, and faced great constitutional success. Argentina, in 1860, adopted an ideal constitution that failed to guarantee stability and growth; Mexico, after its revolution, blended foreign ideas with domestic, and faced the greatest stability in Latin America.

*Naturam expellas furca, tamen usque recurret.*¹

*Monsieur Diderot, j'ai entendu avec le plus grand plaisir tout ce que votre brillant esprit vous a inspiré; mais avec tous vos grands principes, que je comprends très bien, on ferait de beaux livres et de mauvaise besogne. Vous oubliez dans tous vos plans de réforme la différence de nos deux positions: vous, vous ne travaillez que sur le papier, qui souffre tout; il est tout uni, souple, et n'oppose d'obstacles ni à votre imagination, ni à votre plume; tandis que moi, pauvre impératrice, je travaille sur peau humaine, qui est bien autrement irritable et chatouilleuse.*²

Introduction: The Paradoxes of Constitutional Constraint

Constitutionalism is fraught with paradoxes and challenges. At the very foundation we have what we might, with Ostrom (1980, 422) call the Faustian Paradox:

the very nature of government involves the legitimate use of force in ordering human relationships. The use of force in human relationships is of the nature of an evil. The use of instruments of evil as a necessary means to realize the

¹ You may chase nature away with a pitchfork, but it will come running back. Horace, *Odes*.

² "Mr. Diderot, I have heard with the greatest pleasure the inspiration of your brilliant mind; but with your lofty principles, which I understand very well, one would make beautiful books and bad deeds. You forget in all your proposed reforms the difference between our two positions: you work only on paper, which suffers everything; it is unified, supple, and does not oppose any obstacles to your imagination or your pen; but I, poor empress, I work on human skin, which is rather irritable and ticklish." Catherine the Great to Diderot on his proposed Polish constitution (Ségur 1826; translation my own).

advantage of ordered social relationships creates a fundamental moral dilemma that can be appropriately characterized as a Faustian bargain. A reasonable expectation, given the Faustian bargain, is that government will fail.

How are we to prevent the state Mephistopheles from claiming his due – and somehow ensure that the Faustian bargain of government does not end in tears? Even in the best case scenario, we are next faced with the Liberal Paradox (see Locke 2002, Hayek 1960 or Rothbard 1978). Is there no way, other than coercion by the state, to prevent coercion? Lest anarchy prevail, we must have recourse to the state to protect our rights, or coercion to prevent coercion. Finally, moving to a more practical level, we are faced with a third problem, the Weingast Paradox: a government strong enough to bind itself is also strong enough to break its bonds; see Weingast 1995. How, then, do we enable government to provide an environment conducive to human liberty and flourishing – while also constraining it, so it does not violate the very rights it was established to defend? How do we avoid constitutional failure, as frustrated actors use unconstitutional means to seize power? These are the challenges of constitutionalism.

Alas, a simple and sobering glance at the world tells us that constitutionalism is rare and fragile. And that the challenges of constitutionalism are not mere academic preoccupations for constitutional political economists. Indeed, according to the *Freedom in the World 2014* survey, less than half the world's population (45%, living in 88 countries) is considered to be free; the balance is ranked as partly free (30% of the population, living in 59 countries) or unfree (24%, living in 38 countries).³ Likewise, according to the 2014 *Index of Economic Freedom*, a mere six countries (of 165 ranked) are listed as economically "free", with 28 "mostly free," 56 "moderately free," 61 "mostly unfree," and 28 "repressed" (Miller, Kim and Holmes 2014). Everywhere, we see the consequences of poor constitutionalism, as the world teeters between too little and too much government – or, in the words of Buchanan (1975), between anarchy and leviathan. Neither extreme is conducive to human flourishing (see Scully 1998): one sixth of humanity currently subsists on \$1/day, while one half ekes out a living on \$2/day. Constitutional government is precarious and rare. Nor is this challenge anything new: for a history of attempts at controlling the state through constitutional constraints, see Gordon (1999).

How, then, do we enable government to do useful things while restraining it from doing ugly things? Borrowing from Adam Smith, how do we encourage the human propensity to "truck, barter and exchange" while thwarting the nastier proclivities to "rape, plunder and pillage."

This paper proposes that successful constitutionalism – a system that walks the fine line between too little and too much government, or between Anarchy and Leviathan –

³ See www.freedomhouse.org

depends on the match between the formal parchment and the underlying constitutional culture.

Section One proposes the concept of constitutional culture and presents a paradigm for constitutional stickiness, based on congruence between the formal and the informal. Section Two discusses the mechanics of constitutional stickiness and rejection. Section Three offers four illustrative case studies. The final section concludes.

I. CONSTITUTIONAL CULTURE AND CONSTITUTIONAL SUCCESS

1. Formal and Informal Constraints

As important as constitutions are for liberty and human flourishing, the answer to the challenges of constitutionalism lies not in formal mechanisms. It cannot. After all, constitutions are ultimately mere parchment. Ordinary contracts rely on a combination of internal constraints and external enforcement mechanisms; but a constitution, by definition, is the formal enforcement mechanism of last resort. Alas, the literature in constitutional political economy is mostly quiet on the subject of informal mechanisms. Instead, the emphasis is predominantly on formal, contractual mechanisms; see *e.g.* Buchanan 1990, Buchanan 1975 or Brennan and Buchanan 1985; for commentary and critique, see also Hardin 1988, Gordon 1976 and Voigt 1997).⁴ Useful as these are, there is something missing.

Instead of a contractual approach, I employ Hardin's (1999) basic view of a constitution as a coordinating mechanism among the "interests that matter" within a polity, rather than a contract (see also Hardin 1988 and Gordon 1976).⁵ There can be no outside appeal to any other formal institution beyond the constitution; hence the importance of informal constraints in maintaining constitutional order. Hardin (1988) explains that "without support from relevant people, perhaps often in the grudging form of those unable to co-ordinate in refusing support,...rules would not be worth the paper on which they are recorded." Similarly, Alexander Hamilton noted of the US Constitution that it would be a "frail and worthless fabric" in the hands of the wrong people.

⁴ One wonders why constitutional culture receives such scant attention in the literature. I offer two speculations. First, I suspect there exists a "measurability bias" of sorts in economics (which is, after all, the mother discipline of constitutional political economy): culture does not fit into tidy models or econometric regressions, so it is simpler to assume it away (see Evans 2007, commenting on Boulding 1974, Chamlee-Wright 1997, Tilly 2003, and Lavoie and Chamlee-Wright 2000, 42). Second, with Hayek (1967), I blame the intellectual legacy of "rationalist constructivism" and legal positivism (although, to be sure, James Buchanan, the father of contemporary constitutional political economy, is a contractarian, without being a legal positivist).

⁵ Parenthetically, the coordination approach fits within the greater "evolutionary" approach. Voigt (1997) explains that "whereas Buchanan is clearly leading the contract notion of the constitution, Hayek (*e.g.* 1973, 1976, 1979, 1988) is almost as clearly leading the notion of the constitution as the result of cultural evolution."

