

IMPARTIALITY: JUDICIAL POWER AND CONSTITUTIONAL INTEGRATION

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I JUDICIAL LAW-MAKING

The courts – including the High Court of Australia ('High Court') – were common law courts before they were constitutional courts. When the *Australian Constitution* ('Constitution') provided for the vesting of judicial power in courts, it did so precisely because they were courts; the common law's conception of judicial power was prior to the Constitution, and wholly picked up by it.¹

When politicians, or, indeed, judges themselves, criticise activist judicial decision-making in the constitutional sphere, they assert a tension between judicial power and democracy. This mistakes the nature of judicial power. It is indeed illegitimate for courts to legislate. They are not elected and they are not open to lobbies. These are the two essential elements of a legitimate legislative power, and from them follows the illegitimacy of judicial legislation. Nor are the courts qualified in simple competence to legislate – they do not have access to the wide set of interconnections of policy that is the essence of complex government.² So, judges ought not to legislate. But why would common law judges want to legislate? Their first quality, that which they brought *to* the Constitution, is impartiality. If they were to legislate, they would be partial to whatever it was that informed their legislation.

There is a muddle here, and it comes from a failure to understand the sense in which common law judges find the law, not make it. The muddle is almost universal now among legal thinkers, who constantly say that the law-finding idea of the old common law was a fairy tale, and 'we don't believe fairy tales any more'.³ So now, whenever it is alleged that judges have made the law, defenders of the judges' position find themselves between a rock and a hard place. Either they believe in fairy tales or they support illegitimate judicial law making. This is compounded in the constitutional sphere when the supposed law making

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1 Of course, in the term 'common law', I include equity.

2 See M J Detmold, *Courts and Administrators: A Study in Jurisprudence* (1989) 143-76.

3 See *Kleinwort Benson v Lincoln City Council* [1998] NPC 145, where most of their Lordships declared themselves against fairy tales.

brings about the invalidation of legislation. Then democratic legitimacy itself weighs into the argument.

The key to the dissipation of the muddle involves paying attention to the fundamental quality of judicial power – its impartiality. Impartiality denies both the fairy tale and the legislation – each is a partiality (an invented thing) forbidden to judicial power. I will show that impartiality is the foundation of all law; and that this is true of the laws of physics as much as human law.

It is clear enough from the last decade of constitutional adjudication that whilst the High Court has disavowed much of what it sees as the adventurism of the Mason Court, judicial power is becoming a sharp focus of active and continuing attention. This new focus is to be welcomed. When we fully understand judicial power, we will fully understand law. The key to both is impartiality.

II DEMOCRACY AND CONTRACT

Our two main institutions of social integration are democracy and contract. But democracy by itself, in our present conception, is always the institution of a partiality, namely the program of the majority. There is nothing, except perhaps a vague gesture towards the utilitarian calculus, in the idea of a majority as such. One might suppose it at least as good to give government to a minority; then the partiality of the social power supporting the majority might at least be counter-balanced by government, instead of allied to it. However, either way, democracy is in itself the institution of a partiality, and is in need of the impartiality of contract, supported by judicial power, to be a true instrument of social integration. I will explain the impartiality of contract in the next section.

The contractual condition of democracy is well known. It was set out by John Ely in his book *Democracy and Distrust*.⁴ The systemic respect for all the citizens of a democracy must be such that each one can say of their governance: 'it is my governance; though in fact I disagree with what it is doing in this or that case, the system is a fair one, and I had, and will continue to have, my opportunity'. This fairness, or justice, is nothing but contract, as I will show.

III THE UNDECIDABLE

When Einstein discovered the theories of relativity, he did not legislate them; he found them rather than made them. Physicists find what the world is like (though their findings are always revisable); and this means finding what its laws are. At Einstein's level, such findings are, of course, creative and unforeseen things. But it does not follow that they were legislated.⁵ Similarly, when

4 John Ely, *Democracy and Distrust* (1980).

5 M J Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228.

common law judges found the law of contract, they found what the world was like.

