Queensland Legislators and a Right to Property as a Human Right: The Functioning of the Concept of Human Dignity

Julie Copley

A thesis submitted in fulfilment of the requirement for the degree of Doctor of Philosophy

Adelaide Law School

The University of Adelaide

June 2022

Declaration

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

I give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library Search and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

Jule Copley

June 2022

Abstract

The work of Queensland's legislators when evaluating property questions ought to be taken seriously. Issues of property raise important legal and political considerations for legislators who must enact legislation mediating individual rights and interests and collective considerations. New complexity and difficulty are brought by provisions in the *Human Rights Act 2019* (Qld) requiring legislators to promote and protect 'property rights' (section 24) and to limit property rights only if a limit can be shown to be justified in a 'free and democratic society based on human dignity, equality and freedom' (section 13).

From legal and social (including political) theory and High Court jurisprudence capable of giving meaning to practice, the thesis aims to provide Queensland legislators with a set of real-world normative tools to address contemporary and future complexity and difficulty. The theory includes JW Harris's theory of property and justice, Jeremy Waldron's democratic jurisprudence, Jürgen Habermas's approach to human dignity and human rights, and the unified public law theory of Jacob Weinrib. The tools developed from theory equip legislators to evaluate property questions by way of rational discourse about the underlying human values property serves and the social relationships property shapes and reflects. When legislators mediate the interests of the diversity of people in the political community, the tools equip legislators to ensure a legislative response conforms with common law and statutory controls on legislative authority. One group of normative tools directed to the content of 'property rules' is selected and used via three stages of normative argument about the institutional, property and doctrinal dimensions of the Queensland property institution. A second group of normative tools addresses the legislative task: law-making in the circumstances of politics. For each group, it will emerge that legislators will optimise selection and use of real-world normative tools by attending to the concept of human dignity.

Human dignity is invoked, but not defined in the *Human Rights Act*. The theories of Weinrib, Waldron and Habermas indicate that concept concerns the equal right of each person to freedom and that, as a universal concept, dignity is able to convert the individual/collective and moral/legal tension of property into a constructive dynamic. Citing theory about dignity, the Australian High Court has affirmed the normative functioning in State-enacted legislation of the concept of human dignity. Thus, as a pervasive constitutional value functioning as a normative concept, human dignity is capable of facilitating the accommodations constitutive of Queensland's democratic legal order and its property institution.

Contents

Declaration ii
Abstract iii
Contents iv
Acknowledgements vi
CHAPTER ONE: INTRODUCTION 1
I QUEENSLAND LEGISLATORS AND PROPERTY QUESTIONS 1
II THESIS AND RESEARCH QUESTION 9
III THE QUEENSLAND CONTEXT 14
PART A – STAGED INQUIRY FOR NORMATIVE DISCOURSE 18
CHAPTER TWO: THE QUEENSLAND PROPERTY INSTITUTION 20
I UNDERSTANDING THE INSTITUTIONAL NORMS 20
II LEGAL AND POLITICAL ARRANGEMENTS 23
III THE SOCIAL AND IDEOLOGICAL GOALS 29
IV THE LEGAL FORMS 36
CHAPTER THREE: PROPERTY'S INTERNAL MORALITY 44
I QUEENSLAND LEGISLATORS AND PROPERTY AND JUSTICE 44
II HARRIS ON INTERNAL MORALITY 46
III ADDITIONAL MORAL APPROACHES 50
IV RATIONAL DISCOURSE 57
CHAPTER FOUR: COHERENCE WITH DOCTRINE AND LEGAL PRACTICE 68
I LEGISLATING WITH CARE 68
II LEGAL COHERENCE 75
III COHERENCE WITH LEGAL PRACTICE 83
IV COMPLETING THE STAGED FORMATION OF NORMATIVE INQUIRY 89
PART B – LAW AND LEGISLATION 92
CHAPTER FIVE: LEGISLATIVE AUTHORITY 95
I THE RULE OF LAW 95
II LEGISLATIVE SCRUTINY 105
III THE CONSTITUTIONAL BALANCE 110
IV PROPERTY AND THE HUMAN RIGHTS ACT 119
CHAPTER SIX: LEGISLATIVE DEMOCRACY 131
I COLLECTIVE ACTION IN CIRCUMSTANCES OF POLITICS 131
II HUMAN DIGNITY'S INTEGRATING VALUE 136
III HUMAN DIGNITY AND JUSTICE 140
CHAPTER SEVEN: CONCLUSION 148

BIBLIOGRAPHY 154
A ARTICLES/BOOKS/REPORTS 154
B CASES 176
C LEGISLATION 179
D TREATIES 181
E OTHER 181

Acknowledgements

Grateful thanks to:

Professor Paul Babie and Associate Professor David Brown, Adelaide Law School, University of Adelaide, for patient, wise and professional guidance.

The Adelaide Law School, University of Adelaide, for assistance, including to attend the IVR World Congress 2019.

The Faculty of Law, University of Otago, and the University of Southern Queensland, for the opportunity to research in Dunedin in December 2018 and January 2019.

Colleagues at the University of Southern Queensland and past and present academic, legal, and parliamentary service colleagues for encouragement to research theory as a way of giving meaning to practice.

Matthew Sidebotham for thesis editing in compliance with the university's policies and the Institute for Professional Editing's Guidelines for Editing Research Theses (2nd edition)

Family and friends for unconditional support always.

CHAPTER ONE: INTRODUCTION

I QUEENSLAND LEGISLATORS AND PROPERTY QUESTIONS

The task of Queensland legislators when legislating about property is complex and difficult.[1] Sections of the *Human Rights Act 2019* (Qld) – not found in the other Australian rights statutes or found in different terms – bring new complexity and difficulty.[2] Section 24 requires legislators to promote and protect 'property rights' and contains positive and negative rights provisions,[3] and section 13 allows limitation of property rights only if a limit 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[4] Consequently, the *Human Rights Act* brings new imperatives for legislative discourse about 'property'[5] and for a normative theory to assist the work of legislators when making law in the circumstances of politics.[6]

Aiming directly at these new imperatives, this thesis provides legislators with a set of real-world normative tools to use when evaluating property questions – when responding to a 'property rights' issue. The thesis identifies for Queensland legislators the tools available to solve problems to do with section 24 of the *Human Rights Act*. A key objective is the articulation – in moral and then legal terms – of the values at stake when legislative authority is exercised; even without *Human Rights Act* differences, when compared with other jurisdictions Queensland legislators will reach different answers to the same questions.[7] This is because property plays a different role in each jurisdiction, a role that varies according to social and ideological backgrounds of political communities.[8]

---

[1] JW Harris, *Property and Justice* (Oxford University Press, 1996) 3: property 'is a legal and social institution governing the use of most things and the allocation of some items of social wealth'; David Lametti, 'Property and (Perhaps) Justice: A Review Article of James W Harris, Property and Justice and James E Penner, The Idea of Property in Law' (1998) 43 *McGill Law Journal* 663, 664; Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* (Report No 16, 1973).

[2] *Human Rights Act 2019* (Qld); for substantive differences, see ss 11, 13 and 24(1) and (2).

[3] Ibid s 24(1) and (2).

[4] Ibid s 13(1).

[5] Harris, *Property and Justice* (n 1) 3: 'property as an organizing idea, is very old and is now worldwide'; David Hume, *A Treatise of Human Nature,* ed LA Selby-Bigge and PH Nidditch (Clarendon Press, 1978) 503; Jeremy Bentham, *Principles of the Civil Code* (W Tait, 1843) 115; Lametti (n 1) 663 n1: use of 'property' for the objects of property dates from the seventeenth century and is used interchangeably with 'private property'. Consistent with legal and non-legal discourse, in this thesis the term 'property' is used to refer to the objects or subject-matter of property ('property as things' and 'property as wealth').

[6] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 19.

[7] Jeremy Waldron, 'The Normative Resilience of Property' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing 1999) 170, 170; Charles Taylor, 'The Meaning of Secularism' (2010) *The Hedgehog Review* 23, 29; 'The Nature and Scope of Distributive Justice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985): social and legal rules reflect, Taylor explains, 'what was happening on the ground, for instance, the rise of merchants, of capitalist forms of agriculture, the extension of markets', and the result is 'different national answers to the same question'.

[8] Harris, *Property and Justice* (n 1) 3.

Theory is put to work to provide legislators with 'ways of giving meaning to practice'.[9] This thesis analyses the relevant body of legal and social (including political) theory to identify and describe the array of normative tools available to legislators. The real-world normative tools are divided into two groups. The first (examined in Part A) are selected and used via a three-staged normative argument about the specific institutional, normative and doctrinal dimensions of the Queensland property institution. At each stage, via proposed inquiries drawn from legal and political theory and High Court jurisprudence, norms relevant to any proposed property rule are identified and evaluated. The second group of tools (examined in Part B) equips legislators for lawful legislating in the circumstances of politics. The tools address: the authority of legislators when working within the framework; and the importance of legislative mediation of the interests of the diversity of people in the political community. As law must stand fast and stand for all in the state's political community,[10] real-world normative tools ought to uncover common interests and purposes.[11] It will be shown by this thesis that, optimally, use of these tools involves legislative attention to the concept of human dignity.[12] The concept concerns 'the equal right of each person to freedom',[13] and is invoked, for example, in the *Human Rights Act.*[14] High Court jurisprudence and a growing body of legal and political theory conceptualising human dignity as the '[m]ost central of all human rights ... the source from which all other human rights are derived',[15] demonstrate that legislators attending to human dignity are better equipped to enact law within the framework.

In this chapter, the ground is prepared for the identification, description and analysis of the normative tools. The chapter contains three sections. This first section analyses, as relevant to the framework, the contemporary literature about the complexity and difficulty of the legislative task. The second details the thesis defended, the research question and the methods adopted, and provides an overview of the thesis structure. The third examines the legal and political circumstances of Queensland legislators operating within the framework. In doing so, it identifies reasons for the State's 'bespoke' statutory

---

[9] Janet McLean, 'The Crown in the Courts: Can Political Theory Help?' in Linda Pearson et al (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Bloomsbury, 2008) 161, 172.
[10] Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 47–50; 'Kant's Legal Positivism' (1996) 109(7) *Harvard Law Review* 1535; 'The Normative Resilience of Property' (n 7) 171.
[11] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) 291; Hannah Arendt, *On Revolution* (Penguin Classics, 2006) 231–2; Aristotle, *The Politics* (Cambridge University Press, 1988) 3.
[12] Conor Gearty, 'Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 155; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016); Jeremy Waldron, 'Human Dignity: A Pervasive Value' (Public Law Research Paper No. 20-46, NYU School of Law, 1 July 2019), <http://dx.doi.org/10.2139/ssrn.3463973>; Jürgen Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 (4) *Metaphilosophy* 464.
[13] Weinrib (n 12) 7.
[14] *Human Rights Act* (n 2) s 13 (Human rights may be limited).
[15] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 [50] (Kiefel CJ, Bell, Keane JJ); Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 85; Waldron, 'Human Dignity: A Pervasive Value' (n 12); Habermas 'Human Dignity and the Realistic Utopia of Human Rights' (n 12).

real-world normative tools. Accordingly, the chapter returns first to the challenges of the legislative task.

The scholarly literature recognises that legislating is a difficult responsibility and is becoming more difficult.[16] A body of legal and political scholarship proposes limiting the work of the 'hidebound bodies' within which legislators operate.[17] Legislators, it is suggested, are 'especially unable to respond to situations of crisis' and to the complexity of many contemporary social and legal problems.[18] They operate in 'institutions steeped in history, full of norms, venerable traditions and a good deal of pomp and ceremony',[19] and increased political plurality is destroying democracy and its institutions. [20] One solution offered is to confine legislative functions largely to laws giving executive direction;[21] for example, to confer powers upon national security services to supersede the work of legislators.[22] Another is for legislatures to be abolished altogether: so diminished is the contemporary role, that legislatures are identified as possible casualties of COVID-19.[23] A small number of compelling voices adopt the opposing position: legislators are a vital element of the legal and political functioning of a

[16] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2008); FA Hayek, *Law Legislation and Liberty, Volume 1: Rules and Order* (University of Chicago Press, 1983); Richard A Posner, 'Review: Review of Jeremy Waldron, "Law and Disagreement"' (2000) 100(2) *Columbia Law Review* 582; Jack Beatson, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (Hart Publishing, 2021) 133–58.

[17] John Rawls 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 31, 31–2: a distinction must be made between the legislature and the particular actions or exercises of power of the institution and its legislators.

[18] Tom Ginsburg, 'Foreword for Special Issue on Legislatures in the Time of COVID-19' (2020) 8 *The Theory and Practice of Legislation* 1, 2; Stephen Mills, 'Parliament in a Time of Virus: Representative Democracy As "A Non-Essential Service"' (2019-–0) 34 *Australasian Parliamentary Review* 7; Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010); Eric A Posner and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018) ch 2.

[19] Ginsburg (n 18) 1.

[20] Francis Fukuyama, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile, 2018); Jonathon Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (Penguin, 2013); Michael J Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (Penguin, 2020); Daniel Markovits, *The Meritocracy Trap* (Penguin, 2020); Jon Elster, *Securities Against Misrule: Juries, Assemblies, Elections* (Cambridge University Press, 2013); Michael J Sandel, *Justice: What's the Right Thing to Do?* (Penguin, 2011); David Goodheart, *Head Hand Heart: The Struggle for Dignity and Status in the 21st Century* (Penguin, 2020); John Milbank and Adrian Pabst, *The Politics of Virtue: Post-liberalism and the Human Future* (Rowman & Littlefield, 2016); Dworkin (n 16); DJ Galligan (ed), *Constitution in Crisis: The New Putney Debates* (Bloomsbury Publishing, 2017); Ian Geary and Adrian Pabst (ed), *Blue Labour: Forging a New Politics* (IB Taurus, 2015); Posner and Weyl (n 18); Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).

[21] Edward Rubin 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369, 370–1; Waldron, *Political Political Theory* (n 11) 150–3.

[22] Stephen Sedley, 'Does the Separation of Powers Still Work?' in DJ Galligan (ed), *Constitution in Crisis: The New Putney Debates* (IB Tauris, 2017) 93, 93–4, citing Nelson W Polsby, 'Legislatures' in Fred I Greenstein and Nelson W Polsby (eds), *Handbook of Political Science* (Addison-Wesley, 1975).

[23] Ittai Bar-Siman-Tov, 'COVID-19 Meets Politics: The Novel Coronavirus As a Novel Challenge for Legislatures (2020) 8 *The Theory and Practice of Legislation* 11, 12; Ronan Cormacain and Ittai Bar-Siman-Tov, 'Global Legislative Responses to Coronavirus' (2020) 8 *The Theory and Practice of Legislation* 239: all states exercising public authority via representative democracies 'have struggled to come up with the proper legislative response'.

modern state.[24] And legislation, it is argued, ought to be taken seriously, as 'law is a serious matter affecting the freedom and interests of all members of the community'.[25]

Indeed, contemporary legislators enact laws for political communities in which 'the growth of technology and the modern industrial economy' gives a sense of 'unprecedented power to alter our natural and social condition at will'.[26] The power is characterised, however, by a 'structural tension between a deep regard for political and cultural collectivities and an emphasis on individual rights and liberties'.[27] Lobbies and corporations are thought to have more traction.[28] Plurality appears to be 'something the state controls and manipulates as a tool for its own purposes',[29] allowing legislators to act solely by way of political compromise and the stronger political party occupying the Treasury benches to invariably have its will.[30] Academic and popular perceptions are of 'ordinary legislative activity as deal-making, horse-trading, log-rolling, interest-pandering, and pork-barreling'.[31] Jeremy Waldron points to 'legal scholarship's disregard of legislatures' compared with a preoccupation with courts,[32] and identifies a 'philosophically under-theorised form of law-making'.[33] Waldron's concern

[24] Waldron, *Law and Disagreement* (n 6); *The Dignity of Legislation* (n 10); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Polity Press, 1997); Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2003).
[25] Waldron, *Political Political Theory* (n 11) 145.
[26] Taylor, 'The Nature and Scope of Deliberative Justice' (n 7) 304; Taylor, *Modern Social Imaginaries* (n 24) 14.
[27] Benjamin L Berger, 'Freedom of Religion' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 755, 766: reflecting the 'two logics' shaping constitutional life; namely, political community and 'the modern universal logic of rights protection'.
[28] Ittai Bar-Siman-Tov, 'Beyond Neglect and Disrespect: Legislatures in Legal Scholarship' in Cyril Benoît & Olivier Rozenberg (eds), *Handbook Of Parliamentary Studies: Interdisciplinary Approaches To Legislatures* (Edward Elgar, 2020) ch 9.
[29] Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) 88; Rubin (n 21) 37–3.
[30] John Locke, *A Letter Concerning Toleration*, ed Patrick Romanell (Prentice-Hall, 1950) 50; Waldron, *Political Political Theory* (n 11) 85.
[31] Waldron, *The Dignity of Legislation* (n 10) 2, 84.
[32] Waldron, *Law and Disagreement* (n 6) 9: 'the only structures that interest contemporary philosophers of law are the structures of judicial reasoning. They are intoxicated with courts and blinded to almost everything else by the delights of constitutional adjudication'; Paul Babie, 'Completing the Painting: Legislative Innovation and the "Australianness" of Australian Real Property Law' (2017) 6 *Property Law Review* 157, 159.
[33] Waldron, *Law and Disagreement* (n 6) viii; *The Dignity of Legislation* (n 10) 2–3.

is shared by scholars of legislation located in Australia,[34] the United States,[35] the United Kingdom[36] and Europe.[37]

In Australia, long-running quantitative research shows scholarly disregard for legislators is matched by popular disregard.[38] The 2019 Australian Election Study found the level of satisfaction with democracy (59%) is at its lowest since the Australian constitutional crisis in the 1970s (56%).[39] Satisfaction with democracy places Australia thirteenth in a group of 26 OECD countries.[40] Trust in 'people in government' declined by almost 20% between 2007 and 2019, with responses showing voter trust at its lowest level on record.[41] Only one in four Australians believes government can be trusted to do the right thing, and three in four believe democratic representatives are looking after their own interests.[42] The study identified 'a serious challenge for a representative democracy'; that is, that a 'narrow majority of Australians believe that the entities comprising government are run for a few big interests while just 12% believe the government is run for all people'.[43]

For legislators, the practical consequence of unprecedented power to alter natural and social conditions and of scholarly and popular disregard is a gap between 'political elites' and the people.[44] Jürgen Habermas describes a separation of conventionalised law from postconventional morality leading to 'a legitimation gap [that] opened up on the circuit between instrumentally conceived power and instrumentalized law'.[45] The practical effect is that

[34] Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *UNSW Law Journal* 367; Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash Law Review* 1; William Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) 1–37; Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 *UNSW Law Journal* 1002; Lyria Bennett Moses and Brendan Edgeworth, 'Statutes in a Web of Law' in P Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (The Federation Press, 2019) ch 8.
[35] Posner, 'Review' (n 16) 583: orthodox legal theorists do not trust and are not interested in the work of legislators; Edward L Rubin, 'Statutory Design as Policy Analysis' [2018] *Harvard Journal of Legislation* 143; Jeremy Waldron 'Can There Be a Democratic Jurisprudence?' (Public Law Research Paper No 08-35 12 NYU School of Law, 2008): government has become too complex to suit positivism's austerity.
[36] Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 46; Alan Rodger 'The Form and Language of Legislation' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) 65, 66.
[37] Bar-Siman-Tov 'Beyond Neglect and Disrespect' (n 28).
[38] I McAllister et al, *Australian Election Study 2019* [computer file], December 2019, 15–6, available at: <https://australianelectionstudy.org/>.
[39] Ibid.
[40] Ibid 15–6; Onora O'Neill *A Question of Trust* (Cambridge University Press, 2002).
[41] McAllister (n 38); D Aitkin, M Kahan and D Stokes, *Australian National Political Attitudes Survey, 1969* [computer file], September 2005, available at: <https://australianelectionstudy.org/>: on this measure and relevant to the period of legislative reform examined in this chapter, data has been collected since 1969.
[42] McAllister (n 38) 15–6.
[43] Ibid 16.
[44] Charles Taylor, Patrizia Nanz and Madeleine Beaubien Taylor, *Reconstructing Democracy: How Citizens Are Building from the Ground Up* (Harvard University Press, 2020) 3–4.
[45] Habermas *Between Facts and Norms* (n 24) 146.

> elected officials often don't know which policies are adequate or are afraid to take drastic measures that might not be supported by their constituents. Politicians are afraid to take responsibility because they are not sure what the people want or would accept. Those courageous enough to advance unpopular policies risk the kind of backlash that we see in France with the *gilets jaunes*.[46]

To legislate, however, legislators must answer and decide 'hard questions about justice and equity … the hard way in every individual case'.[47] The solution identified in the legal and political theory of Waldron, Habermas and Jacob Weinrib is the concept of human dignity.[48] This concept is 'conceived of in terms of the right of each person to equal freedom',[49] but 'human dignity' does not have a ready-made definition.[50] Waldron observes that law does not always allow 'a checklist of necessary and sufficient conditions' if a thick-value term is to serve 'as a catalyst for thinking'.[51] As 'an essentially contested concept', dignity 'invites serious normative reflection [as its] elaboration involves continual argument about [its] proper application'.[52] Thus, the moral promise of human dignity is of a universal concept able to mediate the transition of moral imperatives into democratic legislation in modern states.[53] As a catalyst for thinking, dignity provides a solution to the problem-solving paralysis facing contemporary legislators. Dignity equips legislators to make laws for 'what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons'.[54]

Dignity's centrality to a democratic legal order is manifest in the terms of the constitutions and constitutional jurisprudence of more than 150 nations.[55] Many constitutions overtly draw upon Article 1 of the *Universal Declaration of Human Rights* (UDHR), which states: 'All human beings are born free and equal in dignity and rights.'[56] Also drawn upon is the first sentence of the Preamble to the UDHR

---

[46] Taylor, Nanz and Beaubien Taylor, *Reconstructing Democracy* (n 44) 1–2, 4: 'Young people in particular think that democracy is a poor form of governance and that an authoritarian or technocratic regime would be a better alternative.'
[47] Andre van der Walt, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 109, 146.
[48] Waldron, 'Human Dignity: A Pervasive Value' (n 12).
[49] Weinrib, *Dimensions of Dignity* (n 12) 3.
[50] Waldron, 'Human Dignity: A Pervasive Value' (n 12) 16.
[51] Ibid; Weinrib, *Dimensions of Dignity* (n 12) 1–3.
[52] Waldron, 'Human Dignity: A Pervasive Value' (n 12); WB Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167.
[53] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 467.
[54] Ibid 469.
[55] Waldron, 'Human Dignity – A Pervasive Value' (n 12) 2; Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions' in McCrudden (n 12) 113, 113–4.
[56] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; *Charter of the United Nations Act 1945* (Cth) approved under the Charter of the United Nations.

recognising the 'inherent dignity' and 'equal inalienable rights of all members of the human family'.[57] Under these invocations, the concepts of human rights and human dignity are intimately connected: human rights are abstract in character and need to be particularised in each case, such as for property as a human right.[58]

For Queensland legislators, the Preamble to the *Human Rights Act* declares dignity to be at the centre of human rights and the democratic legal order in the state.[59] The Act requires legislators to use the concept of human dignity as a catalyst when thinking about the compatibility of proposed legislation with human rights.[60] Under section 13(1), a human right may be limited 'only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.