Informal constraints thus hold a central importance for constitutionalism. If a critical mass of individuals refuses to be bound, if it rejects constitutionalism generally or the constitution specifically, if it does not accept the deferral of current power for long-run stability, the entire constitutional undertaking will fail. Expediency will trump principle. Power will prevail over rules. And short-term gain will win over long-term coordination. In the words of Franklin and Baun (1995, vii), "in the constitutional state the rule of law prevails, not because the courts or police say it should, but because there exists a general acceptance of and confidence in the law."

2. Constitutional Culture

The relevant ideology and culture – the limits of the willingness to be bound (see Elster 2000 and Hardin 1999) – are best captured in the concept of "constitutional culture," the general attitude towards the nature, scope and function of constitutional constraints. This culture will be the key to successful constitutionalism.

As a coordination mechanism, constitutionalism requires "relatively wide agreement on core issues" (Hardin 1999, 84). North (1981, 14) writes that "compliance is so costly that the enforcement of any body of rules in the absence of some degree of individual restraint from maximizing behavior would render the political or economic institutions non-viable – hence the enormous investment that is made to convince individuals of the legitimacy of these institutions."⁶

Existing attempts at defining constitutional culture offer a useful start. See, *e.g.* Ferejohn *et al.* 2001, especially 10 and 14, Mazzone 2005, Friedman 1975, Kahn 1999, Lupu 1990, and generally Levinson 1988; see also Merriam 1931. Furthermore, it should be noted that the difference between formal and *de facto* laws is covered in the legal literature. For example, Lasalle (1946[1862] in Santiago 2003) distinguishes between the "real constitution" (actual power structures) and the "juridical constitution" (constitutional parchment). But these approaches all share the same major shortcoming, as they limit the concept of constitutional culture to situations where the polity accepts constitutional constraints. Defining constitutional culture as a culture that accepts constitutionalism is simply too limiting; not only is it tautological, but it does not shed light on constitutional failure (which is, after all, much more common than constitutional maintenance).

Adopting a broader definition, constitutional culture captures an attitude about constitutional constraints and constitutionalism. Constitutional culture includes the implicit and explicit, stated and unstated, conscious and subconscious, thoughts, feelings,

⁶ In a rehash of the famous Noble Lie, if the acting citizen *thinks* of the constitution as a contract, and is thus bound that much more strongly by it, then so much the better for successful constitutionalism (even if the theorizing constitutional political economist sees beyond the constitution as contract).

beliefs, impressions and norms a group holds about the nature, scope and function of constitutional constraints. What if Hardin's (1999) "interests that matter" reject constitutionalism completely? What if they are willing to suspend constitutional constraints, if temporarily, in the face of a crisis? How do individuals, or groups amounting to "interests that matter" feel about balancing political expediency with constitutional principle? What relative weights do they assign to popular will (majoritarianism) versus constitutional principles agreed upon in the meta-stage of institutional design (especially when such principles provide an undemocratic brake on democratic excess)? Generally, how do individuals, or groups of individuals, feel about constitutional norms (whether explicitly and rationally, or implicitly and emotionally)? Do individuals trust each other? Do they cooperate? And, if so, do they cooperate only within their community, or also with strangers? Do they internalize rules, in a virtuous circle of reinforcement? Or do they attempt to cheat, defect or shirk, in a vicious circle of anomie?

Different groups in society (*e.g.* educated versus uneducated, élites versus masses, legal practitioners versus politicians, politicians versus the street, *dirigiste* versus *laissez-faire*, etc.) can have different constitutional cultures. As North (2005, 2) emphasizes, a "belief system may be broadly held within the society, reflecting a consensus of beliefs; or widely disparate beliefs may be held, reflecting fundamental divisions in perception about the society." In cases of relative national homogeneity, I will refer to the dominant constitutional culture as *the* national constitutional culture. See, *e.g.*, North (1999, 11) on dominant beliefs as "those of political and economic entrepreneurs in a position to make policies."

Thus, constitutional culture reflects the most basic beliefs and attitudes about general organization, that is, not just the constitutional text itself, "but the entire network of attitudes, norms, behaviors and expectations among elites and publics that surround and support the written instrument" (Burnham 1982, 78). For details on constitutional culture, see Wenzel 2007 and 2010a.

3. A Theory of Constitutional Stickiness, Success and Failure

This paper develops a simple classification for a complex problem: formal-informal constitutional matching. It ties in with the overall literature on institutional change (where matching is alternatively referred to as stickiness or embeddedness; see, *e.g.*, Boettke *et al.* 2008, North 1999, Rodrik 2000 and Roland 2004) – with a particular emphasis on constitutions. In sum, for a constitution to be successful, the formal parchment must match the informal constitutional culture. But, first, we must define constitutional success.

North *et al.* propose that human history can be classified in three social orders: foraging, limited access orders (also known as a closed access order, or natural state) and open

access orders (2009, 2). Setting aside foraging as pre-civilization, they focus on the latter two. A closed access order "manages the problem of violence by forming a dominant coalition that limits access to valuable resources... or access to and control of valuable activities... to elite groups" (30). Such an order is characterized by slow growth and vulnerability to macroeconomics shocks; politics without generalized consent of the governed; a relatively small number of organizations (in the market and civil society); small and centralized governments; and personal social relationships (privilege, hierarchy, lack of rule of law, etc.) (11). There are degrees within this category, ranging from fragile and barely sustained orders (Haiti, Iraq, Afghanistan) to basic orders with a durable and stable organizational structure (Bolivia, Venezuela or Russia), all the way to mature closed orders, with a durable institutional structure and elite organizations outside the immediate framework of the state (Mexico is a prime example) (41). By contrast, an open access order is one in which "political management of violence is based on impersonal rules and organizations, not, as in the natural state, on the manipulations of economic privileges. As a result, open access societies adjust to economic and social change without necessarily making adjustments in the political arrangements dealing with violence" (122). Open access orders manifest high levels of political and economic development, less negative growth, rich and vibrant civil society with many organizations, big and decentralized governments, and widespread impersonal relationships (such as rule of law or property rights) (11). Examples of open access orders include the US, UK and France (which all made the transition from closed to open in the early 19th century), or South Korea and Taiwan (1950s-2000) (27).

In the framework proposed by North *et al.*, "the big question... is how natural states make the transition to open access societies" (25-26). They remind us that the transition occurs within the natural state, and must thus follow natural state logic, while giving elites incentives to make the transition to impersonal exchange. Transition occurs when elites transform personal privileges into personal rights. But transitions do not happen immediately; first, relations within the dominant coalition must transform from personal into impersonal; then this change must extend to the larger population. There are three "doorstep" conditions for the transformation (151): (1) rule of law for elites; (2) perpetual organizations in both the public and private sphere; and (3) consolidated control of the military.

Different countries go through different details and different orders of doorstep conditions. But, in order to make the transition, all countries must fulfill the three doorstep conditions. Now comes the importance of constitutionalism. We can think of constitutions as facilitating or hindering the transition from closed to open access order. North *et al.* (2009, 2) emphasize that "transition [from closed to open access] entails a set of changes in the economy that ensure open entry and competition in many markets, free movement of goods and individuals over space and time, the ability to create organizations to pursue economic opportunities, protection of property rights, and

prohibitions on the use of violence to obtain resources and goods or to coerce others" – in other words, a constitution that limits government while enabling productive exchange.