The fundamental distinction upon which the common law is founded is the distinction between contracting and stealing. Humans have always had a fundamental choice: if one human desires something that another has, they may steal it or they may contract for it.⁶ A murderer steals the life of another, a thief their property, a rapist their sexuality. Specific categories of law (crime, torts, property, etc) define this stealing in all its forms; and the law of contract defines the contrasting thing, contracting. The distinction is found in the world where humans act. Just look around you – you see people acting the tyrant (ie, stealing) every day and you see people contracting every day. I refer here to the whole range of human interaction, not simply to what can be litigated in a court (which is limited for obvious reasons, including court budgets). Every human interaction which proceeds with mutual respect I call ‘contracting’; every absence of it ‘stealing’.

Is the distinction just invented? More formally, it is a distinction found in the nature of minds – if I steal, I take the carriage of whatever my project is into my own mind; if I contract, I acknowledge the existence of the other’s mind. If in everything I do I steal, I acknowledge the existence of no other mind in the world.⁷ Others in this case are mere brains, not minds; such as to require respect in the nature of a calculated caution, rather than respect as ends in themselves. To fail to see other minds in the world is a mistake about the nature of the world. This is no more an invented thing than the fact that an apple severed from its tree falls.

The lawyers’ fellow-practitioners in this attention to the world (including minds) are the philosophers, who also seek to describe its nature. I will in this paper discuss Jacques Derrida’s view. Elsewhere, I have expressed the equivalent argument on the basis of Ludwig Wittgenstein’s view of the world.⁸

Derrida wrote:

The undecidable remains caught, lodged, at least as a ghost – but an essential ghost – in every decision, in every event of a decision. Its ghostliness deconstructs from within any assurance of presence, any certitude or any supposed critiology that would assure us of the justice of a decision.⁹

This undecidability (that character of the found world) is actually the law of contract. This is easily shown: Doe and Roe make a contract in which one is to

6 M J Detmold, ‘The Nature of Judicial Power’ (2001) 12 *Public Law Review* 135, 136-7.

7 M J Detmold, ‘Intention: Meaning in Relation’ in N Naffine, R Owens and J Williams (eds), *Intention in Law and Philosophy* (forthcoming). I adopt Chalmers’ distinction between the phenomenal and psychological aspects of the mind. This is the distinction between how some mental thing feels subjectively and what it does (David J Chalmers, *The Conscious Mind* (1996) 11-31). In my view, the phenomenal thus conceived defines the mind. The mind is a person’s subjectivity, their phenomenal life, what they care about. The whole set of a person’s perceptions and desires make a phenomenal appearance at the point we call their mind. The mind, thus conceived, constitutes an end in self.

8 M J Detmold, ‘Law as the Structure of Meaning’ in T Campbell and J Goldsworthy (eds), *Interpretation in Democratic States* (2001) 163-82.

9 Jacques Derrida, ‘Force of Law: the “Mystical Foundation of Authority”’ (1990) 11 *Cardozo Law Review* 920, 965.

sell a book to the other for \$10. Will the judge decide the value of the book? Of course not. It means nothing that the judge thinks the value of the book to be \$5. The essence of the law of contract is that the relevant evaluations *are undecidable by the judge*. What of the parties? If they are contracting parties, they negotiate not decide. A tyrant (thief) decides the matter for him or herself; a contractor does not decide, but submits to the negotiation, and the equal place of the other. Of course, each contractor decides (as it were) their own desire (what they want to contract for), but nothing follows from that until the contract is concluded. Nothing follows, that is, unless they foreclose the issue by deciding it as tyrant and (say) stealing the goods. Stealing avoids the undecidable, and so is never the result of a free decision:

The undecidable, a theme often associated with deconstruction, is not merely the oscillation between two significations or two contradictory and very determinate rules, each equally imperative ... It is the experience of ... the impossible decision ... A decision which didn't go through the ordeal of the undecidable would not be a free decision, it would only be the programmable application or unfolding of a calculable process.¹⁰

The thief takes the issue of the book into their mind and decides it as the 'unfolding of a calculable process'. In a paradigm contract case (one with no issue of duress of any sort, or fraud¹¹), all the court does is enforce the previously willed decisions of the parties. That is the sense in which, as Hamilton remarked, there is no content in the judicial power: 'the judiciary ... may be truly said to have neither FORCE nor WILL but merely judgment'.¹²