For property questions, section 13 and its interaction with section 24 of the *Human Rights Act* have important implications for legislators.[61] Section 24 requires legislators to protect and promote 'property rights': section 24(1) states a positive right ('All persons have the right to own property alone or in association with others'); and section 24(2) states a negative right ('A person must not be arbitrarily deprived of the person's property'). Section 24 restates Article 17 of the UDHR, but its terms are different from the earlier Australian rights statutes. The statute in the Australian Capital Territory does not protect property rights,[62] and the Victorian Charter includes a negative right only,[63] a right turning upon unlawfulness rather than arbitrariness. To read and apply the *Human Rights Act*, therefore, Queensland legislators ought to engage with court jurisprudence, with property theory (section 24) and with theory about human dignity, including from Waldron, Habermas and Weinrib (sections 13 and 24).[64]

Property theory commonly separates issues of property into 'two large, axiomatic issues'.[65] One set is 'analytical issues about the meaning and use of the most important concepts in property law, such as

[57] Ibid.
[58] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 467.
[59] *Human Rights Act* (n 2) Preamble.
[60] Ibid s 8: 'An act, decision or statutory provision is "compatible with human rights" if the act, decision or provision – (a) does not limit a human right; or (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.'
[61] Kent Blore and Nikita Nibbs, 'A Theory of the Right to Property Under the *Human Rights Act 2019* (Qld)' (2022) 30 *Australian Property Law Journal* 1.
[62] *Human Rights Act 2004* (ACT).
[63] *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).
[64] Lametti (n 1) 665; Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) xi: 'At the base of every single property debate are competing theories of property – differing understandings of what private property is, why we have it, and what its property limitations are. In these disputes, theory, as such may not be explicitly articulated, but it is always near the foundation of the disagreement.'
[65] Lametti (n 1) 666.

"private property", "ownership", and "thing"'; the other is normative or justificatory issues.[66] The two are connected because sharper analytical understanding of concepts like 'ownership' clarify what is at stake when questions of distribution and institutional design are raised.[67]

Queensland legislators can turn to the canon of Western legal and political theory,[68] 'a spate of new works on property' that 'pick-up on the traditional questions and state some now familiar conclusions',[69] and publications on specific issues of property.[70] This body of literature affirms the complexity of issues of property. Relevant principles available to assist legislators include that: a property institution must pass a certain threshold of justice;[71] property 'ranks below life, but alongside liberty' on the scale of human well-being;[72] property questions are 'inseparably affected by the social setting in which a property institution exists';[73] and property questions arise within a 'community',[74] where there will be an overlap or 'imbrication' between the rights of the individual and the rights of a community.[75] The literature indicates that every state must address serious issues of the allocation of goods and services, typically achieved through legislative use of the concept of property.[76] These property questions are '[s]ome of the most important questions that any polity can ask'.[77]

The answer to each question forms part of a state's property institution.[78] This means a property institution is 'a complex organising idea', a product of a state's legal and social (including political) arrangements.[79] Its elements vary enormously in time and place and are 'nowhere static for long'.[80] In

---

[66] Jeremy Waldron, 'Property Law' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd ed, Wiley-Blackwell, 2010) 9; Lametti (n 1) 663.
[67] Waldron (n 66).
[68] Lametti (n 1) 665: treatises in legal and political philosophy focussing 'primarily or in part, on property … comprise some of the core texts in the canon of Western legal and political theory: Plato's *Republic*; Aristotle's *Politics*; Locke's *Second Treatise*; Rousseau's *Discourse on the Origins of Inequality*; and Hegel's *Philosophy of Right*'.
[69] Ibid 665; Alan Ryan, *Property and Political Theory* (Blackwell, 1984); Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988); Stephen Munzer, *A Theory of Property* (Cambridge University Press, 1990).
[70] Margaret J Radin, *Reinterpreting Property* (University of Chicago Press, 1993); Carol Rose, *Property and Persuasion* (Boulder Westview, 1996); Gregory S Alexander, *Property and Human Flourishing* (Oxford University Press, 2018) 20–3: Alexander argues such property theories 'account only for limited parts of property law'.
[71] Jim Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 64, 86.
[72] Ibid 87.
[73] Harris, *Property and Justice* (n 1) 365.
[74] Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2009) xvii; Alexander, *Property and Human Flourishing* (n 70) xiv: Alexander's 'human flourishing' theory 'conceives of human flourishing as including (but not limited to) individual autonomy, personal security/privacy, personhood, self-determination, community, and equal dignity'.
[75] Joseph William Singer, 'Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations' (2017) 18 *Theoretical Inquiries in Law* 519.
[76] Harris, *Property and Justice* (n 1) Part II.
[77] Lametti (n 1) 665.
[78] Harris, *Property and Justice* (n 1) 10.
[79] Ibid 3, 284, 304.
[80] Ibid 3.

the public interest,[81] a state acts to establish and refine a property institution comprising transmission freedoms and the consequential power to build financial wealth from 'property as things' and 'property as wealth'.[82] The institution is often the background to contestation about individual freedom.[83]

In Queensland, property rules are largely in legislative form,[84] and the compass of property extends to the use of 'most valuable things, such as houses and factories, and to the allocation of a substantial part of social wealth'.[85] The state specifies the compass of property when 'the various organs of government deploy it, officially … for controlling the use of things and … for supervising or directing the allocation of wealth'.[86] Open to 'democratic (re-) determination, it is inevitable that property will routinely be affected by normal and legitimate legislation'.[87]

Legislators working within the framework then (evaluating proposed legislation to address a property question) have real reasons to use theory to give meaning to legislative practice.[88] The next section elaborates how it is proposed legislators do so.

II THESIS AND RESEARCH QUESTION

This thesis argues that when legislators evaluate property questions, they work in the space where human dignity and a right to property connect. It is contended that human dignity is a universal concept, capable of converting the individual/collective and moral/legal tension of property questions into a constructive dynamic. It mediates the legal and political, facilitating the accommodations constitutive of a democratic legal order and its property institution. Legislators attending to human dignity are better equipped to particularise 'just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons'.[89]

In Harris' theory of property, a background right to property is a human right in a modern state.[90] For each property rule, human dignity is the catalyst for thinking about the right as it ought to be protected

[81] Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733, 773; Harris (n 1) 149–50; Taylor, *Modern Social Imaginaries* (n 24) 104: 'There seem to be two main semantic axes along which the term public is used': one 'connects public to what affects the whole community ("public affairs") or the management of those affairs ("public authority")'; the other is 'a matter of access ("This park is open to the public") or appearance ("The news has been made public")'.
[82] Harris (n 1) 3, 284, 304; Reich (n 81) 746–55.
[83] Harris (n 1) 3, 140.
[84] Ibid 3.
[85] Ibid.
[86] Ibid.
[87] van der Walt (n 47) 127.
[88] Janet McLean, 'The Crown in the Courts: Can Political Theory Help?' (n 9) 172.
[89] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 467.
[90] Harris, 'Is Property a Human Right?' (n 71) 87.

and promoted.[91] In the *Human Rights Act*, for instance, a statutory connection is made between human dignity and the protection and promotion of a right to property.[92] The question posed here is whether 'human dignity' is a substantive normative concept relevant to legislators enacting property rules for the Queensland property institution. Certainly, the political, and especially legal, functioning of human dignity in modern states is widely contested.[93] There is scholarly belief that dignity is a 'vacuous concept' without boundaries,[94] an indistinct concept that 'masks a great deal of disagreement and sheer confusion',[95] an 'impossibly vague' idea that does not 'provide a universalistic, principled basis' for exercises of public authority, and a subjective idea varying 'radically with the time, place, and beholder'.[96] Jeremy Waldron though, while agreeing dignity is everywhere contested, argues strongly for its acceptance in law and politics as 'an essentially contested concept'.[97] Additionally, the very pervasiveness of dignity in modern constitutions, their jurisprudence, and in statutes, addresses conceptual vagueness.[98] Waldron defines dignity as

> the status of a person predicated on the fact that she is recognized as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organizing her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as human being be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally.[99]

---

[91] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 466.
[92] *Human Rights Act* (n 2) s13.
[93] Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in McCrudden (n 12) 1, 1–2; Weinrib (n 12) 1; Habermas 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 475–6.
[94] Mirko Bargaric and James Allen, 'The Vacuous Concept of Dignity' (2006) *5 Journal of Human Rights* 269; Nicholas Aroney 'The Rise and Fall of Human Dignity' (2021) 46 *Brigham Young University Law Review* 1211.
[95] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012) 67; Patrick Riordan, 'Which Dignity? Which Religious Freedom?' in McCrudden (n 12) 421, 421.
[96] Stephen Pinker, 'The Stupidity of Dignity' (2008) *The New Republic* 28.
[97] Waldron, 'Human Dignity: A Pervasive Value' (n 12) 16; McCrudden, 'In Pursuit of Human Dignity' (n 93) 13–14: dignity is a concept 'around which we can all meet and discuss'; Bernhard Schlink, 'The Concept of Human Dignity: Current Usages, Future Discourses' in McCrudden (n 12) 631; Paolo G Carozza, 'Human Rights, Human Dignity, and Human Experience' in McCrudden (n 12) 615, 615; Taylor 'The Meaning of Secularism' (n 7) 25.
[98] Waldron, 'Human Dignity: A Pervasive Value' (n 12) 15.
[99] Jeremy Waldron 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200, 201–4: 'I am using dignity as a status idea rather than a value idea (as it is used by Kant, for example, in the *Groundwork of the Metaphysics of Morals*, where it refers to a certain kind of precious and non-fungible value). Twelve years after the publication of the *Groundwork*, Kant wrote again about dignity in "The Doctrine of Virtue" which is the second part of his late work, *The Metaphysics of Morals*, and there he spoke of it much more as a matter of status: he talks of the respect which a person can "exact" as a human being from every other man, and that respect is no longer simply the quivering awe excited in a person by his own moral capacity … but a genuine making-room for another on a basis of sure-footed equality and acting toward another as though he or she too were one of the ultimate ends to be taken into account. The later discussion preserves the element of infinite value but presents it much more in the light of this status idea.'

To investigate whether human dignity is a substantive normative concept or a mere placeholder, this thesis models and tests a proposed approach for Queensland legislators evaluating issues of property. Machiavelli would be dismayed that contemporary legislators are 'afraid to take responsibility because they are not sure what the people want or would accept'.[100] As such, we can stage a formation of normative discourse for property questions. Normative discourse, Waldron states, 'is what takes place when we think together about how to guide and evaluate' choices about distribution and institutional design.[101]

Property discourse is necessary anyway, for two reasons. First, law is generated by the communicative power of a democratic legislature. Hannah Arendt describes legislation depending upon a communicative power that no one is really able to 'possess'.[102] Habermas points to the need for a 'democratic procedure to ground the legitimacy of law'. The procedure complements the 'discursive character' of will-formation in parliamentary bodies that has the '*practical sense* of establishing relations of mutual understanding … that unleash the generative force of communicative freedom'.[103]

The second reason for the necessity of property discourse involves questions of justice. Legislators convert the questions into legal currency because it is in systemic law that 'the *moral promise* of equal respect for everybody is supposed to be cashed out'.[104] This is 'the Janus face' of legislative property questions: legislators evaluating property questions must turn at once to morality and to law.[105] The equality of all people gives a *prima facie* right to property – property as a human right – but equality 'forces distribution and use of resources through a private property mechanism' and creates inequalities between people.[106] Property discourse externalises the functional morality of property, making it possible for legislators to enact law particularising enforceable subjective rights and granting specific liberties and claims.[107] Acting in the public interest, ensuring equal freedom for all people, legislators ought to legislate even when the moral content of an issue of property is contested and diverse.[108]

Part A of the thesis (chapters 2 to 4) provides the real-world normative tools necessary to legislating when property questions are contested. Across three proposed stages of normative argument, this part

[100] Taylor, Nanz and Beaubien Taylor (n 44) 4; Nathan Tarcov and Harvey Mansefield (eds), *Niccolò Machiavelli: Discourses on Livy* (University of Chicago Press, 1996); Waldron, *The Dignity of Legislation* (n 10) 164–5.
[101] Waldron, 'Property Law' (n 66) 14.
[102] Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 200.
[103] Habermas, *Between Facts and Norms* (n 24) 151.
[104] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 469–70.
[105] Ibid; Habermas, *Between Facts and Norms* (n 24) 151.
[106] David Lametti, 'The Morality of James Harris's Theory of Property' in T Endicott, J Getzler and E Peel (eds), *The Properties of Law: Essays in Honour of James Harris* (Oxford University Press, 2006) 147.
[107] Ibid; Berger (n 27) 766.
[108] Lametti, 'The Morality of James Harris's Theory of Property' (n 106); Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 466.

offers an 'increasingly determinate conception' of the institutional, property and doctrinal norms constitutive of a democratic legal order, its property institution,[109] and the human values it serves.[110]

Chapter 2 introduces the proposed Stage 1 (institutional) inquiry, that analyses the Queensland property institution[111] – part of the State's legal and political arrangements when the colony separated from New South Wales[112] – and the property institution's social and ideological background,[113] and its legal features.[114] Chapter 2 considers the proposed inquiry into a property institution: legal and political arrangements;[115] 'larger' purposes;[116] and legal forms, specified via application of the Honoré-Waldron thesis to identify the 'mix, balance, and blend' of 'ideal-typic property types'.[117]

In Chapter 3, the proposed Stage 2 (property) inquiry is into the norms of property and justice for a modern state. Legal and political theory is analysed for assistance to legislators connecting justice and morality with positive law. The theory includes Harris's property-specific justice reasons,[118] thicker moral approaches to property,[119] and theory of human dignity.[120] Chapter 3 examines also justificatory and normative discourse as a mechanism for legislators to mediate individual, rights-based norms with

---

[109] Weinrib (n 12) 7–8, 18, 75, describing 'a conceptually sequenced exploration of the right of persons, by virtue of their dignity, to equal freedom'; Waldron, *Political Political Theory* (n 11) 7–8; Harris, *Property and Justice* (n 1) viii.
[110] Weinrib (n 12) 75. Weinrib's approach affords 'a conceptually sequenced exploration of the right of persons, by virtue of their dignity, to equal freedom'.
[111] Harris, 'Is Property a Human Right?' (n 71) 84–5.
[112] *New South Wales Constitution Act 1855* (Imp) s 2; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 37; Taylor, *Modern Social Imaginaries* (n 24).
[113] Taylor, *Modern Social Imaginaries* (n 24) 8, 69: Arto Laitinen, 'MacIntyre and Taylor: Traditions, Rationality, and the Modern Predicament' in Jeff Malpas and Hans-Helmuth Gander (eds), *Routledge Companion to Hermeneutics* (Routledge, 2014) 204–6 (Taylor's modern social imaginary is 'a hermeneutic of legitimacy in relation to … property'); Charles Taylor, 'Modernity and the Rise of the Public Sphere' (The Tanner Lectures On Human Values, Stanford University, 25 February 1992) 219, available at <https://tannerlectures.utah.edu/_resources/documents/a-to-z/t/Taylor93.pdf>; Alasdair MacIntyre, 'Charles Taylor and Dramatic Narrative: Argument and Genre' (2018) 44 *Philosophy and Social Criticism* 761.
[114] Paul T Babie, John V Orth and Charlie Xiao-chuan Weng, 'The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese, and Australian Land Law' (2016) 91 *Tulane Law Review* 739.
[115] Lametti, 'The Morality of Harris's Theory' (n 106).
[116] Taylor *Modern Social Imaginaries* (n 24); 'The Meaning of Secularism' (n 7); 'Modernity and the Rise of the Public Sphere' (n 113); *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989); Alexander, *Property and Human Flourishing* (n 70) 29–30: Taylor's theses are 'highly instructive, not only about the problem of rules and standards but more generally about making practical decisions and the nature of the practical'.
[117] Babie, Orth and Weng (n 114).
[118] Harris, 'Is Property a Human Right?' (n 71) 84–5.
[119] Joseph Singer, 'Property Law as the Infrastructure of Democracy' (Harvard Public Law Working Paper No. 11-16, 2011) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832829>; Joseph Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime* Crisis (Yale University Press, 2015); Laura S Underkuffler, 'Property: A Special Right' (1996) 71 *Notre Dame Law Review* 1033; Laura Underkuffler, *The Idea of Property: Its Meaning and Its Power* (Oxford University Press, 2003); Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) *Cornell Law Faculty Publications* 11; Lametti, 'Property and (Perhaps) Justice' (n 1); 'The Morality of James Harris's Theory' (n 106) 138–65.
[120] Waldron, 'Human Dignity: A Pervasive Value' (n 12); Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12); Weinrib (n 12); TRS Allan, 'Book Review: Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law' (2018) 68 *University of Toronto Law Journal* 312.

the norms of a just state.[121] The proposed Stage 2 (property) inquiries are: What values are really implicated by a proposed property rule? What is the correct response of the state to diversity?

In Chapter 4, the proposed Stage 3 (doctrinal) inquiry is into legal coherence and consistency with existing legal practice – the doctrinal norms. Relevant to Stage 3, Waldron explains that legislators should work towards a 'rule of law' state by ensuring the stability of the legal system and legislative predictability respectful of human dignity.[122] Dialogue between judges and legislators, including as required under the *Human Rights Act*, is an important doctrinal safeguard. The proposed Stage 3 (doctrinal) inquiry is: what, in law, does the careful exercise of legislative authority require?

Part B of the thesis (chapters 5 and 6) analyses the law relating to legislating itself, analysing High Court of Australia and Queensland Supreme Court jurisprudence, and legal, political and constitutional theory. Chapter 5 begins by explaining that legislators operate within legal controls as well as political ones.[123] The legal controls are formed by common law and statute working together to confine exercises of legislative authority to the limits expected by the political community.[124] Controls examined include: the objectives of a Rule of Law state;[125] bespoke Queensland statutory requirements for legislative scrutiny;[126] the court-legislature interaction required to maintain the constitutional balance;[127] and *Human Rights Act* protection and promotion of 'a right to property'.[128]

Chapter 6 adds to the normative tools identified in Part A, outlining Waldron's seven principles of legislation as a further real-world normative tool equipping legislators to 'uncover deeper layers of dignitarian value' when making law in the circumstances of politics.[129] From there, the chapter examines whether the dignitarian values uncovered can, for proposed legislation, integrate a diversity of interests in the Queensland political community, and it examines the functioning of dignity as a shared but floating standard.

Chapter 7 reviews the findings, concluding that, although in modern states such as Queensland, a human right to property might be protected by common law,[130] the *Human Rights Act* nevertheless requires exercises of legislative authority to promote and protect both positive and negative rights to property.[131]

---

[121] Harris, 'Is Property a Human Right?' (n 71) 84–5; Lametti, 'Property and (Perhaps) Justice' (n 1); 'The Morality of James Harris's Theory' (n 106).
[122] Waldron, *The Measure of Property* (n 29) 88.
[123] Beatson, *The Rule of Law and the Separation of Powers* (n 16) 6–7.
[124] Ibid 27–8; John Laws *The Constitutional Balance* (Hart Publishing, 2021) 8–10.
[125] Beatson, *The Rule of Law and the Separation of Powers* (n 16) 27–8; Waldron, *The Measure of Property* (n 29) 18.
[126] *Legislative Standards Act 1992* (Qld); *Statutory Instruments Act 1992* (Qld); *Parliament of Queensland Act 2001* (Qld).
[127] Robert French, 'Common Law Constitutionalism' (2016) 14 *New Zealand Journal of Public and International Law* 153.
[128] Blore and Nibbs (n 61).
[129] David Runciman, 'Review: Jeremy Waldron's Political Political Theory' (2019) 18(3) *European Journal of Political Theory* 437, 445.
[130] Harris, 'Is Property a Human Right?' (n 71) 85.
[131] *Human Rights Act 2019* (n 2) s 24.

Relying upon a normative concept of human dignity,[132] the *Human Rights Act* gives human dignity particular work to do because sections 24 (property rights) and 13 (limitations) are drafted differently from the earlier Australian rights statutes.[133] A close reading of the Act and its provisions shows the necessity of legislative understanding of human dignity as a pervasive institutional value, promoting and protecting property rights; that is, human dignity as a normative concept capable of realising the 'utopia' of universal and equal human rights.[134]

Although not a utopia, as explained in the next section, the Australian State of Queensland provides an instructive context for analysing the capacities of legislators to act in the public interest, ensure equal freedom for all people, and enact property rules even when the moral content of an issue of property is contested and diverse.[135]

III THE QUEENSLAND CONTEXT

Two key features of the political and legal landscape – features formed in the twentieth century, but with a legacy extending into the twenty-first – influence the work of contemporary legislators: past failings in representative democracy erode the authority of legislators; and innovative and reforming real property legislation facilitates state economic prosperity. This section examines both.