These conditions essentially match Hayek's safeguards for individual liberty under a "constitution of liberty" (1960, 205-209): rule of law; equality before the law; separation of powers; and absence of discretionary powers to administrative authorities. In sum, we can define a successful constitution as one that: (a) provides a check on government, just as it empowers it to defend individual rights; (b) provides a space within which markets and civil society can flourish; and (c) supports the shift from a closed-access to an open-access order, or helps in the maintenance of an open access order.

In order to be successful, a constitution must match the underlying constitutional culture. This matching can be seen in the degree to which the constitutional culture is reflected in the constitution, and the degree to which the constitution serves as a vehicle for the state to deliver the public goods desired by the people and assumed in their constitutional culture. Details include such things as the extent to which the constitution is entrenched (or responsive to changes in the popular will); or the scope of governmental power (is it limited, thus matching a suspicious constitutional culture, or is it broad, maybe moving beyond public goods to outright redistribution)? In sum, a constitution matches the underlying constitutional culture if the governmental reality matches the vision of government contained in the constitutional culture. Naturally, there will be different degrees of matching, just as there are different degrees of success.

Having discussed success and matching, I turn in the next section to failure and mismatch. Simply stated, a constitution must match the underlying constitutional culture. If it does not, the informal will reject the formal.

II. MATCHING THE FORMAL AND THE INFORMAL

The short-term stickiness and long-term robustness of a constitution will depend in large part on the formal constitution's compatibility with the underlying constitutional culture. A constitution will fail if it is perceived as a foreign graft onto a constitutional culture that rejects it. If constitutional culture and the formal constitutional system are radically mismatched, the "patient" will reject the foreign transplant completely; if the mismatch is minor, compromise can occur.

Throughout the theoretical possibilities below, I weave in brief illustrations from case studies of constitutional stickiness and constitutional history. I expand on four such case studies in section Three.⁷

⁷ For details on Mexico and Argentina, and Japan and the Philippines, see section three. See also Wenzel 2010b and 2010c, respectively. On France, see Duverger 1998, Stone 1992, Skach 2005, and Wenzel (2017) *J. Juris.* 61

1. Formal-Informal Mismatch: From Change to Rejection

Three types of constitutional rejection and change can ensue; countries can experience different types of mismatch (as well as success) over their constitutional history.

a. Marginal constitutional change. Rather than changing its constitutional system fundamentally, a country may opt for significant change within existing constitutional structures. In the words of an anonymous reviewer, "it is not necessarily the case that stability is the best outcome here (although it is surely not the worst). A more dynamic relationship in which the culture and the constitution may change over time, but in step with each other, may... be at least as valuable to one where the culture and constitutions persist in rigid symmetry." Over time, formal laws and informal culture can be involved in a tango of sorts, as they influence each other (see Jones 2006, Roland 2004, Hardin 1999 and Posner 1997). Marginal constitutional change thus exemplifies the shades of grey in constitutional success. Indeed, a marginal constitutional change could be seen as a rejection of the initial constitutional arrangement; it could, conversely, be seen as a flexible improvement, as the constitution is "strong enough to bend." Examples include the US 17th amendment (which altered the nature of federalism by shifting to direct election of US Senators), Russia in 1992 (which moved from a Madison-style constitutional court to a Kelsen-style council; see Epstein *et al.* 2001) or France in 1962 (which changed to direct presidential election four years after moving from a parliamentary to a semi-presidential system; see Wenzel forthcoming-1).

b. Radical constitutional change. A country may simply drop its existing constitution and adopt a radically different form of government – while staying within the general confines of rule by constitution. This appears to be a national sport in much of Latin America (the Dominican Republic, for example, has had 32 constitutions since 1844; Venezuela has had 26, Haiti 24, and Ecuador 20 since their respective independences; see Cordeiro 2008). France, with its emphasis on the constituting power (the Nation) over the constitution, has mastered this art, as constitutions periodically reflect shifting national identities, experiments or majorities. Thus, since 1789, France has had 21 constitutional regimes, including five republics, two empires, two restorations of the monarchy, and a bevy of temporary constitutional charters (see Duverger 1998).

c. Full constitutional rejection. Finally, instead of amending an existing arrangement or shifting constitutions radically, a country may drop constitutionalism entirely, via military coup or constitutional suspension. Argentina suffered this fate 11 times in the 20th century (see Wenzel 2011). All Latin American countries have suffered it at least once (generally, see Kolesar 1990 or Garcia Hamilton 2005). This was also the case in

forthcoming-1. On Italy, see Wenzel 2015, Sabetti 2000 or Ziblatt 2006 . On the US, see Ferejohn *et al.* 2001. On Russia, see Epstein *et al.* 2001. On constitutional transfer generally, see Wenzel 2014, Billias 1990, Boettke *et al.* 2008, and Kolesar 1990.

Germany's transition from the Weimar Republic to National Socialist dictatorship, or France's summer 1940 suspension of the Third Republic through a grant of full powers to Marshall Pétain (see Skach 2005). Such a full constitutional rejection occurs mostly in dramatic situations of crisis or when the mismatch between constitutional parchment and culture is fundamental, and the cultural patient flatly rejects the constitutional graft.

2. REASONS FOR CONSTITUTIONAL CHANGE AND REJECTION

A formal constitutional system will not stick (and will thus fail) if it does not match the underlying constitutional culture. If there is only a slight divergence, the two will reach a focal point of compromise, within the dynamic circle of formal-informal institutional complementarity. However, if the two diverge sufficiently, the informal body will completely reject the formal transplant, leading to constitutional rejection rather than compromise.

I use four categories to classify constitutional change and rejection:

a. Cultural incompatibility – constitutionalism generally. The dominant constitutional culture may not be amenable to constitutionalism, favoring instead an "institutional *ad hocery*" of expediency over principle. Franklin and Baun (1995, 4) for example, write that "a political culture is capable of promoting constitutional or non-constitutional public policy." At a more fundamental level, constitutionalism presupposes a willingness to be bound and a willingness to defer current income or power – in the name of stability, order, growth, the constitutional undertaking, etc. If the prevailing constitutional culture rejects compromise or exhibits hyperbolic time preferences, constitutionalism as a whole will be rejected. If a country's constitutional culture is impatient with compromise or inflexible in its pursuit of stability, constitutionalism will not survive – a spirit exemplified in the ominous Latin American saying, *la constitucion es una cosa; los militares somos otra*.⁸ Likewise, if the world is seen to be alien and uncontrollable, it would be foolish to make any sacrifices for a long-run that may not exist and can certainly not be predicted or controlled. This attitude is exemplified by Banfield (1958, 85 in Putnam 1993, 88) on the prevailing vision in the Italian village of Montegrano, showing that fatalism leads to passivity, and thus the absence of behavior required for successful constitutionalism: "maximize the material, short-run advantage of the nuclear family; assume that all others will do likewise." Generally speaking, a constitutional culture must incorporate a willingness to be bound – even by an unpalatable opposition – for constitutionalism to prevail. Argentina (as well as all of Latin America, except for Mexico since the end of its revolution) has faced this, as the military repeatedly suspended the constitution (see

⁸ The constitution is one thing; we the military are another. Turning to popular literature, I recall the comment made by a character in Latin American novel: "There is nothing at all wrong with our laws and institutions and our constitution, which are all democratic and enlightened. What is wrong is that they are enforced by people who do not consider themselves bound by them" (Bernières 1990, 306).