The main issue of social integration is difference. Doe and Roe are, let us say, of different sexes. The whole problem of patriarchal power (that partiality, and constitutional duress¹³) is thought (correctly) to turn on sexual difference and the problem of its integration without obliteration. Obliteration is theft in the service of the obliterating power (in this case patriarchy). But any legal question at all, even the most trivial, is a question of difference. In the simple book case (where Roe wants Doe's book) Doe and Roe are different, Doe having the book and Roe not. They might not be relevantly different. They are relevantly the same when they each have a copy of the book. In this case, there is no question of contract. When Roe steals the book she obliterates difference – she thinks: the book is mine! That is, the world is not divided into a difference of property, that which has become the property of this person and that. And the patriarchal theft (obliteration) is much discussed. It is contract that solves the problem of difference on both the individual and constitutional level.

Democracy concerns the large constitutional questions of difference. The point about judicial power here is the same as contract. Judges do not re-write constitutions. A judge would mistake constitutional law who said: 'the

10 Ibid 963.

11 Detmold, above n 6, 136.

12 Alexander Hamilton, James Madison and John Jay, *The Federalist, or, The New Constitution* (1948) 396. See also M J Detmold, 'Legislation and Adjudication' (2001) 22 *Adelaide Law Review* 87, 104-8; Detmold, above n 6, 144-5.

13 Detmold, above n 12, 136.

constitution is such and such, but I am going to legislate something else'. Constitutional law is founded on the undecidable, as much as contract law.

Derrida is also speaking of individual deliberation (whether to obey a certain statute, say, in conflict with some other obligation). But such dilemmas are always constitutional. Both sides of the dilemma are public. And their coming together (as they do in the postulated individual decision) is no different, except in size, from Doe's and Roe's desires coming together in the book contract; and their lawful reconciliation is just as it is in contract – neither is to impose on that which the other represents, neither is to steal from that which the other represents. Neither person, neither class, neither group, neither people.

IV JUSTICE

Difference is fundamental to contract, but contract is blind to difference. Contract is in fact the blindfold, the impartiality, of justice.

John Rawls's theory of justice is perhaps the most famous of the modern theories.¹⁴ Justice, for Rawls, is what humans would choose for their communal arrangements if they were denied knowledge of their personal attributes and positions – that is, their difference – a state of ignorance Rawls calls the 'original position'. Humans are their own choosers in the original position; but they are not choosers of difference, for they are blindfolded as to difference. It is clear that Rawls has not been able to shake himself free from the old Aristotelian problem. Who is to say what was proportionate and what differences count? If anyone does claim to state the proportion (including the philosopher), they assert an individual partiality (a decidability, for Derrida), which can never be justice. Someone, Rawls thinks, has to say it. His answer is that it is humans in the original position who are to say, and that has proved notoriously contestable. But the truth is, *nobody has to say it*. The law of contract shows that the issue is a false one. Humans do not (naturally) hypothesise justice. They simply choose their transactions and relations; and when these are lawfully (contractually) constituted that is all there is to it. The blindfold that Rawls (correctly) wants is available to him in the very idea of contract itself. The parties' desires determine the matter. That is the law, and when it comes to judgment, a judge is quite impartial, or blindfolded, between them.¹⁵

The difference that I have with Rawls comes to this. A theory of justice has to work the blindfold theory through *as a theory*. How this? How that? And what when such and such occurs? All of it is debate in the philosophical literature. Where is the test? Where is the blindfold *that will test the theory of the blindfold*? It is not that there is a problem with theory. There is theorising in physics. But in the end, all theories of physics submit to the world in blindfold

14 John Rawls, *A Theory of Justice* (1971).

15 Detmold, above n 6, 135-6. Note that I am speaking here only of contract; when contracts are subject to personal or constitutional duresses, the issue is a wider one than simple contract, but the solution is the same – the matter is resolved by the relation of desires.

experimentation. It is the same for human law with blindfold adjudication. Take a straightforward stealing case. A thief theorises prior to theft: 'I shall be better off stealing this thing'. The thief's theory is met not by holding it to be wrong or unjust (that would be another theory) but by asserting the blindfold between it and its victim's desire (or theory). In this way, the blindfold forces the thief to contract. The fundamental blindfold is the world itself; that to which the relations of matter and the relations of desire come to judgment.