The first feature, a history of troubled democratic representation hampered 'by several indigenous factors' erodes the authority of modern legislators.[136] These include: the absence of a Legislative Council since 1922;[137] dominant political leaders, sometimes authoritarian, in office for long periods;[138] and 'institutionalised misunderstandings of the roles of government and parliament' contributing substantially 'to the malaise of the Parliament's position'.[139] Notoriously, '[e]xtremism itself aspired to become commonplace' between 1968 and 1988 under the Premiership of Johannes Bjelke-Petersen when '[c]rucial elements of democratic function were eventually etched into public consciousness by the poverty of their absence'.[140] In 1989, a Commission of Inquiry made many corruption-related

---

[132] Ibid s 13.
[133] Blore and Nibbs (n 61).
[134] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 21); Waldron, 'Human Dignity: A Pervasive Value' (n 21) 18.
[135] Lametti, 'The Morality of James Harris's Theory of Property' (n 106); Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 12) 466.
[136] Peter Coaldrake, 'Overview – Reforming the System of Government' in Scott Prasser, Rae Wear and John Nethercote (eds), *Corruption and Reform: The Fitzgerald Vision* (University of Queensland Press, 1990) 158; Colin A Hughes, *The Government of Queensland* (University of Queensland Press, 1980) ch 8; Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees* (Queensland Government Printer, 1992); Scott Prasser, 'The State of Democracy in Queensland', *Online Opinion* (24 December 2007) <www.on-line opinion.com.au>.
[137] *Constitution Amendment Act 1922* (Qld).
[138] Hughes (n 136) ch 2.
[139] Coaldrake (n 136) 158; Hughes (n 136) 10–2; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Mabo v Queensland* (1986) 64 ALR 1; *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[140] Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007) 222.

findings against the Bjelke-Petersen regime.[141] A Police Commissioner, four Ministers and a property developer were found guilty of offences and imprisoned.[142] Bjelke-Petersen was tried for perjury but a jury did not reach a verdict.[143]

The second feature – Queensland's modern package of real property legislation – was developed and enacted during the final years of the twentieth century. Despite the extremism of the Bjelke-Petersen regime, Queensland Law Reform Commission recommendations for reform achieved a 'greatly simplified and improved property law in Queensland … among the leaders in that part of the world whose legal system derives from the common law'.[144] This startling coda to a period of notorious State corruption commenced in 1968 when Bjelke-Petersen became Premier as a strong property institution was central to the ambitions of newly-formed National Party Government.[145] Its last four years in opposition had been spent developing a procedure for reform of real property legislation, so the Government was primed for swift legislative action.[146] At an Opening of Parliament coinciding with formal celebrations of a century of representative government in Queensland,[147] the Governor stated that 'the tremendous potential of the State's land defied assessment'.[148] His Government felt it an appropriate time 'in the life of separate, independent Government in Queensland' to observe 'whence we have come and where we are going'.[149] This included:

> A remarkable transformation in land usage and settlement is occurring in the State, every new block thrown open for selection being eagerly sought;
>
> Introduction of freeholding, modern land clearing and farm equipment, development of new legumes, grasses and pastures, ability to use formerly unproductive land and the success of the Fitzroy Basin Scheme, a project unparalleled in scope and magnitude which is exciting land men throughout Australia, are responsible for the mounting demand for land; [and]

---

[141] GE Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council* (Queensland Government Printer, 3 July 1989) available at <www.ccc.qld.gov.au/>.
[142] Evans (n 140) 243–6; Ross Fitzgerald, Lyndon Megarrity and David Symons, *Made in Queensland: A New History* (University of Queensland Press, 2009) 183–5.
[143] Evans (n 140); Fitzgerald, Megarrity and Symons (n 142) 183–5: there was no retrial.
[144] AA Preece, 'Reform of the Real Property Acts in Queensland' (1986) *QUT Law Review* 41, 41.
[145] Evans (n 140) 243–6: earlier in 1968, a new (Conservative) government had been formed by Premier Pizzey upon the retirement of Sir Frank Nicklin (Premier 1957–68), but Pizzey died after only seven months in office.
[146] Queensland, *Parliamentary Debates [Hansard]*, 20 August 1968, 4; available at <www.parliament.qld.gov.au>; Evans (n 140) 220.
[147] Ibid 2; Clive Bean, 'Changing Citizen Confidence: Orientations towards Political and Social Institutions in Australia, 1983–2010' (2015) 8 *The Open Political Science Journal* 1. Bean identifies this as a period during which 'the post-World War II era of progress and growing prosperity' was coming under increasing pressure during a period of hyper-inflation, but that would be replaced by 'a new period of great prosperity'.
[148] Queensland, *Parliamentary Debates* (n 147) 4.
[149] Ibid 2.

> Areas totalling about 4,000,000 acres are being designed for sheep and cattle production and Crown estates in 44 centres are being developed for residential, industrial and business purposes.[150]

Introducing legislation establishing the Queensland Law Reform Commission, the Government signalled the centrality of real property law to its governance agenda.[151] The Commission's main task was 'to reform the antiquated property law of Queensland' as archaic statutes governed trespassory rules and ownership interests,[152] impeding and imperilling 'the improvement and progress of industry and of society itself'.[153] Indeed, in 1973, the Commission found the real property law of the State comprised 'centuries of judicial exposition of what, at least in theory, is the pre-Norman Conquest common custom of the realm of England, overlaid by doctrines of feudal tenure and by a series of statutes reaching from 1266 … to the present day'.[154] Once formulated, Commission recommendations in the form of draft Bills were enacted relatively quickly. They effected fundamental and broad reform of real property law.[155]

The contemporary Queensland property institution provides fertile ground to examine the individual-collective, moral-legal Janus-like face of property and the institution's legal and political arrangements. The *Human Rights Act* now requires Queensland legislators to attend to the mediating concept of human dignity when evaluating property rights identified in section 24.

Part A, then, analyses the institutional, property and doctrinal norms of the property institution. This establishes the model – tested through staged normative argument – equipping legislators for their task.

---

[150] Ibid.
[151] *Law Reform Commission Act 1968* (Qld).
[152] Peter M McDermott, 'Mr Justice BH McPherson – His Contribution to Law Reform in Queensland' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 433; Queensland, *Parliamentary Debates [Hansard]* 13 November 1968, 1436, 1434, available at <www.parliament.qld.gov.au>; Queensland Law Reform Commission, 'A Working Paper of the Law Reform Commission On a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland' (Working Paper No 32, 1989) 33–4.
[153] QLRC, *Report No 16* (n 1) 1–2: the report proposing detailed reform had two major objects: consolidation to repeal piecemeal, outdated legislation – some of which dated from the early years of the colonial Parliament – and enacting instead 'in one place all the relevant statute law, and only such as is relevant'. Proposed reforms sought to simplify as 'many of the earlier concepts, institutions and techniques, having outlived their usefulness' had become 'little more than obstacles to the proper understanding and functioning of modern property law'.
[154] Ibid 1.
[155] McDermott (n 152) 433; QLRC, *Report No 16* (n 1); QLRCWP 32 (n 152).

PART A – STAGED INQUIRY FOR NORMATIVE DISCOURSE

This part provides a normative claim concerning the content of property, as that term is used in this thesis. In that sense, it represents a normative discourse designed to harness 'communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law'.[1] This will serve Queensland's legislators faced with evaluating property questions, most notably the meaning of property pursuant to the *Human Rights Act 2019*. Three successive stages of inquiry are identified and evaluated in chapters 2 to 4. The discrete yet cumulative stages are intended to build the capacity of legislators to evaluate the norms of the Queensland property institution, its institutional and distributive design, and its doctrinal coherence and consistency with legal practice.

Jacob Weinrib identifies a chasm separating the *practice* of legislating from any *theory* explaining and guiding the work of legislators.[2] To bridge the chasm, each inquiry in the staged formation is drawn from and informed by legal and political theory. An example is Waldron's advice that asking questions about human dignity allows legislators to pin down a conceptualisation of dignity for a discrete legislative measure.[3] The staged formation is developed from Jacob Weinrib's structured analysis of the dimensions of dignity.[4] Part A's structure is Stage 1 (institutional), Stage 2 (property) and Stage 3 (doctrinal). Each stage, as suggested by Jürgen Habermas, is 'a simple procedure for the impartial foundation of norms of action'.[5]

In Chapter 2, analysis proceeds from JW Harris' theory of property and justice in a modern state: 'the well-being of every citizen … requires that his or her society should maintain a property institution'. [6] This is because '[e]veryone would be treated unjustly if his or her society did not afford, at least, the freedom from centralized direction which results from deploying money, full-blooded ownership of chattels, and ownership interests in dwellings'.[7] The chapter examines the particular legal and political arrangements, of the property institution in Queensland, its social and ideological background, and its legal forms. David Lametti's conceptualisation of social and ideological background is of a property

[1] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Polity Press, 1997) 147.
[2] Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016) 270.
[3] Jeremy Waldron, 'Human Dignity: A Pervasive Value' (Public Law Research Paper No. 20-46, NYU School of Law, 1 July 2019) 5, <http://dx.doi.org/10.2139/ssrn.3463973>.
[4] Weinrib (n 2) Part 1: in the thesis, the order of normative and institutional in Weinrib's framework has been reversed.
[5] Jürgen Habermas, *Philosophical Introductions: Five Approaches to Communicative Reason*, tr Ciaran Cronin (Polity Press, 2018) 48.
[6] Jim Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 64, 85–7.
[7] Ibid; David Lametti, 'The Morality of James Harris's Theory of Property' in T Endicott, J Getzler and E Peel (eds), *The Properties of Law: Essays in Honour of James Harris* (Oxford University Press, 2006) 146.

institution's 'larger purposes'.[8] Harris explains the situational influence is ongoing – an institution's role varies according to its social and ideological background within the political community.[9] Application of the Honoré-Waldron thesis developed by Babie, Orth and Weng identifies legal forms – the 'mix, balance, and blend' of 'ideal-typic property types' in a state.[10] It will emerge that the property institution presumes private property as a justified means of social ordering and private property is a predominant legal feature.

Chapter 3 analyses the mid-level structure of the property institution – its distributive justifications and institutional design justifications. Progressively analysed are: Harris' theory of property and justice in modern states; 'thicker' theories of property, including human dignity as a portal for a legislative shift from moral imperatives to enacted property rules;[11] and justificatory and normative property discourse.[12] Relevant theory is drawn from the work of Jeremy Waldron and Jürgen Habermas.[13]

Chapter 4 examines the internal legal coherence of property law doctrine, and legislative consistency with existing legal practice. From legal theory about the rule of law, and from principles of legislation developed by Lon Fuller, Jeremy Waldron and others, two essential considerations for legislators will be drawn: the importance of the stability of the legal system and the importance of legislative respect for human dignity. Waldron suggests an objective of legislators should be a 'Rule of Law state'.[14]

This part, then, establishes the Queensland property institution considered in this thesis. The norms facilitate property discourse and action about what property is, and what the content of property rules ought to be.

[8] David Lametti, 'Property and (Perhaps) Justice: A Review Article of James W Harris, Property and Justice and James E Penner, The Idea of Property in Law' (1998) 43 *McGill Law Journal* 663, 670.
[9] JW Harris, *Property and Justice* (Oxford University Press, 1996) 3.
[10] Paul T Babie, John V Orth and Charlie Xiao-chuan Weng, 'The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese, and Australian Land Law' (2016) 91 *Tulane Law Review* 739.
[11] Harris, 'Is Property a Human Right?' (n 6) 84–5; Lametti 'The Morality of James Harris's Theory' (n 7).
[12] Waldron 'Human Dignity: A Pervasive Value' (n 3); Jürgen Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 (4) *Metaphilosophy* 464.
[13] Ibid.
[14] Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) 88.

CHAPTER TWO: THE QUEENSLAND PROPERTY INSTITUTION

I UNDERSTANDING THE INSTITUTIONAL NORMS

Stage 1 (institutional) of a theoretical inquiry equipping legislators to give meaning to practice – the first real-world normative tool – involves a consideration of the institutional features of the property institution. The institutional norms of a property institution can themselves be separated into norms drawn from a legal system's original and contemporary legal and political arrangements,[1] the social and ideological background,[2] and from its legal forms. Chapter 2 examines each of those normative sources, focusing on Queensland's property institution.

The chapter contains four sections, each dealing with an institutional feature. Referring to JW Harris's theory of property and justice,[3] the first section explains why the institutional features of the property institution are fundamental to the day-to-day property questions confronting legislators.[4] The second analyses the original and contemporary legal and political institutional arrangements put in place at Queensland's establishment. Two historic constitutional sections vesting the management and control of 'waste lands' in the legislature,[5] affirm consistency with Harris's background property right vested in each citizen: a property institution is in place.[6] The third section examines the institution in its colonial social and economic context, elaborating the social and ideological goals (the 'larger purposes') and their contemporary influences.[7] The final section analyses the mix, balance and blend of the four ideal-typic categories of property (private property, state property, common property, and communitarian property).[8] It will emerge that the institution presumes, and has always presumed, private property as a justified means of social ordering, but that the other ideal-typic categories remain important. The aggregated evidence is of a bespoke but malleable property institution preferencing

---

[1] Jim Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 64, 85; JW Harris, *Property and Justice* (Oxford University Press, 1996) 85.

[2] David Lametti, 'Property and (Perhaps) Justice: A Review Article of James W Harris, Property and Justice and James E Penner, The Idea of Property in Law' (1998) 43 *McGill Law Journal* 663, 670; Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, 2007) 2; Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 376: 'the only way to grasp where we are and where we are headed … [is] to have a sense of how we arrived at the present'.

[3] JW Harris, *Property and Justice* (n 1); 'Is Property a Human Right?' (n 1).

[4] Ibid viii.

[5] *Constitution Act 1867* (Qld) ss 30 and 40.

[6] Harris, *Property and Justice* (n 1) 13, 305–6; 'Is Property a Human Right?' (n 1) 84.

[7] David Lametti, 'Property and (Perhaps) Justice' (n 2) 670; Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2003) 2, 6, 8: Taylor's account of the 'idea of order' provides a way to see and describe clearly past and current common practices, what dominates our political thinking and the way we imagine the society we inhabit and sustain.

[8] Paul T Babie, John V Orth and Charlie Xiao-chuan Weng, 'The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese and Australian Land Law' (2016) 91 *Tulane Law Review* 739.

private property over other forms of resource allocation and protecting and promoting individual autonomy.

A link between individual autonomy and a property institution provides a first reason for legislators to inquire into theory. Harris contends each citizen's wellbeing 'requires that his or her society maintain a property institution'.[9] Within an institution, a property system will use 'property' to allocate land according to the legal and political arrangements in place. Harris argues too that, to ensure respect for political freedoms, there is a moral background right vested in every citizen.[10] The background right demands 'that a property institution should be in place, and that a mix of property-specific justice reasons be taken into account, where relevant, in any question of distribution or property-institutional design'.[11]

Harris also explains that property institutions are legal and social institutions, 'instrumentalities for controlling the use of things and for the allocation of wealth'.[12] Typically, a property institution comprises: '(1) trespassory rules; (2) property-limitation rules; (3) expropriation rules; (4) appropriation rules'. When protected or presupposed by 'the bulk of these rules', interests of individuals, groups or agencies are proprietary in nature.[13] In Harris's theory, trespassory rules and the ownership spectrum are 'twinned conceptions': they are 'indispensable features of what is meant by a property institution'.[14]

Property institutions, including the property rules made by legislators, make possible the democratic modern state.[15] They are 'malleable' institutions with a dual function – in legal and non-legal understandings alike – of 'property as things' and 'property as wealth'.[16] States establish and refine property institutions, acting in the public interest. Each state refines the institution via social and legal scaffolding, creating a bespoke, public interest combination of rules for property-limitation, expropriation and appropriation.[17] In Harris's theory, there is no 'true' property, and no one necessary outcome in response to any property question.[18] Instead, respective property institutions 'build upon the

[9] Harris, 'Is Property a Human Right?' (n 1) 85; David Lametti, 'The Morality of James Harris's Theory of Property' in T Endicott, J Getzler and E Peel (eds), *The Properties of Law: Essays in Honour of James Harris* (Oxford University Press, 2006) 138–41.
[10] Harris, 'Is Property a Human Right?' (n 1) 84–5.
[11] Ibid.
[12] Charles A Reich, 'The New Property' (1964) 73(5) *The Yale Law Journal* 746.
[13] Harris, *Property and Justice* (n 1) 141.
[14] Ibid 114.
[15] Conor Gearty, 'Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 155, 166; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 63; Richard Pipes, *Property and Freedom* (Vintage, 1999) 240–8; John Milbank, 'Dignity Rather than Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 189–206, 198: Milbank notes Cicero declared 'the specific reason for the founding of city-states was the securing of private property'.
[16] Harris, *Property and Justice* (n 1) 140; Harris, 'Is Property a Human Right?' (n 1) 65–9.
[17] Harris, 'Is Property a Human Right?' (n 1) 69.
[18] Harris, *Property and Justice* (n 1) 139–40; Lametti, 'The Morality of Harris's Theory' (n 9) 140.

twinned and mutually irreducible notions of trespassory rules and the ownership spectrum' incorporating transmission freedoms and the consequential opportunity to build wealth in the form of money and cashable rights.[19] Trespassory rules purport to 'impose obligations on all members of a society, other than an individual or group who is taken to have some form of open-ended relationship to a thing, not to make use of that thing without the consent of that individual or group'.[20] The 'ownership spectrum' refers to 'the open-ended relationships presupposed and protected by trespassory rules', and any relationship along the spectrum 'will be called an "ownership interest"'.[21] All ownership interests 'comprise some use privileges and some control-powers', but only interests in 'the upper half of the spectrum' include powers of transmission.[22] In these principles, a link between individual autonomy and a property institution solidifies.

An institution – its trespassory rules and ownership spectrum, and the characteristics of the background property right held by each citizen – is historically situated. While a past community managing without property 'cannot be trans-historically condemned',[23] in modern legal systems, 'the more weight one gives property in its role in human development, the closer one gets to positing it as a human right'.[24] Accordingly, although 'there are no natural rights to full-blooded ownership', trespassory rules now 'protect privileged relationships to land, chattels, money, and various sorts of ideational entities'.[25] Harris explains that these property rules carry moral force in a community if the community 'one way or another' takes on the obligation to meet all citizens' basic needs.[26] Jürgen Habermas argues that the 'unprecedented' foundation of constitutional states at the end of the eighteenth century fostered 'a provocative tension within modern societies'.[27] The tension operates if, under favourable historic conditions, 'a mutually enforcing dynamic' arises between human rights and the civil rights held by a citizen of 'a particular political community' established as a modern state.[28]

As elaborated in the next section, these theoretical principles give meaning to the legal and political history of the Queensland property institution, and to ongoing practices for its legal and political arrangements.

---

[19] Harris, *Property and Justice* (n 1) 141.
[20] Harris, *Property and Justice* (n 1) 5; Harris, 'Is Property a Human Right?' (n 1) 65–72; Lametti, 'The Morality of Harris's Theory' (n 9) 142.
[21] Harris, *Property and Justice* (n 1) 5.
[22] Ibid; Harris, 'Is Property a Human Right?' (n 1) 67–72.
[23] Harris, 'Is Property a Human Right?' (n 1) 85; David Lametti, 'Destination' (2020) 66 *McGill Law Journal* 47, 50–1.
[24] Lametti, 'The Morality of Harris's Theory' (n 9) 141.
[25] Ibid 144; Harris, *Property and Justice* (n 1) 5.
[26] Harris, 'Is Property a Human Right?' (n 1) 84–5.
[27] Jürgen Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 (4) *Metaphilosophy* 464, 475–6; *Philosophical Introductions: Five Approaches to Communicative Reason*, tr Ciaran Cronin (Polity Press, 2018) 55; Taylor, *Modern Social Imaginaries* (n 7) chs 1–2.
[28] Jürgen Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 27) 475–6.

II LEGAL AND POLITICAL ARRANGEMENTS

When established, Queensland had in place a property institution providing for the allocation of land.[29] After the founding of the New South Wales colony in the eighteenth century, the colony of Queensland was created in 1859 by its constitutional separation from the original colony,[30] the first colony in Australasia established with representative government.[31] Examining the original legal and political arrangements will determine in this section whether 'one way or another' the community took on the obligation to meet all citizens' basic needs.[32] Habermas argues that, if Queensland was established as a 'modern state', then 'a mutually enforcing dynamic' arises between human rights and the civil rights held by a Queensland citizen.[33] Harris refers to the dynamic as a moral 'background right to property'.[34] Common to each are property rules carrying moral force in a community.

The perceived importance to the colony of an institution allowing the allocation of land is evidenced by Hansard reports from the early years of Queensland, land allocations made, and legislation enacted.[35] When, in May 1860, Queensland's legislators sat for the first time, the legislature comprised an elected Legislative Assembly and a Legislative Council of nominated landowners.[36] Governor Bowen called the legislators to administer 'the control and disposal of the whole' of the property institution as a 'gigantic patrimony'.[37] The legal and political arrangements of British institutions, brought to the Australian colonies by European settlers, as appropriate to 'their own situation and the condition of [the] infant colony',[38] were being substituted incrementally under 'breathtakingly broad delegations of

[29] *Constitution Act 1867* (Qld) ss 30 and 40.
[30] 'Order-in-Council establishing Representative Government in Queensland 6 June 1859 (UK)', *Museum of Australian Democracy: Documenting a Democracy* (Web Page) (2011) <https://www.foundingdocs.gov.au/>.
[31] Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 56.
[32] Harris, 'Is Property a Human Right?' (n 1) 84–5.
[33] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 27) 75–6; *Philosophical Introductions* (n 27) 55.
[34] Harris, 'Is Property a Human Right?' (n 1) 84–5.
[35] The Hansard reports were reprinted in *The Moreton Bay Courier* and are available on the Queensland Parliament website: <www.qld.gov.au>.
[36] 'Order-in-Council establishing Representative Government in Queensland' (n 30).
[37] *Record of the Proceedings of the Queensland Parliament, Legislative Council, 29 May 1860, extracted from the third-party account as published in the Moreton Bay Courier* (31 May 1860), available at <https://www.parliament.qld.gov.au/work-of-assembly/hansard>.
[38] John Bennett and Alex Castles (eds), *A Source Book of Australian Legal History* (Law Book Co, 1979) 204, referencing William Blackstone, *Commentaries on the Laws of England* (1765) Bk 1; *Cooper v Stuart* (1889) 14 App Case 286, 291; BH McPherson, *The Reception of English Law Abroad* (The Supreme Court of Queensland Library, 2007); HV Evatt, 'The Legal Foundations of New South Wales' (1938) 11 *Australian Law Journal* 409, 415, 420–1; Alex Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 2–5; PM Lane, 'Australian Land Law' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013) 212; Eddie Synot and Roshan de Silva-Wijeyeratne, 'Constitutional Foundations: The Persistent Myth of *Cooper v Stuart*' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 36, 36.

power'.[39] Shared legal and political understanding the Crown's sovereignty would give it title to land, and therefore the power to appropriate land to itself and to alienate it to others,[40] meant the circumstances of land grants and land reservations were unparalleled.[41] For dealings with land title, the 'principles of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning',[42] even though 'it was difficult to conceive a society more inhospitable to their reception'.[43] In response, legislators quickly enacted mediating 'statutes designed to provide for conditions unknown in England and to meet local wants in a fashion unprovided for in England'.[44]

As a former penal settlement within the northern part of the colony of New South Wales (from 1824 to 1842),[45] gaining its own legal and political arrangements in 1859,[46] Queensland was, its first Governor said, 'a new venture in imperialism'.[47] The only Australasian colony not to pass through the preliminary stages of colonial government was, Bowen observed, a most peculiar colony, 'exceptional beyond precedent in the history of colonization'.[48] Colonisation was on the cheap, at arms' length from Great Britain, and commencing with 'full-blown' parliamentary self-government.[49]

---

[39] Lisa Ford 'Thinking Big About New South Wales History: Colonial Law in Global Perspective' (2011) 34 *Australian Bar Review* 204, 206; Carney (n 31) 37: the powers of the first Governor of New South Wales were largely undefined by the Imperial Parliament and 'sourced almost entirely in the royal prerogative'; WG McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 1; Jeremy Bentham, *A Plea for the Constitution: Shewing the Enormities Committed ... in and by the Design ... of the Penal Colony of New South Wales: Including an Inquiry Into the Right of the Crown to Legislate Without Parliament in Trinidad, etc.* 2 available at <https://www.bl.uk/collection-items/a-plea-for-the-constitution>: Bentham argued in a pamphlet published in 1803 that legislation was necessary to confer power on the Governor; RD Lumb, *The Constitutions of the Australian States* (5th ed, University of Queensland Press, 1991) 41; WB Campbell, 'A Note on Jeremy Bentham's 'A Plea for the Constitution of New South Wales'' (1951) 25 *Australian Law Journal* 59; S Kenny, 'Colonies to Dominion, Dominion to Nation' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013) 245, 248.