Wenzel 2010b). The same happened in the Philippines, with the 1972-1981 Marcos dictatorship (see Wenzel 2010c).

b. Cultural incompatibility – the specific constitution. Short of rejecting all forms of constitutionalism, a constitutional culture can reject a specific constitution. For example, Evans (2007), working off the theories of Thompson *et al.* 1990, Schwarz and Thompson 1990 and Wildavsky 1998, offers an analysis based on four ideal cultural types. The "individualist stresses equality of *opportunity*... The egalitarian prefers equality of *outcome*, because differences lead to power imbalances. The hierarchist believes in equality *before the law*... The fatalist has no ideal of fairness, because it's not seen to exist." The implications for constitutional culture and constitutional choice follow, starting with the basic idea of economic organization: "If the economy is a pie the individualist will require as large a slice as possible...; the fatalist will accept any portion offered...; the egalitarian will seek to convince all parties that they can make do with smaller slices; and the hierarchist will seek control of the knife, and determine the cut of the pie amidst competing recipients." Such basic economic views will spill over into constitutional political economy. If a constitution does not match the underlying culture, the constitution will be rejected. Likewise, if a country is culturally fragmented among types, and if the constitution favors the vision of one type to the exclusion of others, the document will be rejected by the other types – who may then attempt to seize power through extra-constitutional means. A hierarchist will not suffer the inefficiencies of an egalitarian constitution; an egalitarian will demand redistribution under an individualist constitution, etc. And, in any case, a fatalist will not accept the constraints of constitutionalism if it jeopardizes a certain present for the sake of an uncertain future. Italy, for example, has largely rejected a centralizing constitutionalism that quashed its tradition of local autonomy. Before World War Two, Italy endured fascism, which stepped into the bureaucratic system implemented by its 19th-century constitution. Since World War Two, Italy has been spared military intervention, but the country has lapsed into chronic political instability, heavy bureaucracy, and widespread corruption (see Wenzel 2015 or Sabetti 2000 and Zibblatt 2006 for broader histories). See section three on the cultural mismatch in the Philippines and Argentina.

c. Philosophical incompatibility – the specific constitution. Successful constitutionalism presupposes certain philosophical foundations (which are a component of constitutional culture) – and compatibility between those foundations and the formal constitutional arrangement. In many ways, this matches the above argument about cultural incompatibility, but it is important enough to bear separate mention. Institutions rely on philosophical claims about the world in which we live, about the morality to which we should aspire, about the rights the institutions are designed to protect. A given constitutional culture may be hostile to a specific constitution that reflects a competing philosophy. Indeed, a constitution represents the political expression of an underlying philosophy. If the written constitution reflects a philosophy that conflicts with the

philosophy encapsulated in the underlying constitutional culture, there will be trouble – the constitution will be seen as inappropriate or downright bad, as it delivers the "wrong" political goods. For example, Rousseau's thinking, if not explicitly, is still on the lips of the average French citizen; in the French-Rousseauian tradition, constitutionalism is secondary to democracy – and the state, far from being a threat to individual rights, is seen to represent the expression, and implementation, of the popular will for the common good.⁹ By contrast, the American political tradition is infused with the thinking of the Scottish Enlightenment – both implicitly, in mental models, and explicitly, as Adair (1988 [1951] and 1988 [1957]) so crisply demonstrates (in the words of Thomas Jefferson's US Declaration of Independence – as a representation of one particular philosophical approach to constitutionalism – "*to secure these rights* [of life, liberty and the pursuit of happiness, among others], governments are instituted among men" (emphasis added). Where *dirigisme*, rational constructivism and obsessive infatuation with majority rule took hold of minds and institutions on the Continent, the Scottish tradition of respect for spontaneous order and bottom-up emergence captured American minds and constitutional parchment. An adherent of Continental thought will not accept a Scottish document – and vice-versa. This is exactly what happened at Argentina's founding (1853/1860), where a Scottish document (copied almost verbatim from the US) was imposed on a Continental-Rousseauian constitutional culture (see Wenzel forthcoming-2). Likewise, France struggled from 1789 until 1958 to balance its underlying culture of Rousseauian majoritarianism with the expediency of strong leadership. It took more than 20 constitutions for France to find balance (see Wenzel forthcoming-1).

d. Inefficiency and Instability. Even in the face of cultural and philosophical compatibility between parchment and mental models, if the government does not function and does not deliver basic services – order and security for starters; public goods; or some level of wealth redistribution, depending on the details of the dominant constitutional culture – there may be calls for constitutional change. This appears to have been the case in Argentina throughout the 20th century (along with every other country in Latin America except Mexico), as the military periodically stepped in to clean up after civilian mishandling of economic or military crises). Likewise, France's Third Republic (1870-1940) and Fourth Republic (1946-1958) proved inefficient at dealing with crises, and were replaced by subsequent constitutional arrangements. Fundamentally, the question

⁹ In a recent example of economic anthropology, Declercq (2006) studies press references on the Constitutional Council during the (mostly) political and (somewhat) constitutional crisis surrounding France's 2006 attempts at labor law reforms. First, the study shows that a scant 83 articles mentioned the Constitutional Council, out of a total of 12,000 articles on the projected reform published in the period covered by the study. Second, the study shows the polity's general indifference towards and ignorance of the constitution and the Constitutional Council (a number of articles even contained primers on the Council's role, something unthinkable in the US, whose population is often obsessed with Supreme Court rulings). Finally, the study concludes that "neither venerated nor shunned, the constitution has become irrelevant" (translation my own), and secondary to majoritarian considerations.

comes down to a tension between expediency and principle. If the government is not delivering basic services, what is the tipping point when the people will reject constitutional compromise in favor of a new constitution through which the state will (hopefully) deliver those desired services? At a very basic level, one can imagine frustration with anarchy or civil unrest; or recurring economic stagnation or chaos; or the state's failure to protect basic individual rights. To be sure, there is an element of cost-benefit analysis (see Tullock 2005 on the social dilemma). However, there is also a strong element of constitutional culture: at what point will even the most dedicated of constitutionalists accept extra-constitutional means to obtain the desired political goods?

III. Illustrative Case Studies¹⁰

Constitutional culture is so varied and so rich that an ounce of example is worth a pound of definition. Four case studies illustrate the paper's central proposition: Mexico and Japan exhibit constitutional success, as the framers sought to match the parchment with the underlying culture; the Philippines and Argentina failed constitutionally, because the underlying constitutional culture rejected the parchment.

1. The Philippines after World War Two: Individual Rights? How Nice

The Philippines started its modern history as a Spanish colony; as a result of the Spanish-American War, the country passed from Spanish colony to US protectorate. After World War Two, the Philippines attained statehood with a new constitution adopted in 1946.¹¹ By the 1960s the Philippines was a stable democracy, with established rule of law and constitutionalism (see Overholt 1986, Tate and Haynie 1993 and del Carmen 1973). Naturally, economic growth followed;¹² "from 1950 to 1965, the Philippines' average economic growth rates exceeded all of Southeast Asia, Taiwan and South Korea" (Overholt 1986). In sum, by the 1960s, the Philippines "was viewed as one of the great models of Third World political and economic success" (op. cit.).