V THE WORLD AS THE BLINDFOLD

There are two ways the world comes to us: it comes through our perception and it comes through our desire. Each process is causal. Caused human perceptions found the discipline of physics; caused human desires found the discipline of the common law. And in each case, the discipline finds its validation in its causal origin, the world. In each case, the account that it gives of the world is expressed in terms of law.

The valid part of extant theories of justice is their insistence on the blindfold. But all theories (and notably Rawls's) confuse the blindfold. The world itself is the validating blindfold. It is the world alone to which all theories come to judgment. When a physicist conducts an experiment, the world itself determines the event with absolute disinterest between competing theories. And the equivalent is true for human law in blindfold (impartial) adjudication. Philosophers of science often misunderstand the relation between law and theory. Law holds between theories (the blindfold) – no theory is ever affirmed by law. All there can be is conjecture (theory) and refutation, never affirmation. This (Popperian¹⁶) view of natural science is actually a perfect instantiation of the law of contract. Theories, even of physicists, are large and complex perceptions and desires, as ordinary contracts are on a smaller scale, and the law (the blindfold) advantages none.

The experimental method in physics is quite clear about the blindfold. It has not hitherto been noticed that common law adjudication has the same structure as experimentation. In both cases, a theoretical bias, in other words a contempt for the blindfold, is a corruption of the process. The world itself only speaks (in physics) through the particular experiment. It never speaks generally or in theory. Common law adjudication institutes an equivalent respect for the world in its constant insistence on the revisability of theory to a particular difference that the world of human desires presents in a particular case. In any case of adjudication, the issue is whether a proposed or established theory is distinguishable. Distinguishing is in fact the perfect analogue of experimental refutation in physics.

I will explain this by reference to the old workhorse, *Donoghue v Stevenson*.¹⁷ There are two phases in the problem of what that case stands for. First, how is

16 Karl Popper, *Conjectures and Refutations* (1963).

17 [1932] AC 562.

the court itself to conceive or express its decision, given that there is no true way to describe what it is deciding? (Snail, slimy creature, noxious substance, thing ... are all *equally* true descriptions of a central fact of the case.) Second, given that all these descriptions are equally true, how is anyone subsequently, including a subsequent court, to determine what it is that the *Donoghue v Stevenson* adjudication stands for? This second problem is confounded by the fact that subsequent determination relates not just to a single case such as *Donoghue v Stevenson*. Any issue of the common law will be wider than this for there will be many more cases and authorities, each of which raises the same set of difficulties.¹⁸

We shall pursue the issue in the wider form, embracing a lot of precedent cases. But either way, it is the subsequent determination that is the key here. The first phase of the issue (how is the precedent court itself to conceive or express what it is deciding?) gives way to the second (how is anyone subsequently – perhaps a subsequent court – to determine what it is that the adjudication stands for). The truth is, the first phase does not matter. If judges were legislators, the question of how widely or narrowly they were to express their decision would be an important question. However, they are not legislators, and the answer for them is that it does not matter how they express it. If too widely, the subsequent court excludes that which should not have been included by distinguishing the earlier facts; if too narrowly, it includes that which should have been included by itself making an analogical extension. Either way, the point is to look to the subsequent court. This is not, as is sometimes claimed, because the subsequent court determines the *ratio decidendi* of (reasons for) the earlier court's decision (which entails the nonsense that there are two *ratios* where there are two differing subsequent courts), but because the issue is the relation between the earlier and subsequent cases and only the subsequent court has knowledge of that relation. By contrast, a legislature may project into the future a certain relation between encountered and not yet encountered facts.

Suppose that for a subsequent court, in a certain case, there comes from the recorded practice of judges (the precedents) the proposition of law, ABCD, upon which the judge sets the adjudication to work. ABCD are four facts in conventional legal form. For example, ABCD might be 'where (1) noxious substance (2) negligence and (3) injury there is liability to (4) consumer'.¹⁹ It makes no difference whether the proposition comes exclusively from some official source such as the precedents or a digest or is a hypothesis of the judge in question. In this last case, it can be a proposition individually imagined or imagined with the assistance of counsel. In truth, all cases at any advanced level of thought will be a combination of both precedent and imagination. Our judge has the hypothesis ABCD, and the question is: how is the adjudication to test it?