[40] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 60 (Deane and Gaudron JJ); Brendan Edgeworth, *Butt's Land Law* (Lawbook Co, 2017) 1–2; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010) 2, 13–29; Synot and de Silva-Wijeyeratne (n 38) 38–40.

[41] Enid Campbell, 'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia (1994) 13 *University of Tasmania Law Review* 1, 1–2.

[42] *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 71 (Windeyer J): the *Australian Courts Act 1828* (Imp) stated that English law in force in England applied in New South Wales.

[43] Lane (n 38) 212; Anne Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) 50–1.

[44] *Wik Peoples v Queensland (Pastoral Leases case)* (1996) 187 CLR 1 [429] (Gummow J).

[45] Carney (n 31) 55: in 1842, the Crown Land Commissioner and the Police Magistrate jointly assumed authority for the colony.

[46] 'Order-in-Council establishing Representative Government in Queensland' (n 30); Carney (n 31) 56.

[47] Edward Jenks, *A History of the Australasian Colonies A History of the Australasian Colonies: (From Their Foundation to the Year 1911)* (Cambridge University Press, 1912) 112: 'it is even startling to realize that its members entered upon their full political freedom without any preparation or schooling in the lower forms of political life'.

[48] Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007) 78, quoting Sir George Ferguson Bowen; Carney (n 31) 55; Jedediah Purdy, *This Land is Our Land* (Princeton University Press, 2019) viii–ix: Purdy describes the United States as a 'world-historical land grab' and a 'world-historical experiment' where the experiment was in republican government.

[49] Ibid.

Queensland's colonial exceptionalism includes the constitutional embedding of an institution of property from the time of separation.[50] Section 2 of the *New South Wales Constitution Act 1855* (Imp) empowered legislators to allocate social wealth in the form of ownership interests in land, directed to the success of the new colony.[51] As evidenced by the keeping of public records of grants,[52] land 'had a 'greater significance than the sum of its economic production and use value''.[53] The vesting of legislative powers of allocation 'marked the real birth of Queensland as a political entity with the substantial responsibility for the peace, order and good government of the people',[54] as indicated by Bowen at the Opening of the First Parliament:

> Queensland embraces a territory, blessed with a salubrious climate, and with a fertile soil, equivalent, at the lowest estimate, to nearly three times the area of France, and nearly ten times the area of England and Wales. Along our sea-coast and on the banks of our rivers, we possess millions of acres which bear the same relation to the cotton and sugar, which the great pastoral districts of the interior hold to the wool manufacturers of the mother country.[55]

The vesting of legislative powers also gives rise to 'numerous' court challenges about the legislature's allocations of land.[56] In *Cudgen Rutile v Chalk* the Privy Council accepted as 'fully established' the proposition that 'in Queensland, as in other States of the Commonwealth of Australia, the Crown cannot contract for the disposal of any interest in Crown Lands unless under and in accordance with power to that effect conferred by statute'.[57] In the High Court, in the *Wik Peoples case*, Gummow J said the early constitutional constraint withdraws 'from the Crown, whether represented by the Imperial authorities or by the Executive Government of Queensland, significant elements of the prerogative'.[58] Any Crown authority is 'derived from statute' as the 'management and control of waste lands in Queensland was vested in the legislature',[59] with the term 'waste lands' referring to unoccupied or uncultivated land.[60]

---

[50] Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* (Report No 16, 1973) 6; Anne Wallace, Michael Weir and Les McCrimmon, *Real Property Law in Queensland* (4th ed, Lawbook Company, 2015) [1.30]; Tamanaha (n 2).
[51] *Constitution Act 1867* (Qld) ss 30 and 40.
[52] 'Order-in-Council establishing Representative Government in Queensland' (n 30).
[53] Nicole Graham, 'Dephysicalised Property and Shadow Lands' in Robyn Bartel and Jennifer Carter (eds), *Handbook on Space, Place and Law* (Elgar, 2021) 281, 282.
[54] PA Keane, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 10 *Queensland University of Technology Law and Justice Journal* 106, 121: the explicitly conferred power was relied upon in the colonial era to generate an economy.
[55] *Record of the Proceedings of the Queensland Parliament* (n 37).
[56] *Cudgen Rutile (No 2) Ltd v Chalk* (1975) AC 520, 533–4.
[57] Ibid; *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209 [16] (French CJ, Crennan J).
[58] *Cudgen Rutile (No 2) Ltd v Chalk* (n 56) 533–4; *Mabo (No 2)* (n 40) 63–4 (Deane and Gaudron JJ); Twomey (n 43) 662: the prerogatives may be abrogated or modified by legislation, and in almost all cases have been; *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.
[59] *Cudgen Rutile (No 2) Ltd v Chalk* (n 56) 533–4.
[60] *Mabo (No 2)* (n 40).

The empowerment/constraint carried over from the New South Wales Constitution,[61] was re-enacted as sections 30 and 40 of the *Constitution Act 1867* (Qld),[62] and is preserved now in the *Constitution of Queensland 2001*.[63] Together, sections 30 and 40 give the legislature 'the power to determine … the legal basis on which the settlement and occupation of land' occurs.[64] They complement section 2 of the *Constitution Act 1867* (also preserved) conferring 'Her Majesty' with 'power by and with the advice and consent of the … Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever'. As observed in *Cudgen Rutile v Chalk*, the legal basis of the power and its limitations are 'found in the *Constitution Act of 1867*, of which s 30 provides for the making of laws regulating the sale, letting, disposal and occupation of the waste lands of the Crown, and s 40 vests the management and control of the waste lands of the Crown in the Legislature'.[65]

The legal basis of the power diverged though from the constitutional arrangements in non-Australasian British colonies.[66] In the latter, land acquisition tended to be *ad hoc* rather than the subject of explicit constitutional provision.[67] Gaudron J's reasoning in the *Wik Peoples case* illustrates the effects in law, and the importance to the colony and its people, of the divergence:

> It is clear that pastoral leases are not the creations of the common law. Rather, they derive from specific provision in the Order-in-Council of 9 March 1847 issued pursuant to the *Sale of Waste Lands Act Amendment Act 1846* (Imp) and, so far as is presently relevant, later became the subject of legislation in New South Wales and Queensland. That they are now and have for very many years been entirely anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian States and, earlier, the Australian Colonies authorising the alienation of Crown Lands. Thus, for example, it was said of such

[61] *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict c 54, enacted only four years prior to separation: s 2 gave the New South Wales Parliament the entire management and control of the waste lands belonging to the Crown and the power of appropriation of the proceeds of the sales of the lands; Campbell (n 41) 2; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 [103] (Gageler J); Lane (n 38) 216 n 23: 'In 1855, in preparation for self-government of New South Wales, the Imperial legislature passed 18 & 19 Vic c 56 repealing the *Colonial Waste Lands Act* … to take effect in the enactment of Constitution Acts for New South Wales, Victoria, Tasmania and South Australia, but not Western Australia'; New South Wales Legislative Council *Votes and Proceedings of the Legislative Council*, 1 May 1851 31–2, available at <https://www.parliament.nsw.gov.au/hansard/pages/first-council.aspx#>.

[62] Section 30 states: 'it shall be lawful for the legislature of this State to make laws for regulating the sale letting disposal and occupation of the waste lands of the Crown within the said State'. Section 40 states: 'The entire management and control of the waste lands belonging to the Crown in the said State and also the appropriation of the gross proceeds of the sales of such lands and all other proceeds and revenues of the same from whatever source arising within the said State including all royalties mines and minerals shall be vested in the legislature of the said State.'

[63] *Constitution of Queensland 2001* s 69.

[64] Keane (n 54) 121.

[65] *Cudgen Rutile (No. 2) Ltd v Chalk* (n 56) 533–4.

[66] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019) 17, 25: even today, it is rare for a constitution to identify an entity within a constitutional order with the power to define or alter property interests in land.

[67] Tom Allen, *The Right to Property in Commonwealth Constitutions* (University of Cambridge Press, 2000) 1–2.

holdings in *O'Keefe v Williams* that '[t]he mutual rights and obligations of the Crown and the subject depend, of course, upon the terms of the Statute under which they arise'.[68]

There are important, enduring consequences of the Queensland property institution's constitutional exceptionalism. While, in Canada, 'legislation created the possibility of a fiduciary obligation on the Crown' regarding land interests and First Nations peoples, the 'radically different legislative regimes' in Queensland closed off that avenue.[69] Queensland's colonial legislators could have affirmed interests in land held by Aboriginal peoples and Torres Strait Islanders, 'subject only to the new paramount title of the Crown', but allocations under sections 30 and 40 gave preference to the interests of European settlers.[70] And, as a result of the choice of colonial legislators in Queensland, 'First Nations are still affected by the retrospective justification of their dispossession'.[71]

A key landmark in that dispossession, and in the preferencing of the interests of European settlers, occurred with Queen Victoria's proclamation, on 6 June 1859, of a new colony of 'Queen's Land' in the northern area of New South Wales.[72] Letters Patent passed by the Privy Council that day appointed Sir George Ferguson Bowen as Captain-General and Governor-in-Chief, and provided for separation of the colony, and creation of a government, colonial legislature, and a constitution closely following the New South Wales arrangements.[73] Conferred with 'full power and authority by and with the advice of the said Executive Council to grant in Our name and on Our behalf any waste or unsettled lands in Us vested within Our said colony',[74] Bowen effected Queensland's separation from New South Wales when he read the proclamation in the colony on 10 December 1859.[75]

Although, years earlier, the *Australian Constitutions Act 1842* authorised a colony in the north,[76] proclamation was delayed to ensure 'the future colony of Queensland had sufficient settled land within

---

[68] *Pastoral Leases case* (n 44) 115 (Gaudron J); Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) 29–30: Waldron refers in New Zealand to institutional modifications 'at every stage' taking place 'not through some inexorable logic endogenous to private law (let alone natural law), but by statute (mainly) and (occasionally) by judge-made law'.

[69] Keane (n 54) 109; Justice M Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444.

[70] TP Fry, 'Land Tenures in Australian Law' (1946) 3 *Res Judicatae* 158.

[71] Synot and de Silva-Wijeyeratne (n 38) 45.

[72] *Acts, Laws and Documents Relating to the Constitution of the State of Queensland* (Queensland Government Printer, 1991) 10, 15; R D Lumb, 'The Torres Strait Islands: Some Questions Relating to Their Annexation and Status' (1990) 19 *Federal Law Review* 154.

[73] 'Order-in-Council establishing Representative Government in Queensland' (n 30); Carney (n 31) 56.

[74] 'Letters Patent erecting Colony of Queensland 6 June 1859', *Museum of Australian Democracy: Documenting a Democracy* (Web Page) (2011) <https://www.foundingdocs.gov.au>.

[75] PJ Byrnes 'The Constitution of Queensland' (1992) 1 *Public Law Review* 58, 59.

[76] Ibid: s 51 of the 1842 Act provided for a southern boundary to be at the 26th degree of latitude, but s 34 of the 1850 Act had a boundary at the 30th degree of south latitude; *Australian Constitutions Act 1842* (Imp) s 51; *Australian Constitutions Act (No 2) 1850* (Imp); Carney (n 31) 55 n 134; Sir John Quick and Sir Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (The Australian Book Company, 1901) 72.

its own boundaries to provide revenue for its government'.[77] And delineating an appropriate boundary proved time-consuming because '[t]he placement of the border between New South Wales and Queensland in the 1850s aroused more controversy and debate than any other Australian land border'.[78] Controversies arose about the fate of a large number of settlers in the now Northern Rivers region of New South Wales, the allegiances of pastoral interest holders further to the west, and the economic concerns of each colony.[79]

Once separated, the colony of Queensland comprised 22.5 per cent of Australian land, although the boundaries were later extended west,[80] and then north to incorporate the islands in the Torres Strait.[81] Conversion of that land by colonial legislators – sale or dedication to public purposes of the Crown's 'radical' title[82] – created the bulk of public wealth.[83] And, innovatively legislating within the broad terms of sections 30 and 40 of the *Constitution Act 1867*, legislators created a vast body of individualised property, with: 'an array of tenures unknown to the English law';[84] and 'a statutory system of title by registration, identified by the phrase 'the Torrens system''.[85]

Settlers quickly took up the allocations,[86] building individual wealth from grants binding upon the Crown and its successors, as the courts cannot 'refuse to give effect to a Crown grant'.[87] Individual liberty was 'secured by traditional forms of property such as land or a house' at a time when large corporations and other wealth-generating mechanisms were yet to be established.[88] In Charles Reich's

---

[77] Murray Johnson, 'The historical significance of Queensland Day', *Queensland State Archives: Stories from the Archives* (Web Page) (2016) <https://blogs.archives.qld.gov.au/2016/06/06/the-historical-significance-of-queensland-day/>.

[78] Gerard Carney, 'A Legal and Historical Overview of the Land Borders of the Australian States' (2016) 90 *Australian Law Journal* 579, 598.

[79] Ibid.

[80] 'Letters Patent Altering the Western Boundary of Queensland 1862 (UK)', *Museum of Australian Democracy: Documenting a Democracy* (Web Page) (2011) <https://www.foundingdocs.gov.au>: this added 302,600 square miles to the colony's territory.

[81] *Queensland Coast Islands Act 1879* (Qld); Lumb (n 72).

[82] *Mabo (No 2)* (n 40) [55] (Brennan J) [91] (Deane and Gaudron JJ): 'upon the establishment of the Colony, the radical title to all land vested in the Crown … [T]he practical effect of the vesting of radical title in the Crown was merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony'; Banner (n 2) 8.

[83] Keane (n 54) 103; TP Fry, *Freehold and Leasehold Tenancies of Queensland Land* (University of Queensland, 1946); Fry (n 70) 158; Paul Babie 'Completing the Painting: Legislative Innovation and the "Australianness" of Australian Real Property Law' (2017) 6 *Property Law Review* 157; Thomas Picketty, *Capital in the Twenty-first Century* (Belknap Press, 2017) ch 3.

[84] Babie, Orth and Weng, 'The Honoré-Waldron Thesis' (n 10) 766.

[85] Ibid: 'statute makes the certificate of title conclusive evidence of its particulars and protects the registered proprietor from actions to recover the land, except in specifically described cases'.

[86] Jenks (n 47) 112; Evans (n 48) 83; Joanne Scott et al, *The Engine Room of Government: The Queensland Premier's Department 1959–2001* (University of Queensland Press, 2001) 37: Queensland had a population growth of settlers 'unparalleled by that of any other Australian colony'.

[87] *Mabo (No 2)* (n 40) [47], [74] (Brennan J).

[88] Charles A Reich, 'The Liberty Impact of the New Property' (1990) 31(2) *William and Mary Law Review* 295; AR Buck and Nancy E Wright, 'The Law of Dower in New South Wales and the United States' in Hamar Foster, AR Buck and Benjamin L Berger, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (UBC Press, 2008) 208, 210.

theory of 'new property', these colonial holdings of wealth in the form of private property 'had the great merit of securing independence from the State'.[89] Indeed, towards the end of the twentieth century the Queensland Law Reform Commission would observe that the real property system created by colonial legislators facilitated what was then 'virtually the only form of investment available to a Christian capitalist'.[90] Under the *Real Property Act 1861* operating with the law of trusts,[91] for example, 'the concept of estates and interests in land … conceive of and give effect to ownership of land as something "projected on the plane of time"'.[92] As these colonial statutes conferred leaseholders with the widest possible use decisions,[93] the property institution created had 'a degree of flexibility and elasticity unequalled in any other legal system'.[94]

On the evidence then, under the original legal, political and constitutional arrangements, the Queensland colony had in place a system for the allocation of land. And there is evidence of the colony's property rules carrying moral force in a community. Jeremy Waldron refers to a public commitment in Australasian colonies to a common political life, characteristics of which included the diffusion of property rights and broad economic equality.[95] The evidence substantiates the application in Queensland of Habermas's appellation, 'mutually enforcing dynamic',[96] and Harris's moral 'background right to property'.[97] For the framework, this is a substantial normative finding. As indicated in the previous section, a background right to property 'requires … that a mix of property-specific justice reasons be taken into account, where relevant, in any question of distribution or property-institutional design'.[98] The 'institutional' norms drawn from the moral background property right influence the 'property' norms analysed in the next chapter. Before turning to that, however, it is necessary first to examine the larger, social and ideological goals the Queensland property institution was and is intended to serve.

III THE SOCIAL AND IDEOLOGICAL GOALS

[89] Harris *Property and Justice* (n 1) 149; Reich (n 12) 771.
[90] QLRC, *Report No 16* (n 50) 1–2; Pistor (n 66) 5; Evans (n 48) 78; Ford (n 39) 206.
[91] Mark Leeming, 'What is a Trust?' (2009) 7 *Trusts Quarterly Review* 5, 6: 'A trust is a relationship, not a legal person, popular misconceptions (reinforced by statutory fictions) notwithstanding. The trust relationship is between trustee, beneficiaries, property and third parties. It interacts with other aspects of the legal system, notably, common law and statute.'
[92] QLRC, *Report No 16* (n 50) 1–2.
[93] *Wilson v Anderson* (2002) 213 CLR 401, 481 (Callinan J, McHugh J concurring); *Pastoral Leases case* (n 44) 115 (Toohey J).
[94] QLRC, *Report No 16* (n 50) 1–2; Pistor (n 66) ch 2.
[95] Waldron, *The Measure of Property* (n 68) 31.
[96] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 27) 75–6; *Philosophical Introductions* (n 27) 55.
[97] Harris, 'Is Property a Human Right?' (n 1) 84–5.
[98] Ibid.

Although legal and political arrangements for a property institution imply social and ideological goals, the practice of legislating can benefit from elaboration of theory about this second feature of Queensland's institution. As Harris explains, a property institution's role in a state varies according to its social and ideological background within the political community.[99] Accordingly, this part examines the common social and ideological understanding of the property institution when Queensland was established, and contemporary legacies of that understanding. The property discourse at separation is studied for evidence of the property institution's larger, societal and ideological goals. In this section, however, different terms are again used by different theorists for similar concepts. Bentham refers to 'une base idéale', or 'underlying reason',[100] Charles Taylor to the 'social imaginary' and its 'idea of order',[101] and Lametti to a property institution's 'larger purposes'.[102] In each case, the concept equates to something like the societal and ideological goals an institution is to serve.[103] Taylor explains, for example, that a social imaginary 'is that common understanding that makes possible common practices and a widely shared sense of legitimacy'.[104]

Expanding upon his term, Taylor contends state institutions facilitate a 'social imaginary';[105] that is, 'the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations'.[106] AM Honoré and David Lametti similarly refer to shared understandings creating unity within a state's institutions, including its legal system.[107] A benefit, Lametti explains, is that only in hard cases will it be necessary to look behind the rules.[108] So, for a property institution, Lametti describes shared social and ideological understandings that '[a]rable

[99] Harris, *Property and Justice* (n 1) 3.
[100] Jeremy Bentham, *The Theory of Legislation* (K Paul, Trench, Trubner & Co, 1931) 8.
[101] Taylor, *Modern Social Imaginaries* (n 7) 23–31.
[102] Lametti, 'Property and (Perhaps) Justice' (n 2) 670.
[103] Ibid.
[104] Taylor, *Modern Social Imaginaries* (n 7) 23.
[105] Ibid 32; Charles Taylor, 'Social Theory as Practice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985) 91, 93: 'There is always a pre-theoretical understanding of what is going on among the members of a society, which is formulated in the descriptions of self and other which are involved in the institutions and practices of that society. A society is among other things a set of institutions and practices, and these cannot exist and be carried on without certain self-understandings.'
[106] Taylor, *Modern Social Imaginaries* (n 7) 23: Taylor provides three reasons for adopting the term 'imaginary', and for distinguishing it from a social theory. A social imaginary: has a focus on 'the way ordinary people "imagine" their social surroundings … carried in images, stories, and legends'; 'is shared by large groups of people, if not the whole society', unlike theory which is possessed by a few; and 'is that common understanding that makes possible common practices and a widely shared sense of legitimacy'.
[107] AM Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987) 65–6: 'Laws are laws of groups. Groups have a unity that mere aggregates do not, and that unity is founded on shared understandings'; Lametti, 'Destination' (n 23) 50; Roger A Shiner, 'Law and Its Normativity' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd ed, John Wiley and Sons, 2010) 435.
[108] Lametti, 'Destination' (n 23) 50: 'implicit standards are widely understood'.

land is meant to be planted, water needs to be drunk, land needs to be accessible, and, all things being equal, a structurally well-maintained house is better than an amenity such as a swimming pool'.[109]

Harris notes, relevant to these shared social and ideological understandings, the classical argument '[f]rom Aristotle to the present day private property has been acclaimed as a source of political and cultural independence'.[110] Aristotle held that private property both increased productivity and encouraged 'traits of liberality and temperance'. [111] John Stuart Mill assumed private property as wealth to be good for society because it facilitates the independence of private projects.[112] And TH Green prosecuted 'an independence-instrumental argument' in which property's rationale is 'that everyone should be secured by society in the power of getting and keeping the means of realising a will, which in all possibility is a will directed to social good'.[113]

The influence of the arguments from theory is seen in the social and ideological goals for a real property system within the Queensland property institution, found in instructions from the imperial government that sovereignty over the new territory should be acquired 'With the consent of the Natives to take possession of Convenient Situations in the country in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.'[114] In 1770, Captain James Cook charted the east coast of the Australian mainland and took 'possession' at 'Possession Island', known to Torres Strait Islanders as Bedanug or Bedhan Lag.[115]