Alas, serious problems lurked under the veneer of success: a large disenfranchised underclass subject to the whims of large landholders (Vinacke 1947); "some of the world's worst social inequality" (Overholt 1986); institutions that favored the oligarchic minority; high levels of corruption; and rampant crime. First came economic decline; by the end of the 1960s, economic growth had slowed (Overholt 1986). Then came increasing social unrest. As a result, democratically elected President Ferdinand Marcos imposed martial law, and stayed in power beyond his constitutional mandate, suspending elections and rewriting the constitution in his favor.

¹⁰ For details on the case studies, see Wenzel 2010b and 2010c.

¹¹ There is apparently some debate as to exact dates. For example, Blaustein (1992, 53) refers to the Philippine constitutions of 1936 and 1948, whereas Vinacke (1947) writes of the constitutions of 1935 and 1946. I suspect such minor technicalities come down to drafting versus ratification dates, or the like.

¹² See Scully (1988 and 1992) and the New Development Economics literature as justification for this glib assertion.

What happened? How could such a successful system have lapsed into constitutional suspension? The many sociological, political and cultural explanations (see Tate and Haynie 1993, Overholt 1986 and del Carmen 1973) still beg the fundamental question. After all, "the political system in the Philippines before martial law was institutionally patterned after that of the United States" (del Carmen 1973). Such a system should have protected the country from martial law, military coups and other constitutional suspensions; perhaps details could change at the margin, but surely the constitution would prevail. As del Carmen (1973 writes): "The spectre of the Philippines, long ballyhooed as the 'show window of American democracy in Asia,' unreservedly repudiating constitutional niceties would have been traumatic to Americans as well as Filipinos. Rejection of the American brand of democracy – yes; but the total absence of a constitutional process – no." Yet that is exactly what happened. In blunt summary, the US-inspired constitution of 1946 failed. I turn to the adoption to explain why the constitution, while ideal on paper, was unsuited to Filipino constitutional culture, and thus a bad choice, doomed *ab initio* to be rejected (if after an initial honeymoon) by the cultural recipient.

The Filipino constitution was fundamentally inspired by the US constitution (see Billias 1990, 9-10, del Carmen 1973, Vinacke 1947 and Smith 1945). It established a presidential system with a bicameral legislature and US-style judicial review. This is not surprising, since US authorities worked closely with the Filipino drafters: "the constitutional system..had been planned, in agreement with the United States, for the independent Philippines as well as for the Commonwealth period" (Vinacke 1947). To be sure, there was US influence – but not US imposition (see Smith 1945). In fact, several foreign commentators and Filipino politicians emphasized that the constitution was a Filipino document – inspired by US and other foreign sources, but fundamentally Filipino. Thus, Hayden (1942, 59) asserts that "viewed as a whole, the Constitution of the Philippines reflects the Filipino, Spanish and American antecedents which have made the Filipino people what they are... Above all, it is a Filipino and not a foreign instrument and provides the constitutional foundation for a genuinely Filipino government." Filipino president Quezon (in Vinacke 1947) echoed this, explaining that the new constitution had its own, indigenous philosophy.

Applying the concept of constitutional culture, I take strong issue with these assessments. While the Filipino Constitution may indeed not have been a direct US constitutional import, it was certainly not compatible with the underlying constitutional culture – a disconnect which goes a long way in explaining the underlying socioeconomic and structural woes of the 1950s and 1960s, as well as the 1972-1986 suspension of constitutionalism.

Garcia Hamilton (2005) writes generally of the inherent conflict between the Spanish colonial tradition (personalism/*caudillismo*, authoritarianism, top-down centralization, and

government of men rather than law) and constitutionalism under rule of law. The Philippines, which was a Spanish colony until the end of the 20th century, thus started at a disadvantage, as it had no organic tradition of rule of law. After Spanish colonialism, instead of having the opportunity to develop its own traditions, the country remained a US colony for another 35 years, after which a US-inspired constitution was adopted, out of the blue. Beyond the general traits of former Spanish colonies, several particular Filipino traits were inimical to a US-style constitution of limited government and enshrined rights.

First, the *caudillo* tradition was particularly strong in the Philippines (see Smith 1945).

Second, there existed deep contradictions between the constitutional text and the culture – so while the constitution (on paper) emphasized individual rights, President Quezon could simultaneously claim that "it is the good of the State, not the good of the individual which must prevail" (Vinacke 1947).

Third, the Filipino constitutional culture was all too willing to place political expediency over constitutional principle; as long as the economy was growing, the constitution was respected. But when democracy was seen to have failed, Filipinos were eager to support Marcos' constitutional suspension, in the hopes of greater growth and order (see Vinacke 1947).

Fourth, the Filipino founding evinced a certain schizophrenia on the subject of rights. Smith (1945) states bluntly that "the adoption of [a Bill of Rights] in the Philippines was not as easy as might be supposed. There were traditional modes of thought influencing the Filipino in other directions. The concept in the beginning was alien, and political experience and education had to be added to the characteristic Filipino outlook before the Bill of Rights concept could become second nature to the Filipino" – and it is debatable whether it ever really did.

In sum, the Philippines was doomed, *ab initio*, by the wrong choice of a constitution. Although the Constitution of 1946 was not a verbatim copy of the US constitution, the document was still too strongly influenced by Anglo-Saxon political philosophy to be acceptable to Filipino constitutional culture. The seeds of liberty, limited government and rule of law, were cast on ground too thin – by dint of history and an atavism of Spanish colonialism – to allow such seeds to blossom. The Philippines might have done better with a rights tradition that was less idealistic but more matched to the situation (as in, perhaps, the case of Mexico). Either way, the Filipino experience shows the importance of matching formal parchment to informal constitutional culture – or reaping the harvest of dictatorship and constitutional failure down the road.

2. Japan after World War Two: Planting Western Roses in Japanese Soil?

At the conclusion of World War Two, one of the principal goals of the US occupying forces was to render Japan incapable of repeating its international aggressions of the 1930s – not just via military occupation, but through stronger constitutional constraints (see Kades 1989).

Thus would the US insist on certain principles (separation of powers, judicial review, popular sovereignty, entrenched rights) – but not the details or the language, which were left to Japanese drafters. In the end, a mutually acceptable constitution was adopted. That constitution has stuck for 60 years now, forming the institutional backbone of a successful democracy, operating under rule of law and constitutional order. The Japanese constitution of 1946 established a parliamentary system with executive powers vested in a cabinet responsible to parliament, in the Westminster tradition. However, the constitution adopted US-style judicialism (*i.e.* independent judicial review, rather than an integrated Kelsen-style institution of constitutional review, as is more commonly associated with parliamentary systems; see Kelsen 1942). This latter institution was associated with the adoption of a Bill of Rights, explicitly defined.