18 Curiously, it is not clear whether this widening simplifies or complicates the issue. A second case, let us say, is identical to *Donoghue v Stevenson*, except it concerns a slug not a snail with the same decision about liability. Is the description 'slimy creature' (common to the two cases) made easier or harder by the fact of the second case? The second case does seem to narrow the range of available generalisation quite radically, and a third even more.

19 Of course, for any legal proposition there are many more facts than four.

The subsequent court, taking ABCD to its adjudication, is in the position of a physicist taking PQRS to an experiment. Let PQRS be these four facts in law-like form; say, 'where (1) an apple is (2) severed it (3) falls to (4) earth'. Is the last fact to be ground, earth, planet or object of greater mass? Is the first to be green apple, apple, object of lesser mass or object or what? It is obvious that the primitive experiment that yielded that law raises the same problem of generality as *Donoghue v Stevenson* did. And the same issue arises in sophisticated experiments.

I should say something now about the notation, which we are using for both physics and human law. I follow Joseph Raz's view that only facts are reasons.²⁰ That seems to me to be an enormously helpful insight, amongst other things in the matter of how we express legal analysis. We must connect it to the world (of facts). But facts are all the reasons (theories) for judicial decision.

PQRS is the equivalent of ABCD – just as the judge gathers the hypothesis ABCD, the physicist gathers the hypothesis PQRS from the sources of physics including the recorded practice of physicists (the texts of physics) and the resources of imagination, and then like the judge sets to work. Having gathered their hypotheses, neither physicist nor judge has found anything – it is the next step that is the crucial one. The physicist constructs an experiment to confirm, refute or modify PQRS, and thereby finds something. We have seen that this is done by letting the particular experiment speak *unmodified by any theory*. It is the world, not theory, that speaks. The physicist ensures this (or at least gets as close as possible to it) by the integrity of the experiment; by its not being distorted by any theory; by its being designed always to refute theory, never to establish it. It follows that a hypothesis is only ever confirmed in the sense that it is not refuted. Similarly, an adjudicative hypothesis is only ever confirmed in the sense that it is not distinguished. This I discuss in the next section. For a moment, back to the libraries.

Lawyers record the results of adjudications just as physicists record the results of experiments. Thereupon, in both cases, theories arise. The first theory is that recorded in the law report by the actual judge who adjudicated. Thereafter further theories develop. For the common law, the developed theories are contained in digests (the *American Law Institute's Restatements*, for example, or *Halsbury's Laws of England*), in that vast literature of books by legal scholars, in political rhetoric, and in the reports of subsequent adjudications. And, just as for a physicist, the theory that comes from an experiment is a certain claim about the laws of physics and our future practice of them, so the *ratio* of a case (its theory) is a projection into the future of something that is both a claim about human law and a claim on our future practice.

In Part IV, I said contract was the blindfold. In this Part, I have said the same thing of the world coming to adjudication. The similarity lies in the fact that each is impartial between desires. Partiality between contracting desires is

20 Joseph Raz, *Practical Reason and Norms* (1975) 16-20. This is used and discussed in M J Detmold, *The Unity of Law and Morality* (1984) 8-10, 13-17, 179-205.

stealing. Partiality in adjudication is an obvious corruption, but is fundamentally a stealing by the judge.

VI DISTINGUISHING

We have supposed that for a certain judge, there comes from the precedents and all the other sources of law the proposition of law, ABCD, upon which the judge sets to work. To this point, the judge has not found anything. The next step is the crucial one. Where the physicist constructs an experiment to confirm, refute or modify PQRS, and thereby finds something, the judge adjudicates to the same end. It is very important to see that this is done, as it is in physics, by letting the particular case speak *unmodified by any theory*. The judge ensures this by letting the parties (their desires) speak their particular cases. The adjudication tests the hypothesis by letting the particular case speak; whereupon ABCD is confirmed, refuted, or modified in the way well known to lawyers.