New South Wales – all of the continent east of the 135th meridian, with 'adjacent islands' – was declared a penal settlement in 1784, with settlement itself commencing in 1788.[116] Matthew Flinders explored the future Queensland region in 1799 and twenty years later the east coast was hydrographically surveyed. A penal station was established in 1824 close to the mouth of the Brisbane River, then in 1825 relocated upstream. Substantial building activity occurred from the time of that relocation. The coast and hinterland were explored, agricultural use of land began. Pastoralism soon

---

[109] Ibid.
[110] J Harris, *Property and Justice* (n 1) 301.
[111] Ibid 278–9; Aristotle, *The Politics* (Penguin, 1982) Bk II, 5–6.
[112] J Harris, *Property and Justice* (n 1) 301–2; John Stuart Mill, *Principles of Political Economy: With Some of Their Applications to Social Philosophy* in JM Robson (ed), *Collected Works of John Stuart Mill* (University of Toronto Press, 1965) 225.
[113] Harris, *Property and Justice* (n 1) 302; Thomas Hill Green, *Lectures on the Principles of Political Obligation* (Cambridge University Press, 2012) ii.
[114] 'Secret Instructions to Lieutenant Cook 30 July 1768 (UK)', *Museum of Australian Democracy: Documenting a Democracy* (Web Page) (2011) <https://www.foundingdocs.gov.au/>; Bennett and Castles (n 38) 254; Banner (n 2) 14; Raelene Webb 'The Birthplace of Native Title – From Mabo to Akiba' (2017) 23 *James Cook University Law Review* 31, 33.
[115] Carney (n 31) 37; Kenny (n 39) 246–7.
[116] Lane (n 38) 212, 219; *Randwick Corporation v Rutledge* (n 42) 71 (Windeyer J): 'On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown. The early Governors had express powers under their commissions to make grants of land.'

followed.[117] From 1820, the Governor sold fee simple ownership interests; earlier, fee simple had been granted.[118] In 1842 the Moreton Bay penal settlement was closed by proclamation. It was declared that 'all settlers and other free persons shall be at liberty to proceed hither in like manner as to any other part of the colony',[119] but already 'adventurous pastoralists … had moved up through New England into the Darling Downs'.[120] Jointly, the Crown Land Commissioner and the Police Magistrate assumed authority in Moreton Bay.[121] Until 1859, it remained part of New South Wales and land interests were governed by the colonial law of New South Wales.[122]

Property as wealth was at the centre of what was happening on the ground – as there was arable land to be planted, water to be drunk, and land to be made accessible. At the formal opening of the Queensland Parliament on 29 May 1860, Governor Bowen referred to a 'gigantic patrimony' entrusted 'by the Crown' to legislators.[123] As 'guardians and administrators', Bowen said legislators should be 'deeply impressed with the responsibility involved in such a trust'. Its acquittal would 'in all human probability, affect materially the interests of generations yet unborn'. In short, the 'Land Question' would be 'at once the most comprehensive and the most important' question for the legislature.[124] Thus, Bowen stated a 'firm hope and belief', founded on all that he had seen since arriving in the colony, that

> Her Majesty will have the high satisfaction of witnessing, as the result of Her gracious boon to this colony, its continued progress alike in material industry, in mental activity, and in moral and religious well-being; its steady advance in wealth and social improvement; and the permanent happiness and welfare of Her people.[125]

Indeed, addressing property as wealth as the Legislative Assembly's first substantive, non-procedural issue, the Colonial Secretary said the Government intended to introduce swiftly measures to amend real property law.[126] The *Crown Lands Alienation Act 1860*, for example, opened land for selection. Debating that bill, the Colonial Secretary said: 'The object of any land bill must be the settlement of the country, and in order to induce people to leave England and come and settle here, the land system of

---

[117] Alex C Castles, *An Australian Legal History* (Law Book Co, 1982) 218.
[118] Campbell (n 41) 2–3; Enid Campbell, 'Crown Land Grants: Form and Validity' (1966) 40 *Australian Law Journal* 35, 36–8; Castles, *An Australian Legal History* (n 117) 218; Evans (n 48) 23; Lane (n 38) 219: many early grants were not made in the name of the King, but personally in the name of the Governor. As such, they were invalid.
[119] Castles, *An Australian Legal History* (n 117) 219.
[120] Ibid 218; *Squatting Act 1839* (NSW).
[121] Carney (n 31) 55.
[122] Queensland Law Reform Commission, 'A Working Paper of the Law Reform Commission on a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland' (Working Paper No 32, 1989) 6; Stephen H Roberts *History of Australian Land Settlement, 1788–1920* (MacMillan/Melbourne University Press, 1924) 5.
[123] *Record of the Proceedings of the Queensland Parliament, Legislative Council* (n 37).
[124] QLRCWP 32 (n 122) 6.
[125] *Record of the Proceedings of the Queensland Parliament, Legislative Council* (n 37).
[126] *Record of the Proceedings of the Queensland Parliament, Legislative Assembly*, 29 May 1860, available at <www.parliament.qld.gov.au>.

the colony must be based on liberal principles, and made as attractive as possible.'[127] And, once introduced, the Real Property Bill 1861 received strong support, was enacted quickly, and the Act commenced on 1 January 1862.[128] Similarly, the Torrens land title registration legislation 'did not become a political issue in Queensland', with the bill passing through Parliament 'virtually without any opposition from the legal profession or anyone else'.[129] Other statutes, such as the *Agricultural Reserves Act 1863* establishing a scheme for land in agricultural reserves to be purchased and leased were also enacted quickly. As, of course, were sections 30 and 40 of the *Constitution Act 1867*, and until their enactment, section 2 of the New South Wales Constitution operated to similar effect.

Public revenue from property – from allocations of ownership interests in land – was a key governance imperative.[130] Queensland was '[p]enniless at its inception and not blessed with an endowment from Sydney or London'. Indeed, 'Queensland was born to debt'.[131] Creating wealth from ownership and quasi-ownership interests in land became a pillar of the colony (and then State). In *Mabo [No 2]*, Brennan J refers to 'the importance of the revenue derived from exercise of the power of sale of colonial land', explaining that 'funds derived from sales of colonial land were applied to defray the cost of carrying on colonial government and to subsidise emigration to the Australian Colonies'.[132]

Legislators therefore put in place measures 'best calculated to advance the policies thought … appropriate for the purpose of ensuring the safety and prosperity of the realm'.[133] Statute created the state-backed Torrens system requiring a clear, public record of ownership interests,[134] and new forms of tenure characterised by annual payment of rent and by conditions placed on occupation and development to ensure full use and development of land.[135] TP Fry points to the Crown perpetual leasehold tenure created under the various Land Acts as 'the zenith of the Australian system of Crown

---

[127] *Record of the Proceedings of the Queensland Parliament, Legislative Assembly, 28 August 1860 ... Extracted from the third party account as published in the Moreton Bay Courier 29 August 1860*, available at <https://www.parliament.qld.gov.au/documents/hansard/1860/1860_08_28_A.pdf>.
[128] DS Whalan, *The Torrens System in Australia* (Law Book Co, 1982) 8–9: 'Queensland followed too quickly', the first jurisdiction to adopt the landmark legislative reforms of the *Real Property Act 1858* (SA), the Torrens system of land registration; AA Preece, 'Reform of the Real Property Acts in Queensland' (1986) 2 *QUT Law Review* 41.
[129] Whalan (n 128) 8–9.
[130] *Pastoral Leases case* (n 44) 418 (Gummow J), citing *In re Natural Resources (Saskatchewan)* [1932] AC 28, 38; Banner (n 2) 4.
[131] Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 114; Evans (n 48) 78: 'its Treasury was empty – a thief broke in several nights after Bowen's arrival and stole the seven and one-half pence deposited there'; Lane (n 38) 212; *The Queensland Debt Act of 1862* (NSW); BA Knox, 'Care Is More Important Than Haste: Imperial Policy and the Creation of Queensland, 1856–9' (1976) 17 *Historical Studies* 64. A file of many versions of the bill, including hand-written annotations and copies of accounts provided by the colony of Moreton Bay and then Queensland, is in the Mitchell Library, Sydney.
[132] *Mabo (No 2)* (n 40) [55] (Brennan J), citing *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, 449–50; *Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1, 208–12.
[133] Fry (n 70) 167.
[134] *Real Property Act 1861* (Qld).
[135] Babie (n 83) 163.

leasehold tenures'.[136] Gaining public revenue from land in exercise of its land allocation power, the colonial government defrayed the costs of carrying on colonial government and subsidised emigration to the colony,[137] with strong expectations of private and public wealth built from the property institution aired in parliamentary and public debate about state debt.[138] For, although New South Wales was pushing for apportionment of public debt relating to the costs of administration and public works in the northern colony,[139] Queensland failed to meet the debt New South Wales claimed was owing.[140]

Wealth from land influenced also the response of legislators to disagreements arising between 'avaricious settlers and indigenous peoples'.[141] The Imperial government at Westminster expressed concern 'through such luminaries as Earl Grey' about displacement.[142] And, in law, legislators could have affirmed the title to lands and waters of Aboriginal peoples and Torres Strait Islanders holding a spiritual connection, 'subject only to the new paramount title of the Crown'.[143] However, settlers demanded sections 30 and 40 of the Constitution be used to legitimise ownership interests in land held of the Crown.[144] Lisa Ford describes agitation, ultimately successful, for legislation stating clearly 'the idea of territorial jurisdiction and the authority of the state to exercise it'.[145] Thus, societal and ideological goals influenced 'the performative logic of sovereign power that systematically dispossessed First Nations as colonial settlement expanded'.[146]

The contemporary property institution's role in a state is influenced also by its social and ideological background, Harris says,[147] and three Queensland examples illustrate Harris's statement. The first is that a colonial 'power to pursue the internal development of the new colony' became a clear, continuing legislative power over development via land interests.[148] Nicole Graham refers to a change 'from land law to property law [instituting] legal and economic norms that are now mostly accepted uncritically

---

[136] Fry (n 70) 167.
[137] *Williams v Attorney-General for New South Wales* (1913) 19 ALR 378, 408 (Barton ACJ).
[138] *Record of the Proceedings of the Queensland Parliament, Legislative Assembly, extracted from the third-party account as published in the Moreton Bay Courier, 4 July 1860*, <https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates/dates/1860>; 'Moreton Bay Public Debt' *The Moreton Bay Courier* (Supplement, 1 December 1857).
[139] *The Queensland Debt Act of 1862* (NSW).
[140] John Wanna and Tracey Arklay, *The Ayes Have It: The History of the Queensland Parliament, 1957–1989* (ANU Press, 2010) 1.
[141] Paul McHugh and Lisa Ford, 'Settler Sovereignty and the Shapeshifting Crown' in Lisa Ford and Time Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2013) 23.
[142] Keane (n 54) 121; Lisa Ford, 'Locating Indigenous Self-determination' in Ford and Rowse (n 186) 2: Ford refers to the reordering of space.
[143] Fry (n 70) 158 n 1: more than a century later, this approach was adopted in Papua and New Guinea a very short distance to the north of Queensland; Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, 1989).
[144] Jan Kociumbas, *The Oxford History of Australia* (Oxford University Press, 1992) 317: 'In the north-east of the continent the new colony of Queensland, founded in 1859, was developing its own Native Police Corps to put down Aboriginal resistance across the vast areas now being annexed for pastoralism or gold.'
[145] Ford, *Settler Sovereignty* (n 40) 40–6: 'settler' projects in Australian and North American are contrasted with those in other British colonies governed through indigenous hierarchies; Tamanaha (n 2) 406; Pistor (n 66) ch 1.
[146] Synot and de Silva-Wijeyeratne (n 38) 37, referencing the judgment of Brennan J in *Mabo (No 2).*
[147] Harris, *Property and Justice* (n 1) 3.
[148] Keane (n 54) 122–3; *New South Wales Aboriginal Land Council* case (n 61) [103]–[114] (Gageler J).

and reproduced through education and practice'.[149] The norms add to the early, broadly-worded constitutional powers that continue to be interpreted broadly.[150] The second is that the legislative control of immense revenue from property as wealth allowed legislators to set 'priorities in terms of the expenditure of public moneys'.[151] In the twenty-first century, priority setting continues to favour this source of revenue, including from resource royalties, as evidenced by the State's annual budget.[152] The third is the innovative use of grants of title held of the Crown 'so as to control the exercise of an individual's rights in relation to land', including as held under forms of statutory tenure.[153] Via that exercise, legislators continue to ensure, amongst other objectives, that land is 'preserved for the public good'.[154]

In the twenty-first century, property as wealth is no longer 'virtually the only form of investment available' to capitalists,[155] and is not the only way to secure independence in the way it once was.[156] Nor is there any longer the same scope to secure independence from the state via accumulated wealth in the form of private property interests as to land, goods or money.[157] Instead, in modern states, property as wealth and the fostering of individual autonomy and development form together 'the legitimate basis of a human right to property' and the basis of a just society.[158] The social and ideological background to Queensland's property institution therefore provides legislators with understanding of 'private property as a fundamental human right', a right promoted and protected by any just society 'founded on egalitarian principles, sensitive to individual freedom and autonomy, and respecting the inviolability of the person'.[159]

A third feature, examined in the next section, develops from AM Honoré's argument that 'ideas come in packages' with legal forms associated with the social and ideological goals of the Queensland property institution.[160]

---

[149] Graham (n 93) 2.
[150] Keane (n 54) 122–3; *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1.
[151] *Pastoral Leases case* (n 44) 418 (Gummow J).
[152] The Honourable Cameron Dick MP (Treasurer, Minister for Investment), Appropriation Bill 2021, First Reading Speech, 15 June 2021, available at <www.parliament.qld.gov.au>.
[153] Babie (n 83) 163.
[154] Ibid; *Land Act 1994* (Qld) s 4.
[155] QLRC, *Report No 16* (n 50) 1–2; Pistor (n 66) 5; Evans (n 48) 78; Ford 'Thinking Big About New South Wales History' (n 39) 206.
[156] Reich (n 12) 771: especially, Reich says, 'when compared with freedoms of speech, political association, and demonstration of grievances, and immunities from arbitrary arrest and excessive surveillance'.
[157] Ibid.
[158] Harris, 'Is Property a Human Right?' (n 1) 85; Lametti, 'The Morality of James Harris's Theory' (n 9) 139–41.
[159] Lametti 'The Morality of James Harris's Theory of Property' (n 9) 164.
[160] Honoré (n 107) 32–3: 'Thus, it is recognised in Marxist theory that fully developed capitalism is incompatible with feudal conditions of labour; it requires formally (legally) free labourers who can move and sell their labour as they see fit.'

IV THE LEGAL FORMS

Analysis in this section, of the legal forms of the Queensland property institution, proceeds via the Honoré-Waldron thesis developed by Babie, Orth and Weng to identify the bespoke balance and emphasis given to ideal-typic categories of property.[161] The thesis is that 'the true difference between systems is not one of the presence or absence of any one or more than one ideal-typic form of property, but one of degree of those types of property in each system'.[162] Analysis of the legal forms of the real property system in place in Queensland promotes legislative understanding of the real property system.

In *Property and Justice*, Harris notes theorists' claims that the conception of property comprises three parallel ideal types of property: private property; state (or collective property); and common property.[163] The first ideal-typic category encompasses ownership relations, but the second and third do not.[164] Harris adds a fourth category, 'communitarian property'.[165]

Babie, Orth and Weng observe that 'every legal system, no matter its politico-economic genesis, contains a mix of each of the four ideal types identified initially by [Honoré] in 1961 and sharpened by Harris'.[166] Three ideal-typic categories are identified by Honoré': 'private property' ('comprising both full ownership and some parcelling of a smaller bundle of those rights which together might constitute full ownership held by an individual private person');[167] 'state or public property'; and 'common property'.[168] Harris adds a fourth category, 'communitarian property', a term standing for 'any situation in which the members of a group have mutual rights over a resource, referable exclusively to their own traditions, but are protected against the rest of mankind by trespassory rules'.[169] This part explores the mix of these types in the Queensland system of real property, and the exploration has two strands: Honoré's analytical description of 'ownership' and its 'standard incidents' or 'bundle of rights';[170] and Waldron's contention that categorising an entire property system is a matter of balance and emphasis.[171]

Honoré states:

---

[161] Babie, Orth and Weng (n 10).
[162] Ibid; Jeremy Waldron, *Liberal Rights: Collected Papers, 1981–1991* (Cambridge University Press, 1993) 312–3; Harris, *Property and Justice* (n 1) 110.
[163] Harris, *Property and Justice* (n 1) 111–2; Jeremy Waldron *The Right to Private Property* (Clarendon Press, 1988) ch 2; 'What is Private Property?' [1985] *Oxford Journal of Legal Studies* 313.
[164] Harris, *Property and Justice* (n 1) 112.
[165] Ibid 115: property belonging to First Nations peoples but existing due to recognition within a dominant legal system.
[166] Babie, Orth and Weng (n 10).
[167] AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 109–10; Babie, Orth and Weng (n 10) 740.
[168] Honoré, 'Ownership (n 167): the third category is 'that form of ownership which attaches to the state or the public, or to the community, or to some defined group drawn from the members of a wider community or of the state'.
[169] Harris, *Property and Justice* (n 1) 115.
[170] Honoré, 'Ownership' (n 167) 105–47.
[171] Waldron, *Liberal Rights* (n 162) 313.

> For mature legal systems … certain important legal incidents are common to different systems … Ownership, dominium, propriété, Eigentum, and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular systems. It must surely be important to know what these common features are.[172]

Waldron observes that '[p]roperty rules differ from society to society … Every society has private houses, military bases and public parks. So if we want to categorize whole societies along these lines, we have to say it is a matter of balance and emphasis.'[173] Together, the two strands mean that '[t]he intuitive sense that people have of [a] system … may not be, and likely is not necessarily so'.[174] Application of the thesis to the Queensland real property system proceeds by considering the presence of each ideal-typic category.

Private property has logical priority over all non-private conceptions of property because 'unless some ownership interests are accorded to individuals or groups, there will be no property institution'.[175] And all other features of the property institution 'take their meaning from, or in contrast to, ownership interests'.[176] In Harris's analysis, rights constituent of private property are held by individuals, jointly by individuals or a group, or by a corporation.[177] Waldron says private property is 'assigned to the decisional authority of some particular individual (or family or firm)',[178] while CB Macpherson stresses the personal characteristic.[179] That is, 'private' indicates property 'based on the individual: property could only be seen as a right of an individual, a right derivable from his human essence, a right to some use or benefit of something without the use or benefit of which he could not be fully human'.[180] And C Edwin Baker describes private property as 'a claim that other people ought to accede to the will of the owner' because '[a] specific property right amounts to the decision making authority of the holder of that right'.[181]

---

[172] Honoré, *Making Law Bind* (n 107) 162.
[173] Waldron, *Liberal Rights* (n 162) 313.
[174] Babie, Orth and Weng (n 10).
[175] Harris, *Property and Justice* (n 1) 111–4.
[176] Ibid 114: it follows 'that "private property" is legally prior to all non-private conceptions of property'.
[177] Ibid 100–18; Lisa M Austin, 'The Public Nature of Private Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 1: 'private property' means 'the idea of private ownership and its associated doctrines'.
[178] Jeremy Waldron, 'Property Law' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2010) 9.
[179] CB Macpherson, 'Liberal Democracy and Property' in CB Mapherson (ed), *Property, Mainstream and Critical Positions* (University of Toronto Press, 1978) 201–2; Brendan Edgeworth, 'Post-Property? A Post-Modern Conception of Private Property' (1988) 11 *UNSW Law Journal* 87; Harris, 'Is Property a Human Right?' (n 1) 73.
[180] Macpherson (n 179) 201–2.
[181] C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741, 742–3.