The constitution was not adopted *ex nihilo*. Japan, in spite of its lapse into stratocracy in the 1930s, had already experienced constitutionalism, dating back to the 1889 Meiji constitution (McHugh 2002, 119). That constitution, designed to modernize Japan, was a blend of many traditions; it largely paralleled the Westminster model, in establishing a parliamentary monarchy, but also incorporated Japanese traditions, especially in adopting indigenous legal practices, norms and values (Blaustein 1992, 50; see also McHugh 2002 and Haley 1995).

The Meiji constitution, an existing Japanese institution, thus formed the basis of the new constitution – with several other sources of inspiration. Such a background leads Kades (1989) to conclude that:

Drawing on [many] sources as well as [US] state constitutions, the paradigm for a new constitution of Japan did not follow in the footsteps of the Founding Fathers of the U.S. Constitution. Rather it beat a new path in the direction of a Japanese constitutional structure consistent with Japanese liberal traditions.

McHugh (2002, 118) echoes this conclusion, stating that:

[the post World War Two Japanese] political system was based, in many respects, upon the American model, although a parliamentary structure was adopted, since it was already familiar to the Japanese people and political elites and would prove to be more practical than the admittedly more complex American presidential system. It imitated much of the constitutional structure established during the Meiji restoration, so it was not an entirely alien document to Japanese society.

Haley (1995, 101) corroborates this: "Except for the military establishment, Japan's postwar constitutional reforms displaced few of the basic institutions of the Meiji constitutional order... Albeit imposed by an occupying army, Japan's post-war constitutional regime was as much a product of Japan's reformist views as of American ideals." See also Blaustein (1992, 66).

In sum, Japanese drafters and their US advisors were cautious to avoid a foreign transplant that would be rejected by Japan's constitutional culture. In the wise words of the lead Japanese constitution-drafter, the "arbitrary transplantation of a constitutional system unadapted to the condition and circumstance of the nation concerned" was bound to fail, just as some "roses of the West, when cultivated in Japan, lose their fragrance totally." (Kades 1989).

Japan's constitutional drafting was propitious for success, as it was not a constitutional imposition, but a consultative process with parameters that respected, Japanese traditions. But what of the match between Japanese constitutional culture and constitutional parchment? Two themes in Japanese culture bear mentioning.

First, Haley (1995, 98-99) writes that

No simple statement of Japan's political culture seems adequate. Nevertheless, certain orientations of habit, attitude and value should be apparent in the political and legal life of any nation. For a country with the ethnic homogeneity of Japan, certain orientations can be identified, several of which seem especially important to Japanese constitutionalism. The first is the remarkable stability of Japan's institutional structure and processes. Another is an acceptance of hierarchical authority and law with, however, an expectation of benevolence by those who receive the benefits of such deference. A third is more paradoxical, a communitarian emphasis in Japanese social, economic, and political life with a corollary concern for community and individual freedom from state control.

As discussed in earlier sections, such orientations are conducive to successful constitutionalism. Stability, a willingness to follow rules, and a willingness to compromise with others, within an ethic of respect for individual rights; all of these are a good foundation for constitutional order.

Second, McHugh (2002, 118 and 127-128) explains how the Shinto-Taoist ethic of "reconciliation of opposites" has facilitated Japan's adoption of Western values and institutions – not as a wholesale adoption, but as a harmonious blend of ideas that would otherwise seem contradictory: individual rights and community rights; deference to government with an expectation of government benevolence; Western civil law with Japanese legal practices; popular sovereignty with a symbolic emperor, etc.

The constitution stuck initially because it "accurately caught the spirit and aspirations of the Japanese people" (Kades 1989). Mayo (1987) concludes that "the Constitution's continuing popularity and staying power" can be traced primarily to the fact that "it owes much to lessons learned during Japan's prior experience, both good and bad, under the Meiji Constitution of 1889."

Japan's constitutional success can thus be attributed to the formal parchment's congruence with the underlying constitutional culture. The constitution drew on a sufficient number of endogenous legal, political, institutional and cultural sources that the two were able to adapt, in a successful compromise that has facilitated a half century of democratic, political and constitutional stability, and the ensuing blessings of economic growth.

3. Mexico in 1917: Western Influences... Cautiously

Mexico is known for corruption rather than rule of law; for chronic economic instability and underdevelopment caused by unsound institutions; and for its contrast between Ivy League-educated élites and impoverished masses. In addition, Mexico has only recently emerged from almost a century of one-party rule, in what Vargas Llosa (1991) dubbed "the perfect dictatorship," able to maintain power with an international veneer of democracy and constitutionalism, and minimal resort to traditional dictatorial methods.

But, for all its shortcomings, Mexico has been remarkably stable in the 20th century, especially by Latin American standards. Since the conclusion of the 1910-1920s revolution, Mexico has enjoyed stability, constitutional maintenance and constitutional transitions, and high levels of democratic participation – if "Mexico-style." Contrary to its Latin American neighbors, Mexico has not suffered a military coup since its early 20th century revolution, nor has it fallen into periodic civil war. McHugh (2002, 175) opines that Mexico's constitutionalism "has been a testament to a legal and political persistence that has not always been entirely successful but...has, nonetheless, provided a basis for the continuing democratic evolution of this country."

The stability and success of the 1917 revolutionary constitution are especially remarkable if one considers Mexico's early post-colonial turmoil. In fact, pre-revolutionary Mexican history can be roughly broken down into three periods: (i) 1821-1875, a period of political and institutional fumbling after independence, with no less than 800 (!) armed revolts and more than 50 presidents; (ii) the *porfiriato* dictatorship between 1875 and 1910; and (iii) a protracted revolution *cum* civil war from 1910 through the 1920s (Wiarda 1995, 121; for a general history, see Skidmore and Smith 2001). Hardly an auspicious foundation for constitutional government. In addition to this waltz of post-independence regimes, Mexico also underwent an unstable succession of constitutions. Mexico saw an 1824 federalist constitution designed to abolish the absolutism of the Spanish colonial legacy (Gutierrez Gonzalez 2005, 27), rooted in European and Spanish traditions, but

also influenced by the US (Kolesar 1990, 52). That constitution was replaced by the 1836 centralist constitution, a conservative plan to impose order on competing regional *caudillos*. That constitution lasted until 1854, with the beginning of the liberal reform, leading to an 1857 federalist/liberal constitution designed to stem the centralization of power (McHugh 2005, 27). The liberal order lasted until 1876, when strongman Porfirio Diaz revolted and occupied Mexico City. Diaz was to dominate Mexico for the next 34 years, in a period known as the *porfiriato*. Overturning liberal reforms (but without ever formally amending the 1857 federalist/liberal constitution), Diaz suspended civil liberties and constitutional rights, strengthened landowner power over the impoverished peons, and encouraged foreign investment, leading to a period of economic growth. That growth, however, was unstable, as it involved increasing inequality between the rich cronies and the poor marginalized masses; Wiarda (1995, 126) estimates that 80% of the Mexican population was economically or politically unintegrated at the beginning of the 20th century.

A powder keg of impoverished masses, regional *caudillos* vying for power against the *porfiriato* centralization, a marginalized indigenous population, and general dissatisfaction with the lack of civil liberties and rule of law, led to the Mexican revolution of 1910-1920.