I shall give two examples of this, one an ordinary case, the other constitutional. Suppose ABCD is the proposition that landowners are liable for their negligence to persons who come onto their land. The case of a trespasser has not yet been contemplated. That case now arises, and a particular landowner-relative-to-a-trespasser asserts their difference. ABCD is now distinguished to a different proposition, ABCE, which discriminates the trespasser case (E is trespass, D non-trespass). It is important to maintain that it is the particular case, *not* ABCE, that has caused the distinguishing. ABCE is merely a theoretical speculation as to the distinguishing that has occurred, with no greater claim to truth in itself than ABCD. The theoretical speculation is found, first in the judge's own reasons for judgment, and second in the mass of literature that follows. The most that can be said for any ABCE is that it is held open, as ABCD was, to distinguishing in the next case (which might distinguish, say, child trespassers, ABCF; which in turn is open to further distinction). Of course, it may be the case that the judge does not distinguish ABCD. This is, in a sense, rule-application – the rule ABCD was simply applied. But the more accurate statement is that such a decision goes by analogy. Call the first case ABC and D1. Call the second case ABC and D2. D1 and D2 are judged to be analogous. It makes no difference whether this is articulated by the judge (the judge might simply talk of D, thinking the analogy between D1 and D2 obvious). And it makes no difference whether the analogy is one that has been instituted in language (D1 and D2 are both cases of D as a matter of language). Any word at all may be subdivided, Ds of this sort and Ds of that sort, when the substance requires it, so the judge's use of D must always be taken to be affirming the analogy implicit in the meaning of D.²¹

All cases, therefore, go by either distinction or analogy. But distinction must be thought the ontologically more authentic process, as refutation is in physics. Analogy usually sleeps in the language or the culture; distinction, however, must

21 The application of legislation (the legislative use of D) is, of course, quite different.

be raised and tested. The equivalent of analogy in physics is where we simply assume the law of gravity applies to pears as well as apples, or assume it applies in the quantum as well as the ordinary state; or assume that your time is the same as mine. Even when analogy is specifically raised it can only be decided as a merely theoretical speculation. The world, in adjudication as well as experimentation, only refutes.

In both physics and human law, if there is no refutation (distinction) the rule is affirmed. In both cases this simply confirms current practice. In neither case is affirmation logically capable of asserting truth.

My second example returns the discussion to constitutional law. A decade ago, Eddie Mabo stood before the High Court expressing his desire to be recognised as the owner of land he believed his.²² In the notation, the theory of *terra nullius*, and every other legal doctrine that stood between Mabo and his desire, is ABCD. ABCD was distinguished to ABCE. For the decision to be a valid one, the process had to be distinction not change. Were it change, the relevant desire would be that of the judges themselves, and the adjudication would be corrupted. The judges would have made the change themselves – it would be just like a scientist fixing an experiment's outcome. In fact, the High Court judges made their decision by force of the world itself – Eddie Mabo coming from the world, looking them in the face²³ and expressing his desire to them (a dead eye by the time the case was decided, but all the more powerful for that). How was the case different, how was it one to warrant the distinction? This one looking us in the face was someone, not no-one, *nemo*, of which *nullius* is the genitive. The world changed for the judges: the one who was no-one emerged from the world as someone, and they could not ignore him anymore. The partiality of Mabo's exclusion became, by the process of distinction, the impartiality of his inclusion.

The Mabo case illustrates a connection between impartial adjudication and social integration. When a legal rule obliterates difference, distinguishing re-asserts the difference. This is always an act of inclusion; the person with the difference is judged to count in the legal scheme of things. It is not simply that the difference counts. A difference always constitutes a person, whether it be found in their actions (the purchase of ginger beer) or their status (someone, rather than no-one) – it is the person that counts, it is the person who is by that fact included. The constitution of difference is in this way the institution of integration. It is also the institution of freedom.²⁴

22 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('Mabo').

23 There is an obvious question of authenticity of desire here, which I have not the space specifically to address in this article.

24 Detmold, above n 6, 142-4.

VII CONCLUSION

I am suggesting that judicial power is the task for the constitutional law of the next century. To embrace that future we must embrace the past: we need to return to judicial power's common law antecedents.

Through this examination will come the full understanding of human law. Law is set in the next century to become an international discipline, as physics did half a millennium ago. Before that time, physics as a discipline varied from community to community (this was positivist physics). Now it is universal with, for example, the law of gravity operating impartially between cultures. In the next century, we have the opportunity to bring the discipline of human law to an equivalent state. In this project, judicial power is the critical element. There will be no world sovereign, no world legislature, and no world constitution. But there will be world courts.²⁵

25 M J Detmold, 'Australian Law Areas: the Status of Laws and Jurisdictions' (2001) 12 *Public Law Review* 175, 193-4.