In Queensland, the common law has long protected property.[182] Legislation, however, expands significantly upon this protection. The *Property Law Act 1974* and the *Acquisition of Land Act 1991,* for instance, mark out rights constituent of private property, and provide remedies for infringement of property rights. More recently, the *Human Rights Act* protects and promotes positive and negative property rights.[183]

Public or state property, exists where 'the collective, represented usually by the state, holds all rights of exclusion and is the sole locus of decision-making regarding use of resources'.[184] Rather than individuals, groups or corporations, 'agents of the state or other public officials' are conferred with 'bundles of rights … in relation to certain assets'.[185] This means there is a 'non-self-seekingness' when rights are exercised, with the exercise governed by the public or state purpose for which the property is held, and legislation is likely to state those purposes.[186] Babie, Orth and Weng examine four examples of public and state property in Australian jurisdictions: pastoral leases; selections; perpetual leases; and land reserved for a public purpose.[187] Through these tenures created by legislation, the large body of public or state land within an Australian State system is 'enjoyed by individuals as a form of quasi-private property, or by the public pursuant to some form of trust, through the proliferation of these variously legislatively created tenures'.[188]

In Queensland, legislators have variously created pastoral leases,[189] selections,[190] perpetual leases[191] and reserve land for a public purpose.[192] Indeed, since separation from New South Wales, legislators exercising the powers conferred by sections 30 and 40 of the *Constitution Act 1867* have created 'a vast body of public/state property', including 'an array of tenures unknown to the English law' that constituted 'a new form of private property in those lands'.[193] Thus, the administering government department refers to 'land under the control of the State of Queensland … which may be subject to a

---

[182] *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* (2009) 237 CLR 603 [40]–[41] (French CJ).
[183] *Human Rights Act* ss 24(1) and (2).
[184] Babie, Orth and Weng (n 10) 748.
[185] Ibid.
[186] Ibid; Harris *Property and Justice* (n 1) 104–5.
[187] Babie, Orth and Weng (n 10).
[188] Ibid 767–9.
[189] See *Land Act 1994* ch 8, pt 4; Austrade, *About Land Tenure – Pastoral Leases*, available at <https://www.austrade.gov.au/land-tenure/Land-tenure/pastoral-leases>: 'It is estimated that there are approximately 1000 pastoral leases in existence covering about 40% of Queensland.'
[190] Department of Natural Resources and Mines, *A Guide to Land Tenure Under the Land Act 1994* (State of Queensland, 2013) 6: a perpetual lease selection was granted as a lease in perpetuity for intensive farming and used to promote the soldier settlement and closer settlement schemes. The tenure was phased out in the final decades of the twentieth century.
[191] See *Land Act 1994*, ch 8, pt 3: these include grazing homestead perpetual leases and non-competitive perpetual town, suburban and country leases issued for purposes such as residential, business, commercial and tourism activities.
[192] See *Land Act 1994*, ch 3, pt 1 and s 23.
[193] Babie, Orth and Weng (n 10) 766.

lease, licence or permit, reserved for a community purpose, dedicated as a road or subject to no tenure at all'.[194]

Common property Harris explains as 'no property'; namely, 'resources which are exempted, not merely from ownership and quasi-ownership interests, but also from trespassory rules'.[195] The category can be seen as 'a largely theoretical foil in order to explain why private property exists (in other words, why an exclusionary right exists)'.[196] Within a system of property, 'the term may be applied to some kinds of wild animals, sunlight, atmospheric oxygen, and airspace above a certain height', but 'for the time being, this form of property remains a very insignificant one in Australian law'.[197] In *Yanner v Eaton*, the High Court discussed common property when examining interaction between the *Fauna Conservation Act 1974* (Qld) and Yanner's rights to catch juvenile estuarine crocodiles. The Act vests all wild fauna in the Crown and under the control of a Fauna Authority. The State of Queensland and Commonwealth of Australia argued the Crown's interest is 'full beneficial, or absolute, ownership'.[198] The Court held that as at common law 'wild animals were the subject of only the most limited property rights … there could be no "absolute property", but only "qualified property" in fire, light, air, water and wild animals'.[199] Instead, the interest of the Crown under the Act is regulatory in character.[200] And, in a similar way, although sunlight and air are 'infinite and uncontrollable' with no one able to 'hold title over them',[201] 'ubiquitous … modern urban regulation' is removing the ability to refer to them as 'common property'.[202]

Communitarian property is 'the most difficult category'.[203] It is 'that form of property which belongs to an indigenous people, yet depends for its existence upon the recognition and protection of a dominant legal system'.[204] Harris explains the ideal-type to be communitarian if it can be seen that 'individual self-seeking ownership' would be unjust, even though 'some kind of trespassory protection' is desirable.[205] The term indicates a community of people having the following relationship to land:

---

[194] Department of Natural Resources and Mines (n 190) 1.
[195] Harris, *Property and Justice* (n 1) 110–1; *Land Title Act*, pt 6A and s 41A (Creation of indefeasible title for common property): common property is distinct, therefore, from community titles schemes, including the 'common property' in those schemes.
[196] Babie, Orth and Weng (n 10) 764.
[197] Ibid 765.
[198] *Yanner v Eaton* (1999) 201 CLR 351 [22] (Gleeson CJ, Gaudron, Kirby, Hayne JJ).
[199] Ibid [24] (Gleeson CJ, Gaudron, Kirby, Hayne JJ); Harris, *Property and Justice* (n 1) 110; Roscoe Pound, *An Introduction to the Philosophy of Law: Revised Edition* (Yale University Press, 1954) 111.
[200] *Yanner v Eaton* (n 198) [22] (Gleeson CJ, Gaudron, Kirby, Hayne JJ).
[201] Babie, Orth and Weng (n 10) 764; Bradbrook MacCallum Moore Grattan, *Australian Real Property Law* (5th ed, Lawbook Co, 2011) [17.190]–[17.210].
[202] Babie, Orth and Weng (n 10) 765; *Bloom v Lepre* [2008] NSWSC 79 [39] (Young CJ in Eq): sunlight is stated to be a non-proprietary right ancillary to property; *Property Law Act 1974* (Qld) s 178; Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.8]–[3.9].
[203] Babie, Orth and Weng (n 10) 741, 786; Harris, *Property and Justice* (n 1) 100–18.
[204] Babie, Orth and Weng (n 10) 748.
[205] Harris, *Property and Justice* (n 1) 111–2.

> They have the benefit of trespassory rules excluding outsiders from the resource – in that sense it is their private property. However, whatever powers of internal division or transmission they possess are referable, not to the wider institution which contains the trespassory rules that confer protection against outsiders, but to internal regulations arising from their mutual sense of community.[206]

The interests of the Meriam people of the Torres Strait are a 'surviving instance of communitarian property',[207] accepted in *Mabo (No 2)* as 'a special defeasible interest which the common law ought in justice to (and therefore did) recognize'.[208] The decision means native title persists only as long as the group holding the communitarian property retains 'some spontaneous evolving connection to the land', and that the interest is to be disposed of only to the Crown.[209] Subsequent decisions of the High Court note the importance of legislators appreciating communitarian rights and interests consistent with long communitarian occupation,[210] and appreciating 'tradition' and the spiritual connection of Aboriginal peoples and Torres Strait Islanders with 'country'.[211]

A property question evaluated by the Queensland Parliament at the turn of the twenty-first century demonstrates the utility to legislators of inquiring into the legal features of the institution in place in Queensland. By the final decade of the twentieth century, three law reform bodies had made recommendations for the consolidation of the various constitution statutes.[212] A parliamentary committee queried though the recommendation to repeal sections 30 and 40 of the *Constitution*

---

[206] Ibid 103.
[207] Ibid 103–4.
[208] *Mabo (No 2)* (n 40): the decision provides the only common law determination of communitarian ideal-typic property in Queensland. All subsequent determinations were made under the *Native Title Act 1993* (Cth), which provides a national forum in which native title determinations are made.
[209] Harris, *Property and Justice* (n 1) 104; *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209 [32]–[35].
[210] *Love v Commonwealth* (2020) 270 CLR 152 [28] (Kiefel CJ).
[211] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167; *Love v Commonwealth* (n 210) [70] (Bell J), [121] (Gageler J), [194] (Keane J), [276] (Nettle J), [290] (Gordon J), [458] (Edelman J), [22], [28] (Kiefel CJ): 'It may be accepted that the connection spoken of in these cases is special, unique even. Its importance at a personal and community level to the members of an Aboriginal group cannot be denied'; Evans (n 48) 5; *Human Rights Act 2019* s 107: the Act does not affect native title rights and interests.
[212] Electoral and Administrative Review Commission, *Report on Consolidation and Review of the Queensland Constitution* (Queensland Government Printer, 1993); Legal Constitutional and Administrative Review Committee, *Consolidation of the Queensland Constitution: Final Report (Report No 13)* (Queensland Government Printer, 1999); Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to the Acts and Laws that relate to the Queensland Constitution* (Queensland Government Printer, 2000); Legal Constitutional and Administrative Review Committee, *Review of the Queensland Constitutional Review Commission's Recommendations Relating to a Consolidation of the Queensland Constitution (Report No 24)* (Queensland Government Printer, 2000); John Waugh, 'Australia's State Constitutions, Reform and the Republic' (1996) 3 *Agenda* 59; Julie Copley, 'Public Deliberation on Legislation: From Fitzgerald to Facebook and Beyond', paper presented at *Scrutiny and Accountability in the 21st Century*, Australia-New Zealand Scrutiny of Legislation Conference, July 2009, Parliament House, Canberra, Australia.

Act 1867, beyond repeal of a proviso in section 40(2) regarded in law as spent.[213] The committee thought repeal and re-enactment 'would affect native title holders differently than it would affect freehold title holders and would therefore not be a valid future act under the *Commonwealth Native Title Act 1993*'.[214] The legislature preserved the sections of the *Constitution Act 1867* in section 69 of the *Constitution of Queensland 2001*, accepting a recommendation to maintain 'the constitutional status quo surrounding land ownership and native title'.[215] Legislators did not, therefore, prise open places for the interests omitted from the trespassory rules and interests on the ownership spectrum in the way that Irene Watson advocates; namely, that 'the rewriting needs to be done from "another place", outside the jurisdiction of the Australian common law and the sovereignty of the Australian state'.[216] However, the legislators did not close off those places completely, as might have occurred if initial recommendations were accepted.

The committee's rejection of the proposed constitutional reform, and the property discourse of the committee's legislators, model a cautious approach to institutional norms. The 'constitutional logic that puts a concern for communities at the heart of the constitutional project' can facilitate 'groups as sites of repression and discrimination'.[217] In colonial and in contemporary times, holdings of wealth may secure independence, but holders of property as wealth are able to dominate the lives of others.[218]

For legislators then, an inquiry into the legal features of the real property system delivers clear normative findings. First, there is no one essential or 'correct' composition of legal forms.[219] Colonial legislators put in place, and contemporary legislators maintain and alter, a bespoke mix, balance and blend of ideal-typic categories. Second, private property is preferenced by legislators over other forms of resource allocation and management. The 'protection and promotion of individual autonomy forms an important – perhaps *the* most important – component of' the institution;[220] and is protected and promoted by the *Human Rights Act*.[221] Thus, trespassory rules and the ownership spectrum maintain

---

[213] Queensland Constitution Bill 2001, Explanatory Notes 34, available at <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2001-755>; *Mabo (No 2)* (n 39) 195, 201, 239 (Mason CJ, Wilson and Dawson JJ): the utility of the proviso in s40(2) of the *Constitution Act 1867* had long since ceased to exist.

[214] Queensland Constitution Bill 2001, Explanatory Notes (n 213) 33–4: 'As native title may still exist over some of the waste lands, re-enacting [ss 30 and 40] would permit dealings with land in respect of which there may be native title but not ordinary title. The re-enactment may affect native title holders whereas ordinary title holders would not be affected because the legislation has no effect on them.'

[215] Legal Constitutional and Administrative Review Committee (n 212).

[216] Irene Watson, 'First Nations Stories, Grandmother's Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Re-writing Law* (Hart Publishing, 2014) 46, 53; Osca Monaghan, '*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141: Essay' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making*' (Routledge, 2021) 25.

[217] Benjamin L Berger, 'Freedom of Religion' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 755, 769.

[218] Harris, *Property and Justice* (n 1) 149; Reich (n 12) 746–55.

[219] Harris, *Property and Justice* (n 1) 149; Lametti, 'The Morality of James Harris's Theory' (n 9) 139–40.

[220] Lametti, 'The Morality of Harris's Theory' (n 9) 148–9.

[221] *Human Rights Act* s 24.

'independence, dignity and pluralism in society by creating zones in which the majority has to yield to the owner'.[222] Third, all four ideal-typic categories are contemporary legal features of the institution, including the communitarian property of Aboriginal peoples and Torres Strait Islander groups.[223]

The findings in this section complement the findings in the earlier sections of this chapter. The findings were of a Queensland property institution: creating in each citizen a moral 'background right to property';[224] with a social and ideological background in which private property is promoted and protected by a just society 'founded on egalitarian principles, sensitive to individual freedom and autonomy, and respecting the inviolability of the person'.[225] Taken together, the findings across the chapter foster deeper, normative understanding of the legal and political arrangements of the Queensland property institution, its social and ideological background, and its balance and blend of legal features. The evidence is of a bespoke but malleable property institution.

The findings demonstrate that, for the framework (evaluating proposed legislation to address a property question), legislators ought to understand what 'property' is, and what legal and political arrangements are in place for a property institution, and why. The preservation, perhaps temporarily, of sections 30 and 40 of the *Constitution Act 1867* demonstrates, for example, that 'the governing paradigms which have structured all of our lives are so powerful that we can think we are doing progressive work, dismantling the structures of racism and other oppressions, when in fact we are reinforcing the paradigms'.[226] In short, an institutional inquiry equips legislators for deeper, normative argument about distribution and institutional design and re-design.

In the proposed staged formation of normative argument then, the institutional norms of a background right to property, analysed in this chapter, influence the 'property' norms drawn from 'a mix of property-specific justice reasons [to] be taken into account, where relevant, in any question of distribution or property-institutional design'.[227] The property norms – from the internal morality of property – are analysed in the second stage of the formed argument in Chapter 3.

[222] Reich (n 12) 771.
[223] *Constitution of Queensland 2001*, Preamble.
[224] Harris, 'Is Property a Human Right?' (n 1) 84–5.
[225] Lametti, 'The Morality of James Harris's Theory of Property' (n 9) 164.
[226] Monaghan (n 294) 30; Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017) 55: even in a postcolonial context, there may be a mismatch between property rights recognised by the community and rights recognised by a state.
[227] Harris, 'Is Property a Human Right?' (n 1) 85.

CHAPTER THREE: PROPERTY'S INTERNAL MORALITY

I QUEENSLAND LEGISLATORS AND PROPERTY AND JUSTICE

Stage 2 (property) of a theoretical inquiry equipping legislators to give meaning to practice involves an analysis of the internal morality of property. The analysis identifies substantial moral imperatives – norms – to be imported into law by enacted property rules.[1] Chapter 2 sets out a proposed approach to the use of real-world normative tools for questions of distribution and institutional design. To begin, legislators adopt JW Harris's rights-based approach to internal morality.[2] Then, for more complex issues of property, a second tool augments the analysis. That tool is selected from the more overtly 'moral' approaches,[3] such as in the theory of Joseph Singer or Laura Underkuffler.[4] Throughout Stage 2 analysis, a third real-world normative tool, rational discourse, is essential to legislative identification and mediation of property norms.[5]

This section provides an overview of theory supportive of the Stage 2 inquiry, and of the moral concerns of Australians relevant to the framework. Subsequent sections address, progressively: Harris's mix of property-specific justice reasons relevant in any question of distribution or property-institutional design; the benefits, when necessary, of supplementary, more overtly moral approaches to property; and justificatory and normative discourse informing legislative responses to property questions.[6]

An initial point to note is that many property questions might appear to legislators to have nothing to do with property.[7] However, a substantial body of theory, complemented by High Court jurisprudence, reveals the property norms relevant to legislative practice. The literature includes Harris's theory of property in western philosophical traditions, 'thicker', more explicitly moral approaches to property,

---

[1] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Polity Press, 1997) 146: Habermas identifies a gap arising from the separation of conventionalised law from postconventional morality.
[2] Jim Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 64, 86; JW Harris, *Property and Justice* (Oxford University Press, 1996) 305; Charles Taylor, 'The Nature and Scope of Deliberative Justice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985) 289.
[3] David Lametti, 'The Morality of James Harris's Theory of Property' in T Endicott, J Getzler and E Peel (eds), *The Properties of Law: Essays in Honour of James Harris* (Oxford University Press, 2006) 148–9; Harris, 'Is Property a Human Right?' (n 2); Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) *Cornell Law Faculty Publications* 11.
[4] Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000); Joseph William Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime* Crisis (Yale University Press, 2015); Laura Underkuffler, *The Idea of Property: Its Meaning and Its Power* (Oxford University Press, 2003).
[5] Jeremy Waldron, 'Human Dignity: A Pervasive Value' (Public Law Research Paper No 20-46, NYU School of Law, 1 July 2019) 5, available at <http://dx.doi.org/10.2139/ssrn.3463973>; Jürgen Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 (4) *Metaphilosophy* 464; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016).
[6] Jürgen Habermas, *Philosophical Introductions: Five Approaches to Communicative Reason*, tr Ciaran Cronin (Polity Press, 2018); Taylor (n 2).
[7] Harris, *Property and Justice* (n 2) 305.

and recent theory of human dignity's mediating role as the moral source from which property rights derive their meaning in a modern state. Theoretical contributions examined include those from Jeremy Waldron, Jürgen Habermas and Jacob Weinrib.[8] Waldron's concept is of dignity as a 'pervasive' constitutional value and Habermas's is of dignity as a 'portal' through which the egalitarian and universalistic substance of morality is imported into law.[9] Waldron,[10] Habermas,[11] Weinrib[12] and Conor Gearty[13] all have something to say about how legislators might pin down conceptualisations of property. The contentions are that legislators can grasp and evaluate hard questions by engaging in contextual discourse, including about human dignity's 'proper use' in legislation.[14] Each theorist advocates discourse about dignity as a conceptual hinge between individual rights and a just society; for example, Habermas argues that discourse ethics, with human dignity providing the internal conceptual connection, creates an 'explosive fusion' of moral contents and coercive law.[15]

The moral contents in Australian society are indicated by data from a 2014 national consultation by the Australian Human Rights Commission on 'Rights and Responsibilities'.[16] Australian people were asked to identify: 'the types of property you own or believe you should own'; 'where restrictions on your property rights exist'; 'whether your right to own property or exercise rights has been compromised, restricted or removed'; and 'what could be done to enable you to exercise your right to property'.[17] The Commission's consultation report states '[t]he right to property provides security, and enables opportunities for economic and social development'.[18] Themes about 'how property rights affect the lives of Australians' are identified in the report; namely, 'access to affordable housing and homelessness'; 'government acquisition of land or regulation of land use'; 'the freedom to exercise native title'; 'intellectual property rights'; and 'criminal confiscation laws'.[19]

---

[8] Waldron, 'Human Dignity: A Pervasive Value' (n 5); Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5); Weinrib (n 5).
[9] Waldron, 'Human Dignity: A Pervasive Value' (n 5); Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 469.
[10] Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' (Public Law Research Paper No 08-35, NYU School of Law, 2008) 12, available at <https://ssrn.com/abstract=1280923>; Gerald J Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, 2011) 565: '[n]o philosopher in the Anglophone tradition since Bentham has focused upon such questions … of institutional focus and competence and the balance of interaction among legal institutions'.
[11] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5).
[12] Weinrib (n 5) 3, 18.
[13] Conor Gearty, 'Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 155.
[14] Waldron, 'Human Dignity: A Pervasive Value' (n 5) 16; Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 84; Weinrib (n 5) 96.
[15] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 479.
[16] Australian Human Rights Commission, *Rights and Responsibilities: Consultation Report* (2015) 8, available at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/rights-responsibilities-consultation-report>; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2016) [20.9].
[17] Australian Human Rights Commission (n 16); Australian Law Reform Commission (n 16).
[18] Ibid 39.
[19] Ibid.

Legislators have an obligation to achieve justice, taking into account the moral concerns of the plurality of the political community, even though this is not an easy task. Indeed, '[p]eople everywhere invoke "justice" in political and ethical controversies and in criticizing and applying the law. Against that, two and a half millennia of speculative thought have yielded no agreement about what justice is.'[20] The property-specific justice reasons in Harris's theory of property and justice are examined in the next section as a foundation for legislative evaluation.

II HARRIS ON INTERNAL MORALITY

The normative inquiry in this section is, put simply, into what is really going on with property. The objective of this real-world normative tool is to examine the internal morality of the Queensland property institution to identify norms relevant to the framework: the connections to be made between property theory and legislative practice. It is anticipated the findings will equip legislators to shift the egalitarian and universalistic substance of morality into enacted law. Again, theory provides legislators with 'ways of giving meaning to practice'.[21] The proposed starting point is the contextual internal morality in Harris's theory of property and justice, focusing on the 'protection and promotion of individual autonomy'.[22] This focus is a 'widely shared and highly defensible' in the modern Western idea of property.[23] Analysis follows of more moral, augmenting approaches to private property, including the theory of Joseph William Singer, Laura Underkuffler and David Lametti; these 'thicker' approaches present a property institution as a social, contextual institution.[24] They adopt a less individualistic view of society,[25] and an idea of property that is 'more inherently and fundamentally complex'.[26]

Given the complexity of property questions, legislators evaluating questions about distribution and property-institutional design commonly fail to attend to specifications of morality, even though morality (or a determination to avoid questions of morality) is a key preoccupation of property theorists.[27] The proposed starting point therefore is Harris's approach to the contextual internal morality, and its focus on protecting and promoting individual autonomy.[28]

---

[20] Harris, *Property and Justice* (n 2) vii.
[21] Janet McLean, 'The Crown in the Courts: Can Political Theory Help?' in Linda Pearson et al (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Bloomsbury, 2008) 161, 172.
[22] Harris, 'Is Property a Human Right?' (n 2) 85; Harris, *Property and Justice* (n 2).
[23] Lametti, 'The Morality of James Harris's Theory' (n 3) 148–9.
[24] Ibid; Singer, *Entitlement* (n 12); *No Freedom Without Regulation* (n 12); Underkuffler (n 12); Alexander et al (n 3).
[25] Lametti, 'The Morality of James Harris's Theory' (n 3) 150.
[26] Alexander et al (n 3) [1]–[2]: it is necessary to examine 'the underlying human values that property serves and the social relationships it shapes and reflects'.
[27] Harris, *Property and Justice* (n 2) Preface, viii; David Lametti, 'Destination' (2020) 66 *McGill Law Journal* 47.
[28] Harris, *Property and Justice* (n 2); Harris, 'Is Property a Human Right?' (n 2).