Mexico's post-revolutionary stability falls into three periods: (i) an initial period of post-revolutionary consolidation that lasted until the late 1920s establishment of the PRI (the party of the institutionalized revolution) as the central force in Mexican politics, a corporatist umbrella of regional and socioeconomic interests; (ii) stability from the 1920s through the 1990s, under the PRI's domination; and (iii) the opening of political power from the 1990s through the present, as the PRI eventually lost its monopolistic grip on Mexican politics, and Mexico ushered in a new era, the history of which is still being written.

What was different about the Mexican constitution of 1917? Why did it stick, and how was Mexico able to enjoy a century of constitutional maintenance after so many civil wars, dictatorships, military coups, and constitutional instability? In simple summary, after a century of constitutions that did not match the country's underlying constitutional culture, the formal Mexican constitution of 1917 finally matched the country's informal constitutional culture. Wiarda (1995, 123) explains that the

earlier, nineteenth-century Mexican constitutions had been largely imitations of the U.S. Constitution, with the French Declaration of the Rights of Man appended. Many articles of these Mexican Constitutions were simply translations of the U.S. Constitution. They set forth such principles as separation of powers, independent courts and legislatures, long lists of civil and political rights, subservience of the armed forces to civilian authority, separation of church and state, federalism, and equal rights for indigenous peoples... But these principles usually bore little resemblance to the way Mexico was actually governed. It is not

that these constitutional principles were complete myths or "laughable," as some have claimed. Rather, they represented idealistic principles and future goals, for which most thinking Mexicans recognized the social, economic, and organizational foundations had not yet been firmly laid...

The problem was not just that the nineteenth-century Constitutions represented future aspirations, however, but that in many areas they had no bases in Mexican realities. Separation of powers was a noble principle, but Mexico had always been governed – under the Aztecs as under the Spanish – in a unified, integralist, top-down manner. Federalism worked in the United States, but Mexico had always been a centralized system. Democracy and egalitarianism were magnificent values, but Mexico was organized on a hierarchical basis, based on rank orders and the assumed inequality among persons, and with the social gradations reinforced by racial criteria...¹³

Thus did Mexico adopt, in 1917, a strong executive, single-party rule and a weak judiciary, which deferred to the executive, in what McHugh (2002, 187) calls a "certain deference to traditional institutions." Constitutional tensions abound, but they are a reflection of Mexico's mixed traditions: a strong executive is bound by strict term limits (Wiarda 1995, 124); constitutional rights are intertwined with constitutional duties (McHugh 2002, 187); negative, natural rights are intertwined with "positive rights" (McHugh 2002, 182 and Blaustein 1992, 56-57); individual rights figure side by side with a constitutional enshrinement of Mexico's indigenous communal land ownership (the *ejido*, McHugh 2002, 183 and Wiarda 1995, 124); federalism is tempered by a public finance and mercantilist structure that gives preponderance to the central government over the states and municipalities (Gutierrez Gonzalez 2005, 28, Wiarda 1995, 124 and McHugh 2002, 186); and democracy is dampened by *de facto* one-party rule (or was from the 1920s until the 1990s).

In sum we see a blend of indigenous and foreign constitutional influences (Wiarda 2005, 124; Blaustein 1992, 56-57); the Mexican constitution of 1917 was the "first to incorporate, at least partially, Mexican realities into the basic law of the land" (Wiarda 2005, 123).

To be sure, the Mexican constitutional system is not perfect. The country is still held back by endemic corruption. For most of the 20th century, power was monopolized by a corrupt, dirigiste, corporatist, "authoritarianism-light" political party. And Mexico still has great strides to make in human rights, economic freedom and development, and respect for rule of law. Still, the constitution has stuck for almost a century, in a country and

¹³ McHugh (2005, 26-27) echoes this tension between constitutional ideal and political reality, as does Kolesar (1990, 52)'s explanation that Mexican constitutions before 1917 had roots in foreign ideas, not Mexican traditions.

region not known for constitutional stability. The military is under firm civilian control and the country is remarkably stable, both exceptions in a region marred by instability, civil war and *caudillismo*. Much remains to be done, as Mexico continues its struggling (but successful) path towards democracy, rule of law, and economic growth.

Mexico certainly did not adopt the "best" ideas and institutions; communal ownership, the power of the presidency, and the state's role in the national economy are all thwarting Mexico's economic development. But Mexico has enjoyed constitutional maintenance, and the best is the enemy of the good – as exemplified by the next example, that of Argentina. The major difference is that Argentina's founders sought to adopt the best ideas and institutions, while neglecting the underlying constitutional culture – and paid the price for it in the form of constitutional failure.

4. Argentina's Idealism and Failure: A Scottish Constitution for a Continental Culture

Argentina's constitution – almost a verbatim copy of the successful US constitution – offers a textbook study of constitutional failure. If the formal systems were the same, the differences in outcome must be traced to the informal, underlying constitutional culture.

The half-decade after Argentina's 1810 independence was marked by instability and bloodshed. Out of this chaos emerged a *caudillo*, Juan Manuel Rosas, who forced his way into control of the Province of Buenos Aires, a position he used for almost a quarter-century of authoritarian reign over the country (1829 to 1852). It was against the backdrop of Rosas's order-through-power that dissenting voices began to grow, leading eventually to the constitution of 1853/1860. In the next half century, Argentina grew into the eighth richest country in the world (see Ribas 2000 and Miller 1997). However, seeds of future discontent were already being sown under the rapid economic growth. "Major revolts occurred in 1874, 1880, 1890, 1891 and 1905" (Miller 1997). The ruling oligarchy maintained power through force and electoral fraud until the opposition, boosted by the universal suffrage law of 1912, broke its hold on power in 1916. There followed fourteen years of populist rule, until the military intervened in 1930, overthrowing the civilian president, in the first of 11 coups throughout the 20th century. In 1946, Juan Domingo Perón became president and established an Argentine version of national socialism. In 1955, the military stepped in to replace Perón, starting a 30-year waltz of unstable civilian regimes and military coups. Since 1983, democracy – if not rule of law – has been solidly entrenched, although Argentina, once in the world's top 10 economies, has struggled with debt default and economic crisis. For historical detail, see Shumway 1991, Ribas 2000, Sarmiento (2000[1874]), Miller 1997, and Skidmore and Smith 2001.