Harris observes that, from time to time, we 'disagree on moral and political grounds about how property should be allocated among us'.[29] We assume, however, 'that "property" does not refer to a morally contested concept in the way that justice does'.[30] The advantage of this neutral starting point is that legislators need not search for 'one true, valid, moral form of private property with which to compare all other schemes'; in fact, doing so would be a misguided enterprise.[31] Instead, as in Queensland, as found in the previous chapter, legislators should assume a 'malleable' property institution.[32]

Harris assesses, next, the 'normative weight that ought to be given to various kinds of justificatory argument about the justice of the property institution'.[33] As 'issues of justice are often difficult' and controversial,[34] Harris begins with a minimalist conception of justice.[35] Quarrying claims about 'just human association which have a bearing on property institutions' from Western political philosophy,[36] Harris finds that

> [t]he upshot consists of a mix of morally viable property-specific justice reasons. I offer them to all those concerned with political and legal questions about distribution and property-institutional design. They are relevant to such questions because it is these same property-specific justice reasons that support a moral right of every citizen of a modern State that his society should provide a property institution, but only one which is structured to take account of what justice does indeed require.[37]

John Rawls explains '[j]ustice is the first virtue of social institutions as truth is of systems of thought'. Further, 'laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust'.[38] Legislators evaluating property questions demonstrate the virtue of justice when they decide questions of distribution and institutional design, taking account of what justice does indeed require.[39] This requires 'mid-level arguments about justice': arguments 'independent of some larger master vision of private property, exhibited in wider theories of justice'.[40] They involve review of holdings of 'ownership or quasi-ownership interests in land, chattels, ideas, money or cashable rights'

---

[29] Harris, *Property and Justice* (n 2) vii.
[30] Ibid 139–40.
[31] Lametti, 'The Morality of James Harris's Theory' (n 3) 163.
[32] Ibid 138–9; David Lametti, 'Property and (Perhaps) Justice: A Review Article of James W Harris, Property and Justice and James E Penner, The Idea of Property in Law' (1998) 43 *McGill Law Journal* 663, 717–8.
[33] Lametti, 'The Morality of James Harris's Theory' (n 3) 138–9.
[34] Jeremy Waldron, 'The Primacy of Justice' (2003) 9(4) *Legal Theory* 269, 29; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 82–9.
[35] Harris, 'Is Property a Human Right?' (n 2) 85; David Lametti 'The Morality of James Harris's Theory' (n 3) 140–1.
[36] Harris, 'Is Property a Human Right?' (n 2) 85.
[37] Harris, *Property and Justice* (n 2) vii–viii.
[38] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 3.
[39] Waldron, 'The Primacy of Justice' (n 34) 269; Dworkin (n 34) 82–9; Lisa M Austin, 'The Public Nature of Private Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 1, 2, 4; Paul Babie, 'Property in the Empirical World' (2019) 7 *UNSW Law Journal Forum* 1, 3.
[40] Lametti, 'The Morality of James Harris's Theory' (n 3) 142.

and whether more support ought to be given to 'non-ownership proprietary interests, or property-limitation, expropriation and appropriation rules'.[41] The justificatory arguments are: property-freedom arguments; the 'constant counterpoise' of domination-potential; and three property-instrumental arguments directed respectively to wealth creation, markets, and 'the independence from governmental control associated with private holdings of wealth'.[42] Thus Harris urges arguments about justice upon legislators (and lawyers and judges):

> I offer them to all those concerned with political and legal questions about distribution and property-institutional design. They are relevant to such questions because it is these same property-specific justice reasons which, I shall argue, support a moral right of every citizen of a modern State that his society should provide a property institution, but only one which is structured so as to take account of what justice does indeed require.
>
> Hence the day-to-day property questions which confront the political reformer, the lawyer, or the judge ultimately implicate a more fundamental question.[43]

Harris explains further that a 'moral right' arises 'when some facet of the right-subject's well-being is, *prima facie*, a sufficient reason for the introduction or maintenance of one or more social (or legal) rules'.[44] In a modern state, he states, 'the background right is now a human right'.[45] Habermas similarly describes liberal rights crystallising around 'the inviolability and security of the person, around free commerce, and around the unhindered exercise of religion … designed to prevent the intrusion of the state into the private sphere'.[46] Here, Harris argues that in the scale of human well-being, property 'ranks below life, but alongside liberty'.[47] In a 'presumptive (and weak) sense', there is a human right to 'the holdings vested in any particular person at any particular time' as the holdings are 'stamped, morally, with a contestable and mutable mix of property-specific justice reasons'.[48]

The argument from freedom and giving the individual pride of place is 'omnipresent in Harris's theory of justification', manifest in Harris's attention to rights.[49]. Harris points to the 'most celebrated exposition' of freedom and individual private property found in Hegel's *Philosophy of Right*.[50] Consistent with that exposition, the argument from freedom is an argument both for and against private property, 'based on promoting and protecting individual freedom and autonomy'.[51] Private property 'is

---

[41] Harris, 'Is Property a Human Right?' (n 2) 84.
[42] Ibid.
[43] Harris, *Property and Justice* (n 2) Preface, viii.
[44] Harris, 'Is Property a Human Right?' (n 2) 75.
[45] Ibid 85; Lametti, 'The Morality of James Harris's Theory' (n 3) 140–1.
[46] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 468.
[47] Harris, 'Is Property a Human Right?' (n 2) 87.
[48] Ibid.
[49] Lametti, 'The Morality of James Harris's Theory' (n 3) 146–7; 'Property and (Perhaps) Justice' (n 32) 720–5; Harris, 'Is Property a Human Right?' (n 2) 84.
[50] Harris, 'Is Property a Human Right?' (n 2) 84; GWF Hegel, *Elements of the Philosophy of Right*, tr HB Nisbet (Cambridge University Press, 1991) 73–101; Harris, *Property and Justice* (n 2) 236: the exposition is summarised by Harris in six propositions.
[51] Lametti, 'The Morality of James Harris's Theory' (n 3) 142.

controversial for the same reason that it is commonly prized': it 'emphasizes the individuality of the property-holder'.[52] This is because ownership interests confer individuals with 'open-ended use privileges, control-powers and (usually) powers of transmission'.[53] Ownership interests thereby augment ranges of autonomy.[54] There is also a presumptive carry-over into specific holdings, such as qualified immunity from expropriation.[55]

Harris's theory of property and justice supports legislators performing 'many functions which modern societies expect their governments to discharge',[56] including acting in the public interest to counter the domination-potential of private property holdings.[57] All property freedoms are valuable, Harris states, but 'none of them is sacrosanct'.[58] Always, there is potential for property freedoms to entail illegitimate exercises of power to dominate the life-chances of others: the domination-potential is a 'constant counterpoise' to the property-freedom argument.[59] Legislators ought bear in mind, therefore, that private property is 'about both the control and use of goods and resources, but also, and significantly, about controlling the lives of others'.[60] For property questions, legislation should be 'a tool that promotes a public perspective', not one permitting private persons to use property as an instrument of private domination.[61] The obligation of the state is to achieve justice.[62]

Three justificatory arguments complement arguments from freedom. These arise from wealth creation, valuable markets, and 'the independence from governmental control associated with private holdings of wealth'.[63] Like the property-freedom argument, arguments arising from markets and independence are distributionally-blind.[64] The implication then is that each distributionally-blind argument ought to be assessed against the justice of the institution's distributive considerations.[65] That is to say, the moral

[52] Harris, *Property and Justice* (n 2) 165.
[53] Harris, 'Is Property a Human Right?' (n 2) 84.
[54] Ibid.
[55] Ibid; *Human Rights Act 2019*, s24(2): 'A person must not be arbitrarily deprived of the person's property.'
[56] Harris, *Property and Justice* (n 2) 150, 364–6; Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733, 773–4.
[57] Lametti, 'The Morality of James Harris's Theory' (n 3) 84.
[58] Harris, 'Is Property a Human Right?' (n 2) 84.
[59] Ibid; Lametti, 'The Morality of James Harris's Theory' (n 3) 84; Robert J Shiller, *The New Financial Order: Risk in the 21st Century* (Princeton University Press, 2003) 156: 'There must be some obvious limitations arising from the inability of some private persons, such as minors and the unborn, to take risk management action regarding their private property interests.'
[60] Morris R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8, 9; Paul Babie, 'Sovereignty as Governance: An Organising Theme for Australian Property Law' (2013) 36 *University of New South Wales Law Journal* 1075; Paul Babie, 'Private Property: The Solution or The Source of The Problem?' (2010) 2(2) *Amsterdam Law Forum* 17, 19: 'The state, through law, creates private property just as through that same law (what is more commonly known as regulation), it is said to mediate the socially contingent boundary between private property and non-property holders. This is the essence of private property – state conferral of self-serving rights that come with obligations towards others.'
[61] Austin, 'The Public Nature of Private Property' (n 39) 10; Lisa M Austin, 'Property and the Rule of Law' (2014) 20 *Legal Theory* 79, 79; Harris, 'Is Property a Human Right?' (n 2) 84.
[62] Harris, 'Is Property a Human Right?' (n 2) 84–5.
[63] Ibid.
[64] Ibid.
[65] Ibid.

force of the trespassory rules binding all non-owners upon which a property institution is built must, 'one way or another, shoulder the burden of meeting all citizens' basis needs'.[66] In addition, the shell of natural rights based on labour-desert and privacy may be given substance, even though 'there are no free-standing natural rights to full-blooded ownership'.[67]

Ultimately, Harris proposes legislators alter a property institution 'where a conventional solution exists which clearly runs counter to the balance of property-specific justice reasons'.[68] And they should do so when the rules of a property institution do not 'shoulder the burden of meeting all citizens' basic needs'.[69] An example from Chapter 2 is the distributional blindness to First Nations' communitarian interests in the colonial property-freedom argument and arguments arising from markets and independence.[70] The *Native Title Act 1993* (Cth) acknowledges changes to property-specific justice due to High Court jurisprudence,[71] and ongoing amendment of the Act shows a need for legislative monitoring of property-specific justice reasons.[72]

So, to ensure normative identification of what is really going on, legislators ought to begin with Harris's theory of property – in modern states such as Queensland, protection and promotion of individual autonomy is an important stage in the formation of normative discourse for property questions. Lametti summarises the internal morality stated in *Property and Justice* as the 'protection and promotion of individual autonomy', and 'perhaps the most important … component of the dominant modern Western idea of property'.[73] Nevertheless, in this chapter, and in the literature, Harris's theory may be augmented by more overtly moral approaches to property.[74] The next section turns to those approaches.

III ADDITIONAL MORAL APPROACHES

At times, legislators may require further, 'more explicitly moral approaches to property', capable of augmenting Harris's *Property and Justice* theory.[75] The approaches available include Harris's own later

[66] Ibid 84–5; Harris, *Property and Justice* (n 2) 305–6; Lametti, 'The Morality of James Harris's Theory' (n 3) 146.
[67] Harris, 'Is Property a Human Right?' (n 2); Lametti, 'The Morality of James Harris's Theory' (n 3) 145–9.
[68] Harris 'Is Property a Human Right?' (n 2) 85.
[69] Ibid 84–5; Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th ed, Oxford University Press, 2009) 58.
[70] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010) 2; Andrew Fitzmaurice, 'The Genealogy of *Terra Nullius*' (2007) 38 *Australian Historical Studies* 1.
[71] *Native Title Act 1993* (Cth), Preamble; *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 [498] (Gordon J); *Mabo v Queensland [No 2]* [42] (Brennan J); *Western Australia v Commonwealth* (1995) 183 CLR 373 [32] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).
[72] *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth); *Native Title Legislation Amendment Act 2021* (Cth); *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10; Benjamin L Berger, 'Freedom of Religion' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 755, 769.
[73] Lametti, 'The Morality of James Harris's Theory' (n 3) 148–9.
[74] Ibid; Harris, 'Is Property a Human Right?' (n 2).
[75] Lametti, 'The Morality of James Harris's Theory' (n 3) 149.

conception of a background right to property as a human right.[76] These approaches 'move beyond the individual, rights-based moralities', towards an idea of property that is 'more inherently and fundamentally complex'.[77] Four approaches, each directed to identifying the norms implicated by any issue of property, are examined in this section.

For legislators, theory-justice connections differ depending on the property questions being asked.[78] Where a property question requires inquiry beyond Harris's theory of property and justice, the augmentation ought to be tailored to the given issue of property under evaluation. Paul Babie argues, for example, that the theory of Morris Cohen regarding property constituting 'the essence of what historically has constituted political sovereignty' is practically useful as an organising theme for understanding Australian property law.[79] Four different approaches are analysed, to provide examples of the additional normative tools available to legislators.

Singer and Entitlement

The theory of Joseph William Singer provides an explicitly moral understanding of property.[80] The statement that '[w]e are each entitled to the means necessary for a dignified human life',[81] indicates Singer's argument for a more limited idea of private property than the one advanced by Harris. Singer argues his model puts the concept of ownership in its 'proper place', ensuring property is about 'entitlements and obligations, which shape the contours of social relations'.[82] A property institution, he says, should ensure a private person with ownership rights is not free to ignore the externalities.[83] Rather, '[s]ince each person is entitled to be treated as equally important, a legitimate property system must ensure that access to a minimum amount of property is available for every single person'.[84] Accordingly, each person should be entitled in law to ownership of some property.[85] Singer's identification of the inherent tensions in the ownership model in this way is highly relevant to the work of legislators. However, Singer cautions that when one holder of a private property right disagrees with another owner of a private property right, the concept of property itself gives 'no help at all in

[76] Harris, 'Is Property a Human Right?' (n 2); AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays on Jurisprudence* (Oxford University Press, 1961) 107; Alexander et al (n 3) [1]–[2]: it is necessary to examine 'the underlying human values that property serves and the social relationships it shapes and reflects'.
[77] Lametti, 'The Morality of James Harris's Theory' (n 3) 149.
[78] Ibid.
[79] Babie, 'Sovereignty as Governance: An Organising Theme for Australian Property Law' (n 60) 1077–78; Cohen (n 60).
[80] Lametti, 'The Morality of James Harris's Theory' (n 3) 150.
[81] Joseph William Singer, *The Edges of the Field* (Beacon, 2000) 28; Singer, *Entitlement* (n 12) 24, 63, 211–2; David Hollenbach, 'Human Dignity: Experience and History, Practical Reason, and Faith' in McCrudden (n 13) 123, 131.
[82] Singer, *Entitlement* (n 12) 61.
[83] Joseph William Singer, *Introduction to Property* (Aspen Law and Business, 2001) xxv; Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 *Cornell Law Review* 1009, 1048; Singer, *Entitlement* (n 12) 202–4.
[84] Singer, *The Edges of the Field* (n 81) 27–8.
[85] Ibid.

formulating a rigid answer to the question of whose immunity rights should be protected'.[86] While the tension must be addressed by legislators, they cannot remain neutral and must 'choose which claim will prevail'.[87] Therefore, legislators must realise 'the source of obligation is moral, and that sometimes such obligations ought to be reflected in legal norms'.[88]

Underkuffler and the Contours of Property

The work of Laura Underkuffler defines private property according to a variety of dimensions or contours.[89] In identifying the four dimensions – rights, spatiality, stringency of protection, and the length of time for which an interest endures – Underkuffler seeks to provide a more comprehensive understanding of a property institution.[90] Relevant to the work of legislators, a key innovation achieved by Underkuffler's spatial particularisation of private property is the implication that the physical or non-physical nature of the resource can influence the contours of a property right.[91] Underkuffler's approach is likely to assist legislators to form connections between theory and practice where property rights must be distinguished from other human rights.[92] Where an individual interest (such as an exclusionary right or a title) grounding a right is different from the rights asserted by the community, Underkuffler proposes the property right be given greater weight.[93] Where, however, the presumptive powers of property do not favour the individual interest, the individual and collective norms are equal; for example, for environmental and planning legislation.[94] In short, Underkuffler identifies and balance the competing interests, leading Lametti to suggest the process 'goes to the very relation between the individual and the collective'.[95]

The Statement of Progessive Property

A third approach emerges in the *Statement of Progressive Property* written by Gregory Alexander, Eduardo Peñalver, Joseph William Singer and Laura Underkuffler.[96] The statement outlines a progressive theory of property that 'might take root within any number of specific normative frameworks' and identifies 'several features progressive theories of property should have in common'.[97]

---

[86] Singer, *No Freedom Without Regulation* (n 12) 6.
[87] Singer, *Entitlement* (n 12) 7.
[88] Lametti, 'The Morality of James Harris's Theory' (n 3) 153; Singer, *Entitlement* (n 12) 209; Harris, *Property and Justice* (n 2) 137–8.
[89] Underkuffler, *The Idea of Property* (n 4); Laura S Underkuffler, 'Property: A Special Right' (1996) 71 *Notre Dame Law Review* 1033.
[90] Underkuffler, *The Idea of Property* (n 4); Lametti, 'The Morality of James Harris's Theory' (n 3) 155.
[91] Lametti, 'The Morality of James Harris's Theory' (n 3) 156; Paul Babie, 'The Spatial: A Forgotten Dimension of Property' (2013) 50 *San Diego Law Review* 323.
[92] Underkuffler, *The Idea of Property* (n 4); Lametti, 'The Morality of James Harris's Theory' (n 3) 156.
[93] Underkuffler, *The Idea of Property* (n 4).
[94] Ibid 97; Lametti, 'The Morality of James Harris's Theory' (n 3) 156–7.
[95] Lametti, 'The Morality of James Harris's Theory' (n 3) 158; Charles Taylor 'The Meaning of Secularism' (2010) *The Hedgehog Review* 23, 29; 'The Nature and Scope of Distributive Justice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985).
[96] Alexander et al (n 3).
[97] Ibid.

They are that 'we should understand property as both an idea and an institution, that property confers power and shapes community, both in its legal and social dimensions, and that property should be understood as serving plural and incommensurable values whose accommodation is possible through reasoned deliberation and practical judgment'.[98]

Habermas, Waldron and Weinrib on Human Dignity

Even armed with additional approaches to property, such as the approaches from Singer, Underkuffler and the Statement of Progressive Property, the problem-solving capacities of legislators might continue to be tested by any given property question. This is because the idea of justice 'loses its substantive content with increasing social complexity'.[99] And, as Harris acknowledges, while property law is intrinsically connected to ideas of justice it does not lead to a specified form of justice.[100] Nor does the liberal conception of property, for example, as it 'is neutral as to exactly how rights are allocated … and as to the normative foundations for structuring the institution in one way or another'.[101] Indeed, while law 'aspires to justice',[102] there are 'many of us, and we disagree about justice'.[103]

For legislators, there are a number of considerations arising from the plurality of interests and norms relevant to any one property question. They include that each state's property institution will require different answers to the same question, [104] and that property rules must accommodate *both* a claim-right and a just society.[105] In the theory of Waldron, Habermas and Weinrib, legislating requires prescription of 'the normative substance of the equal dignity of every human being'.[106] It is this theory that provides the fourth approach to complement Harris's theory of property and justice. As Bernhard Schlink will explain, the role of dignity is to supply a value, or a set of values, that other approaches do not.[107]

Fourth, then is theory of the concept of human dignity as an internal moral source mediating the individual and collective concerns for prescription as property rules. When legislators must shift from an internal moral obligation to a legislative provision, the argument is that human dignity can perform

---

[98] Ibid.
[99] Habermas, *Philosophical Introductions* (n 6) 119.
[100] Austin, 'The Public Nature of Private Property' (n 39) 2, 4; Gregory S Alexander, *Property and Human Flourishing* (Oxford University Press, 2018) 3: '[p]roperty theorists differ in their accounts of the moral underpinnings of property, and some do not clearly identify, let alone analyse, the values that constitute the moral foundation of their theories'.
[101] Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) 6; Daniel H Cole, 'The Law and Economics Approach to Property' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 106; Jeremy Waldron, *God, Locke and Equality* (Cambridge University Press, 2003); Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1994) 1.
[102] Jeremy Waldron *Law and Disagreement* (Oxford University Press, 1999) 6.
[103] Ibid; Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 199–210: Arendt explains law is made for all the people in a political community.
[104] Taylor 'The Meaning of Secularism' (n 95) 29; 'The Nature and Scope of Distributive Justice' (n 95).
[105] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 464–7.
[106] Ibid; Waldron, 'Human Dignity: A Pervasive Value' (n 5); Weinrib (n 5) 7.
[107] Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in McCrudden (n 13) 1, 2.

a mediating role human dignity within that shift.[108] And the concept of dignity is supplied by private people knowing when they are being accorded 'their proper respect as human beings'.[109] Habermas describes two aspects to the theory, each likely to assist legislators. One, a concept able to 'facilitate compromises when specifying and extending human rights by neutralizing unbridgeable differences'.[110] The other, a substantive normative concept from which human rights can be deduced by specifying 'the conditions under which human dignity is violated'.[111]

Habermas and Waldron each point to a major transition in legal and political thought and legislative and judicial practice occurring since the end of World War II.[112] With that transition, dignity became a jurisprudential value and a substantive normative concept.[113] Although the idea of human dignity 'comes trailing a religious as well as a philosophical heritage', Waldron suggests that '[t]alk of dignity in modern jurisprudence represents an attempt to see whether moral and political ideas can be extricated altogether from those foundations, without abandoning the key insights of respect for personhood'.[114] Human dignity forms 'the 'portal' through which the egalitarian and universalistic substance of morality is imported into law'.[115] In the jurisprudence, therefore, dignity delineates the conditions of equal freedom from the choices of others, and demands people be treated as ends in themselves, not simply means to an end.[116] This 'status-concept' of dignity is supported by Waldron, Weinrib and Habermas (with qualification).[117]

---

[108] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 464–7.
[109] Brenda Hale 'Preface' in McCrudden (n 13) xv–xvi; Weinrib (n 5) 14; TRS Allan, 'Book Review: Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law' (2018) 68 *University of Toronto Law Journal* 312, 313: in this respect, Weinrib's theory echoes Immanuel Kant's idea of a rightful condition and draws attention to Arthur Ripstein's explanation in *Force and Freedom*. There, freedom is independence; that is, 'independence from the will of another': Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009).
[110] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 467.
[111] Ibid 466; Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010).
[112] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 464–6; Waldron, 'Human Dignity: A Pervasive Value' (n 5) 1–4; Weinrib (n 5) 2: dignity is invoked by states: as a right or value imposing an all-pervading obligation on exercises of public authority; the foundation of constitutional rights; a principle for determining rights protections; a constraint upon constitutional amendment, and a 'standard against which limitations of rights must be justified'.
[113] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 464–6; Waldron, 'Human Dignity: A Pervasive Value' (n 5) 1–4.
[114] Waldron, 'Human Dignity: A Pervasive Value' (n 5) 10; Meir Dan-Cohen, 'Introduction: Dignity and its (Dis)content' in Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, & Rights* (Oxford University Press, 2015) 5: placing human dignity in a legal habitat, 'is an astute step that leaves open difficult conundrums of moral philosophy, while allowing us to make progress on the central issues and main practical ramifications associated with the concept of dignity today'; Jeremy Waldron, 'Law, Dignity and Self-Control' in Waldron and Dan-Cohen (above) 135: our sense of how dignity is being put to work in law will grow and develop.
[115] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 469.
[116] McCrudden 'In Pursuit of Human Dignity' (n 107) 9, describing Kant's view of dignity.
[117] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 471, 473. Habermas adds two further stages to the genealogy of the concept. The first is that 'universalisation must be followed by individualization'. The second is that the status must be based on 'the absolute worth of any person'.