What happened? Why did the constitutional order lead from flourishing to dictatorship and stagnation? At first, the constitution appeared to stick. Power transfers, if based on fraudulent elections, were respected. Civil disorder kept to a minimum. Regional *caudillos* were checked by the national government. And, most importantly, after a half-century of

stagnation, Argentina's economy boomed, as the country attracted foreign capital and immigration. By the dawn of the 20th century, Argentina seemed solidly ensconced in the ranks of the world's rich countries and the world's constitutional democracies. What went wrong? In sum, the Argentine constitution failed because it never really stuck in the first place. I outline here four main reasons.¹⁴

First, philosophy. Argentine constitutional culture was (and is) predominantly Rousseauian. The 1810 independence from Spain was inspired by Rousseau, whose ideas had spread throughout Argentina in the early 19th century (Ribas 2000, 48). Argentina's main constitutional drafter, Juan Bautista Alberdi (2002[1852], 76) points to Rousseau as the inspiration for the Argentine revolution of 1810/1816 and asks rhetorically "what is our great revolution, in terms of ideas, if not a phase of the French revolution?" (ibid, 50). Although Argentina had a tradition of French thinking (Shumway 1991 and Sarmiento 2000[1874]), Alberdi was lured by the success of the US constitution, and thus proposed a document that was heavily influenced by the Scottish Enlightenment (see, e.g. Bailyn 1992, and Adair 1998[1951] and 1998[1958]). The clash was fundamental, and the constitution was ultimately an ideological aberration in Argentina's intellectual history. Argentina had a Rousseauian-majoritarian tradition, which clashed with Scottish constitutionalism.¹⁵

Second, a mercenary and instrumental vision of liberty. To be sure, liberty was prominently featured in Argentina's constitution, but (a) it was economic, rather than political or civic; and (b) the document reflected an emphasis on freedom as a means rather than freedom *qua* freedom. Alberdi (2002[1852], 18) complains that the early Argentine constitutions emphasized independence, rather than economic development. To him, rights were instrumental rather than a reflection of natural law (see, e.g. Alberdi (2002[1852]), 84). Alberdi (2002[1852]), 166) says it all when he concludes of the constitution that "its mission... is essentially economic;" after economics, "peace and interior order are the other great ends that the Argentine constitution must have" (90, translation my own). For an even more unabashedly instrumental approach, see Alberdi's (1954[1855]) economic analysis of the constitution. Economics first, then peace and order. But what of liberty and the pursuit of happiness? Alberdi's vision was one in which industry would lead to order, which would in turn lead to liberty (49); contrast this with the US founding vision, where respect for natural rights would lead to flourishing (see Bailyn 1992 and Adair 1998[1951] and 1988[1957]).

Third, institutional liberalism and political oligarchy. The political economic order of the post-constitutional era (the so-called "conservative order") was decidedly not liberal. Concessions to freedom were calculated and not principled, as the oligarchic order wisely

¹⁴ For dissenting views, see Miller 1997, Ribas 2000 and Garcia Hamilton 2006.

¹⁵ For details on the two enlightenments, see Hampson 1991, Boettke 2000, Porter 2001, Himmelfarb 2004, and Wenzel 2008.

applied the personal guarantees necessary to attract immigration and capital, while using the state to foment economic growth. The freedoms not necessary or conducive to growth were not emphasized at the founding, and were quickly neglected. From 1853 to 1916, the constitution was driven and manipulated by the oligarchy. Economic growth for the country was really economic prosperity for the élite. The system was economically liberal, but not in a civil or political sense, *e.g.* no universal suffrage. There was economic liberty, but no respect for individual rights. As long as they could stay in power, and as long as the money kept rolling in, the oligarchs maintained the veneer of a liberal order. But as soon as they started to lose power through electoral reform and the subsequent middle class erosion of their power base and the economy faltered, the proverbial iron fist broke out of the velvet glove, and the military formally broke the constitutional order in 1930. Throughout Argentina's constitutional history, entrenched power meant change from within was impossible. Power was never shared, nor did national debates take place within the constitution's parameters. In sum, the constitutional culture did not accept power-sharing or the imposition of constitutional constraints on political disputes. This cultural proclivity was not helped by Argentina's institutional choices; until 1983 (with the restoration of democracy), force was used for change, because the institutional system was too inflexible to allow change from within.

Fourth, the Spanish colonial tradition clashed with rule of law and constitutionalism. Argentina lacked indigenous customs at the founding, having existed as a viceroyalty for only 34 years before independence, then having struggled, vision- and rudder-less for 19 years before succumbing to a 23-year dictatorship. Argentina lacked local legal customs, a local tradition of self-government, and a tradition of constitutionalism. Garcia Hamilton (2005) explains that Argentina's constitutional culture in the 19th century stemmed directly from Spanish colonial antecedents, none of which were propitious cultural soil for constitutional seeds – especially political absolutism, mercantilism, disregard for the law, and militarism. The country was thus already at a disadvantage, as it had not enjoyed the slow forging of institutional custom on the anvil of time. Argentina was burdened, in a diffuse sense, by the atavism of Spanish colonial, to which constitutionalism (generally) was foreign. In addition, the specific 1853 constitution of limited government was wholly alien to the legacy of Spanish colonialism. In a cultural parallel to the philosophical disconnect described above, the 1853/1860 constitution did not jibe with the constitutional culture. The parchment established a relatively limited government, with power balanced in the US tradition. This spelled disaster, as the constitutional culture would not abide by limited government; it rejected the formal parchment, which was too limiting. The two were so fundamentally disconnected that rupture ensued. The people wanted powerful, intrusive government – and that is what they got, constitutional parchment notwithstanding; we are left with Alexander Hamilton's warning that, in the wrong hands, a constitution is "frail and worthless fabric."

CONCLUSION

The matching paradigm proposed in this paper can be used to understand many other constitutional situations. I outline three here (see Wenzel 2012 for a proposed research agenda and applications of constitutional culture).

First, constitutional review mechanisms and the tension between democracy and constitutionalism can be understood through the optic of constitutional culture. Thus does a Madisonian system reflect the American constitutional culture of suspicion of government and separation of powers to curb; a Westminster system of parliamentary sovereignty evinces a constitutional culture that is suspicious of aristocratic or royal fetters on the popular will; and the Kelsen compromise reflects a balance between the two (see Kelsen 1942, Gardbaum 2001 or North and Weingast 1994; generally see Epstein *et al.* 2001 or Gibson *et al.* 1998; see also Wenzel 2013).

Second, the matching paradigm can be used to understand constitutional change, from the disbanding of Russia's first post-Soviet constitutional court, whose aggressive independence was rejected in favor of a more moderate Kelsen-style council; to France's 1958 constitution, which finally got things right, as it matched the underlying constitutional culture, and brought stability to a country that has had 21 constitutions since 1789; or Britain's continued stability, absent a written constitution, where constitutional culture binds the state; and so on.

And third, the matching paradigm contains real hope, beyond academic curiosity, for the world's victims of unhealthy constitutional environments – the unfree, the repressed, and the hungry.

This paper is intentionally descriptive; its policy recommendations are intentionally limited at best. In sum, a good constitution can be designed, but it will not stick unless it matches the underlying constitutional culture. And any constitution is bound to fail if it assumes or attempts to create, a "new man" or a new culture, as constitutions often do – or if it attempts to impose an "ideal" constitution that does not take the underlying constitutional culture into account (see, *e.g.*, Siegan 1994).

As is so often the case, we find wisdom in the words of Adam Smith's *The Theory of Moral Sentiments* (1997[1759], VI.II.2, 59-60):

The man of system...is apt to be very wise in his own conceit, and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. He goes on to establish it completely and in all its parts, without any regard either to the great interests, or to the strong opposition which may oppose it: he seems to imagine that he can arrange the different members of a great society, with as much ease as

the hand arranges the different pieces upon a chess board: he does not consider that the pieces upon the chess board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess board of human society, every single piece has as principle of motion of its own, altogether different from that which the legislature might choose to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably, and the society must be, at all times, in the highest degree of disorder.

This paper is but a beginning. I look forward to further research, and further case studies to illustrate the theory.

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