The status-concept of dignity is a political conceptualisation, according to which human rights including a right to property are 'understood as conditions for inclusion in a political community'.[118] Citizenship alone protects the equal freedom of every person, and the protection is via the grant of equal rights.[119] Habermas says that it is this 'internal connection between human dignity and human rights' alone that 'gives rise to the explosive fusion of moral contents with coercive law as the medium in which the construction of just political orders must be performed'.[120] Waldron says that, due to the internal connection, dignity bubbles up 'pervasively in the law even if it's not textually mandated'.[121] Conor Gearty, noting Waldron's reference to dignity bubbling up in law, adds that 'visions of dignity already drive a great deal of legislation'.[122]

In Australia, High Court jurisprudence affirms dignity to be 'a well-established transnational and international concept'.[123] In *Clubb v Edwards; Preston v Avery* concerning the implied freedom of political communication and use of public space,[124] all judgments engage with the concept of dignity.[125] The plurality affirms of dignity as a status-concept in Australia, quoting from Aharon Barak:

> As Barak said, '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'. Within the present constitutional context, the protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom, is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[126]

A subsequent appointee to the Court, Gleeson J, observes in an extra-curial speech that the Barak statement quoted by the plurality 'invokes the language of Immanuel Kant'.[127] Gleeson J points also to the influential judgment of Baroness Hale in *Ghaidan v Godin-Mendoza.*[128] In that judgment, rights and democracy were associated with dignity as a status-concept, with Baroness Hale stating, '[d]emocracy

---

[118] Kenneth Baynes, 'Discourse Ethics and the Political Conception of Human Rights' (2009) 2 *Ethics and Global Policy* 1; 'Toward a Political Conception of Human Rights' (2009) *35 Philosophy and Social Criticism* 371; Rawls (n 38).
[119] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 479; Gearty (n 13) 167–8; Hale (n 109) xv–xvi.
[120] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 479; Gearty (n 13) 167–8; Hale (n 109) xv–xvi.
[121] Waldron, 'Human Dignity: A Pervasive Value' (n 5) 10; Hale (n 109).
[122] Gearty (n 13) 166.
[123] Scott Stephenson, 'Dignity and the Australian Constitution' (2020) 42 *Sydney Law Review* 369, 394.
[124] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171.
[125] Ibid [51], [120] (Kiefel CJ, Bell and Keane JJ); [126], [128] (Gageler J); [258] (Nettle J); [497] (Edelman J).
[126] Ibid [51] (Kiefel CJ, Bell and Keane JJ) quoting Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 85; *Monis v The Queen* [2013] HCA 4 [247].
[127] Jacqueline Gleeson, 'Human Dignity in the Time of John Hubert Plunkett', 10th Annual JH Plunkett Lecture, Francis Forbes Society for Australian Legal History, available at: <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/gleesonj/Human%20Dignity%20In%20The%20Time%20of%20John%20Hubert%20Plunkett.pdf>.
[128] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

is founded on the principle that each individual has equal value. Treating some as automatically having less value than others … violates his or her dignity as a human being.'[129]

As a normative concept, providing a tool for legislators to shift moral imperatives into enacted law, Bernhard Schlink's understanding of dignity is instructive: dignity 'encapsulates our yearning for a recognition and protection of humans that is not up for grabs (political grabs, balancing grabs)'.[130] While the yearning human dignity encapsulates may 'never be fulfilled' and might be 'severely disappointed', Schlink says, a shared signifier of equal freedom is needed anyway.[131] The normative role of dignity is to supply a value, or a set of values, that other approaches do not.[132] In this literature, this is possible because human dignity is: a ''non-interpreted' thesis';[133] an occasion for dialogue;[134] a way of keeping ''agonists' in one conversation';[135] and a concept accommodating of conflicting values and rights.[136] Accordingly, Waldron adds, 'those who value popular participation in politics' need not 'value it in a spirit that stops short at the threshold of disagreements about rights'.[137] Instead, 'we are to ask questions about human dignity as a way of pinning it down'.[138]

When legislators ask property questions about dignity, the normative substance of the concept delineates the internal morality of property: human dignity is capable of bearing 'an enormous justificatory burden'.[139] Wherever 'disputes arise about the duty that attends the exercise of public authority, the concept of human dignity inevitably emerges',[140] ensuring a property institution looks to 'the underlying human values that property serves and the social relationships it shapes and reflects' in a given political community at a specific point in time.[141] Roberto Mangbeira Unger describes 'the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the

[129] Ibid [132]; Gleeson (n 127).
[130] Bernhard Schlink, 'The Concept of Human Dignity: Current Usages, Future Discourses' in McCrudden (n 12); McCrudden, 'In Pursuit of Human Dignity' (n 107) 13–14; Gearty (n 13) 163.
[131] Schlink (n 130) 163.
[132] McCrudden, 'In Pursuit of Human Dignity' (n 107) 2.
[133] Schlink (n 130) 163.
[134] McCrudden, 'In Pursuit of Human Dignity' (n 107) 14; Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) 11: Dworkin's stated ambition for dignity in democracies is that it be understood as being of sufficient depth and generality to establish common ground across political divides and having enough generality to enable argument about interpretation and consequences.
[135] McCrudden, 'In Pursuit of Human Dignity' (n 107) 14.
[136] Paolo G Carozza, 'Human Rights, Human Dignity, and Human Experience' in McCrudden (n 13) 615; McCrudden, 'In Pursuit of Human Dignity' (n 107) 14.
[137] Waldron, *The Dignity of Legislation* (n 14) 155.
[138] Waldron, 'Human Dignity: A Pervasive Value' (n 5) 5.
[139] Jacob Weinrib, 'Human Dignity and Its Critics' in G Jacobsohn and M Schor (eds), *Comparative Constitutional Theory* (Edward Elgar, 2018) 167.
[140] Ibid.
[141] Alexander et al (n 3) 743 [1]; Alexander, *Property and Human Flourishing* (n 100) xiv; Rachael Walsh, 'Property, Human Flourishing and St Thomas Aquinas: Assessing a Contemporary Revival' (2018) 31(1) *Canadian Journal of Law & Jurisprudence* 197. Scholarly assessment is not fully supportive of Alexander's Thomist approach.

other person',[142] indicating that the political conceptualisation of dignity ensures the individual wellbeing of every citizen,[143] and that 'the community shoulders the obligation to meet the basic needs of all'.[144]

Thus, legislators are equipped to shift from morality to law by mediating individual and collective concerns,[145] as human dignity effects the 'imbrication' of the rights of the individual and the rights of a community.[146] Legislators can ensure enacted law protects 'just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons.'[147] As a result, 'surer legislative footing' is found 'on the theoretical common ground of just human association as it has a bearing on property institutions'.[148]

Property discourse is, however, an important real-world normative tool for that surer legislative footing. It facilitates legislative choice between property norms (and also institutional and doctrinal norms, as analysed in chapters 2 and 4). For property questions, discourse is important because '[o]ur concept of property is one whose application to the world is difficult, controversial and tendentious'.[149] To ensure legislators are fully equipped for property questions, rational discourse is examined in the next section.

IV RATIONAL DISCOURSE

Property questions are questions about distribution and institutional design.[150] And 'the trouble with the application of norms to property is not that there are in principle no right answers, but that there is no basis common to the parties for determining which answer is right'.[151] To this point, however, tools have been provided for analysis of norms relevant to property questions, but not for a robust, objective way to choose between norms. So, this section puts to work Habermas' discourse ethics,[152] together

[142] Roberto Mangbeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015) 120; Jonathon Sacks, *Morality: Restoring the Common Good in Divided Times* (Hodder & Stoughton, 2020) 248.
[143] Harris, 'Is Property a Human Right?' (n 2) 85; *Thomas v Mowbray* (2007) 233 CLR 307 [143] (Gleeson CJ); *Bank of NSW v Commonwealth* (1948) 76 CLR 1; *United Mizrahi Bank et al v Migdal Cooperative Village et al* [1995] 49 PD 221 [47].
[144] Harris, *Property and Justice* (n 2) 305.
[145] Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2009) xvii; Alexander, *Property and Human Flourishing* (n 100) xiv. Alexander's 'human flourishing' theory 'conceives of human flourishing as including (but not limited to) individual autonomy, personal security/privacy, personhood, self-determination, community, and equal dignity'.
[146] Singer, *Entitlement* (n 12) 203–4; Joseph William Singer, 'How Property Norms Construct the Externalities of Ownership' in Alexander and Peñalver, *Property and Community* (n 145) 57, 60; Paul Babie, 'Three Tales of Property, or One?' (2016) 25(4) *Griffith Law Review* 600, 606–7.
[147] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 469.
[148] Harris, *Property and Justice* (n 2) viii; Singer, *Entitlement* (n 12) 211, referencing Joseph L Sax, 'Liberating the Public Trust Doctrine from Its Historical Shackles' (1980) 14 *UC Davis Law Review* 185, 186–7.
[149] Waldron, *The Dignity of Legislation* (n 14) 47.
[150] Waldron, 'Property Law' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2010) 9,14.
[151] Waldron, *The Dignity of Legislation* (n 14) 49.
[152] Habermas, *Philosophical Introductions* (n 6); *Between Facts and Norms* (n 1).

with a second aspect of Charles Taylor's theorem about distributive justice.[153] The objective is to deepen property discourse about distribution and institutional design. Once again, although legislators might regard theory as 'artifice', applying legal and social (including political) theory to develop normative discussion aims to give meaning to practice.[154] The proposed inquiry in this section is into the correct response of the state to diversity.[155]

In modern states such as Queensland, the political ethic is 'comprehensive views of the good' shared by people of very different outlooks.[156] The ethic is productive of many 'arguments' challenging the problem-solving capabilities of legislators.[157] Waldron, who has long prosecuted a 'rosy view' of law and disagreement,[158] explains that 'normative argument' is 'what takes place when we think together about how to guide and evaluate' legislative choices.[159] Habermas's description, elaborated in his theory of 'discourse ethics', is of 'rational discourse'.[160] Together with Waldron's approach to normative argument, Habermas's discourse ethics theory is directly relevant to the framework. It explains and resolves the legislative difficulty that 'one cannot tell simply by looking at accepted social norms whether they exist "by right"'.[161] Legislators can be certain 'only about those norms that meet with the carefully considered agreement of all addressees under conditions of a rational discourse'.[162]

Relevant to rational discourse for property questions, Waldron provides an instructive illustration.[163] In 1996, Waldron was asked to provide the New Zealand Federated Farmers with assistance regarding 'a number of irksome environmental statutes' they were facing. The representative group sought 'some philosophical vindication of their rights in their land', as they sought to set up 'natural entitlements' against legislative incursions.[164] Waldron explains, however, that even in Robert Nozick's version of John Locke's account, 'the importance of respecting a current property right presupposes that it is the culmination of an unbroken series of consensual transactions stretching back to the dawn of time'.[165] Instead, in New Zealand – as in other Australasian colonies – 'the land seems to have been governed

---

[153] Taylor, 'The Nature and Scope of Distributive Justice' (n 2).
[154] Janet McLean, 'The Crown in the Courts: Can Political Theory Help?' in Linda Pearson et al (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Bloomsbury, 2008) 161, 172.
[155] Taylor, 'The Nature and Scope of Distributive Justice' (n 2); 'The Meaning of Secularism' (n 95); Charles Taylor, 'Modern Social Imaginaries' (2002) 14 *Public Culture* 91; Charles Taylor, 'Modernity and the Rise of the Public Sphere' (The Tanner Lectures on Human Values, Stanford University, 25 February 1992) <https://tannerlectures.utah.edu/_documents/a-to-z/t/Taylor93.pdf>.
[156] Rawls (n 38).
[157] Charles Taylor, Patrizia Nanz and Madeleine Beaubien Taylor, *Reconstructing Democracy: How Citizens Are Building from the Ground Up* (Harvard University Press, 2020) 3–4.
[158] Jeremy Waldron, *Law and Disagreement* (n 102); Waldron, *The Dignity of Legislation* (n 14); Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012).
[159] Waldron 'Property Law' (n 150) 14.
[160] Habermas, *Philosophical Introductions* (n 6); *Between Facts and Norms* (n 1).
[161] Ibid 102–3.
[162] Ibid.
[163] Waldron, *The Rule of Law Property* (n 158) 28–34; Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016).
[164] Waldron, *The Rule of Law and Measure of Property* (n 158) 28–34.
[165] Ibid.

by social and public legal arrangements from start to finish'.[166] And, at every stage from start to finish, 'modifications to the conveyancing laws, in farmers' ability to alienate government leaseholds, in the laws of trusts and bankruptcy, and in the laws of inheritance, family provision and intestacy … all took place not through some inexorable logic endogenous to private law (let alone natural law), but by statute (mainly)'.[167]

Waldron's example, illustrating the inadequacy of a univocal concept of ownership,[168] also demonstrates the vital importance of the 'effective public normativity' of legislative practice.[169] In 'a *postconventional*, differentiated and rationalized society, citizens, who are simultaneously members of civil society' must collectively determine 'their common destiny by recognizing each other's civil rights without which collective deliberation lacks the ability to legitimize and motivate'.[170] So, a valid norm must meet the condition that '*all* can accept the consequences and side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation)'.[171]

Mutual perspective-taking is essential, Habermas argues. It must occur in the context of inclusive discourse.[172] Habermas's idea is that democracy must be both inclusive and deliberative,[173] and that

> [d]iscourse can be understood as that form of communication that is removed from contexts of experience and action and whose structures assure us … that participants, themes, and contributions are not restricted … that no force except that of the better argument is exercised; and that, as a result, all motives except that of the cooperative search for truth are excluded. If under these conditions a consensus about the recommendation to accept a norm arises argumentatively, that is, on the basis of hypothetically proposed, alternative justifications, then this consensus expresses a 'rational will'.[174]

Political discourse must be invested with 'energy' if it is to ensure a valid norm meets the democratic condition, Habermas explains.[175] Otherwise, political discourse cannot 'rationalize the arbitrary core of

[166] Ibid 30–1.
[167] Ibid 32.
[168] Harris, 'Is Property a Human Right?' (n 2) 82–4
[169] Waldron, *Political Political Theory* (n 163) 152–3; Ronan Cormacain and Ittai Bar-Siman-Tov, 'Global Legislative Responses to Coronavirus' (2020) 8 *The Theory and Practice of Legislation* 239.
[170] Jean-Marc Durand-Gasselin, 'Introduction – The Work of Jürgen Habermas: Roots, Trunk and Branches' in Habermas, *Philosophical Introductions* (n 6) 1, 53.
[171] Jürgen Habermas *Moral Consciousness and Communicative Action,* tr Christian Lenhardt and Shierry Weber Nicholsen (MIT Press, 1990) 65–6.
[172] Jürgen Habermas *Philosophical Introductions* (n 6) 116.
[173] Ibid.
[174] Jürgen Habermas, *Legitimation Crisis*, tr Thomas McCarthy (Beacon Press, 1975) 107–8.
[175] Habermas, *Philosophical Introductions* (n 6) 129.

political practice'.[176] John Dewey's political philosophy, for example, does not achieve this objective.[177] The energy is generated only by the 'interest-*generalising*' and cognitive dimension of discourse ethics, pointing to 'a discourse theory of law and constitutional democracy'.[178] And 'the vitality, the perceptiveness and the level of the public discourses depend to a large extent on the semantic potential, the depth and the articulatory power of a political culture that shapes a population's imagination and sense of justice'.[179]

When issues of property are evaluated by contemporary legislators, since property is a human right, the energy of the interest-generalising and cognitive dimensions must be stronger still: the vitality, perceptiveness and level of public discourse must lift because human rights are different from moral rights.[180] Habermas says that human rights 'are oriented toward institutionalization and call for a shared act of inclusive will-formation, whereas morally acting persons regard one another without further mediation as subjects who are embedded from the start in a network of moral rights and duties'.[181]

There are two considerations here, identified in Habermas's theory regarding the mediation of the concept of human dignity and enabling legislation to be made accommodating both individual and collective concerns. One, is the historically-shaped political culture, founded on 'the cumulative experiences of violated dignity' constituting 'a source of moral motivations' for entering into states.[182] In this context, Baroness Hale refers to '[f]reedom-fighters, levellers, feminists even, who knew that they were not being accorded their proper respect as human beings and sometimes called this dignity'.[183] The second is 'the status-generating notion of social recognition of the dignity of others'.[184] It constitutes 'a conceptual bridge between the moral idea of equal respect for all and the legal form of human rights'.[185] It is the mediating concept of human dignity that generates the necessary energy: the people of a community, as 'addressees', can 'come to enjoy the rights that protect their human dignity only by first uniting as authors of the democratic undertaking of establishing and maintaining a political order based on human rights'.[186]

Habermas's essential features of democratic politics – inclusion and deliberation – provide important insights concerning property theory. As to inclusion, for example, Waldron notes Kant's insistence we 'take account of the fact that there are others in the world besides ourselves' and see others 'not just as

[176] Ibid: 'the Aristotelian conceptions of *praxis* and *phronesis* are too weak to invest political discourse with the energy'.
[177] Ibid; John Dewey, *The Quest for Certainty* (Minton, Balch and Company, 1929); *The Public and Its Problems: An Essay in Political Inquiry* (Ohio University Press, 2016).
[178] Habermas, *Philosophical Introductions* (n 6).
[179] Ibid 132.
[180] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 470, n10.
[181] Ibid.
[182] Ibid.
[183] Hale (n 109).
[184] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 470, n10.
[185] Ibid.
[186] Ibid 473.

objects of moral concern or respect, but as *other minds, other intellects, other agents of moral thought, coordinate and competitive with our own*'.[187] As to deliberation, Joseph William Singer says that rational, qualitative choice about property allocations 'remains possible through reasoned deliberation'.[188]

Some property questions conceived as intractable may in fact find efficacy in Habermas' discourse ethics. Three examples assist. First, a property institution and its rules must stand in the name of all in a community, its place in the common life accepted. This is the case even though some people would be better-off acting inconsistently with those legal and political arrangements.[189] However, the interest-generalising approach of discourse ethics rationalises 'the arbitrary core of political power', converting it into 'the rational core of political practice' sought by contemporary legislators.[190] Taylor similarly argues that in a modern political community, a diversity of people seek and value in common a diversity of 'goods', and that common appreciation of these factors is constitutive of a political community.[191]

Second, in the political ethic of the modern state, arguments about property are political arguments about 'security, prosperity, citizenship, making a mark on the world'.[192] They arise because property as things and property as wealth matter to private people but are contested between them.[193] Indeed, sometimes these 'disputes raise passions, at both personal and political levels, like few other topics can'.[194] Harris explains that 'there is not consensus and there is also scepticism, about the concept of property … We also, from time to time, disagree on moral and political grounds about how property should be allocated among us.'[195] Waldron similarly states that we demand 'economic freedom, free markets and private property because our life plans are different from one another and because we know that there is no other way to reconcile our varying preferences in a coherent way of life'.[196] As a result, private property (alongside markets and economic freedom) is highly important to a political community, but controversial in substance and application.[197]

---

[187] Waldron, *The Dignity of Legislation* (n 14) 47, 61; emphasis in original.
[188] Alexander et al (n 3) [3]; Radin (n 101) 35–71; Singer, 'Democratic Estates' (n 83) 1057. Radin's approach, focussing on qualitative judgments about entitlements protected by property law, informs the Statement.
[189] Alexander and Peñalver, *An Introduction to Property Theory* (n 101) 6–7.
[190] Habermas, *Philosophical Introductions* (n 6) 129
[191] Taylor, 'The Nature and Scope of Distributive Justice' (n 95) 289.
[192] Alan Ryan, *Property and Political Theory* (Blackwell, 1984) 192–3.
[193] Singer, *An Introduction to Property* (n 83) xxv; *Entitlement* (n 12) 154; Radin (n 101) 38: 'For Hegel, objects may start out external, but they do not remain so: they become constitutive of personality. Indeed, the right to hold property is an inalienable attribute of personality.'
[194] Alexander and Peñalver, *An Introduction to Property Theory* (n 101) 1.
[195] Harris, *Property and Justice* (n 2) vii.
[196] Waldron, *The Rule of Law* (n 158) 110; 'What is Private Property?' (1985) 5 *Oxford Journal of Legal Studies* 313.
[197] Waldron, *The Rule of Law* (n 158) 110.

Here, although Habermas's response of mutual perspective-taking is recognised in property theory,[198] property theory alone may not generate sufficient energy, and could obscure the distinction between moral duties and legal obligations. The former 'pervade all spheres of action without exception'.[199] Modern law, however, 'creates well-defined domains of private choice for the pursuit of an individual life of one's own', and 'subjective rights rather than duties constitute the starting point for the construction of modern legal systems'.[200] So, people orient their activities by making use of their rights in law, rather than asking what is owed to another, and the state has a role in defining legal domains, but not in morality.[201] Overall, this means people claiming legal recognition are reaching 'beyond the reciprocal moral recognition of responsible subjects'.[202]

Third, liberal and neo-liberal conceptions of property have dominated into the twenty-first century, but are contested.[203] Discourse ethics seeks to explain and then overcome modern intellectual and historical 'antagonisms'; that is, to resolve differences between, for example, freedom and equality and 'civil rights and participation rights'.[204] The mediating and integrating energy of human dignity contributes a 'substantive normative concept' to fuse morality with law, as required in a just political order.[205] Dignity is a concept 'around which we can all meet and discuss',[206] including where it might be necessary to introduce deep transformations in broadly-held social and cultural expectations and perceptions.[207] Indeed, reliance upon human dignity by those on each side of a disagreement evidences 'interest-*generalising*' and the cognitive dimension of discourse ethics.[208] Waldron refers, therefore, to dignity operating as an 'essentially contested concept': the concept's proper use 'involves continuing

[198] Ernst Freund, *Jurisprudence and Legislation* (Houghton Mifflin & Co, 1904); JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711; Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia Law Review* 1667; Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710; Tony M Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987).
[199] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 471.
[200] Ibid.
[201] Ibid 472.
[202] Ibid.
[203] Alexander and Peñalver, *An Introduction to Property Theory* (n 101), 35–56; JE Penner, *The Idea of Property in Law* (Oxford University Press, 1997) 713–4; 'The "Bundle of Rights" Picture of Property' (n 198); Radin, 'The Liberal Conception of Property' (n 198); Eric A Posner and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018) ch 1; Johan Olsthoorn, 'Two Ways of Theorising "Collective Ownership of the Earth" in Penner and Otsuka (n 39) 187.
[204] Durand-Gasselin (n 170) 51–2.
[205] Ibid.
[206] Ibid 12–3; Carozza (n 136).
[207] Catherine Dupré, 'Constructing the Meaning of Human Dignity' in McCrudden (n 13) 113, 119–20; McCrudden, 'In Pursuit of Human Dignity' (n 107) 13–14; Schlink (n 130); Gearty (n 13) 163.
[208] McCrudden, 'In Pursuit of Human Dignity' (n 107) 12–3, quoting Jeremy Waldron in discussion.

argumentation about its proper use'.[209] Sometimes, he says, we need concepts 'that invite serious normative reflection'.[210]

One reason, Habermas says, is because '[t]he more deeply civil rights suffuse the legal system as a whole, the more often their influence extends beyond the vertical relation between individual citizens and the state and permeates the horizontal relations among individuals and groups'.[211] Collisions occur more frequently, calling for more frequent legislative resolution of competing rights-based claims.[212]

American analysis of collisions arising through the United States *Fair Housing Act* prohibition of discrimination in the residential real estate market provide further guidance.[213] The scholarship endeavours to draw attention to what is really going on in the property institution as a result of the property rule. Owners of residential accommodation – such as a putative 'Mrs Murphy' – are exempt from the residential anti-discrimination provisions if they occupy one unit in a multi-unit dwelling which contains no more than four units, where the units are separate and the families living in the units reside independently of each other.[214] Although owners are not exempt from the *Fair Housing Act*'s prohibition of discriminatory advertisements,[215] rights-based claims of freedom of association are otherwise given priority over all forms of discrimination.[216]

The Mrs Murphy exemption leads to frequent collisions in the horizontal relations between individuals and groups, and between norms of exclusion and norms of access.[217] Consistent with the weight given by the common law and criminal law to interests of privacy and associational autonomy, the provision carves out space to protect people's associational interests when in the privacy of their own homes.[218] Indeed, 'when no comparable human capabilities are at stake on the other side, owners should be entitled to exclude unwanted people, including for trivial reasons'.[219] Even weighty interests in favour

---

[209] Waldron, 'Human Dignity: A Pervasive Value' (n 5) 16; *The Dignity of Legislation* (n 14) 84; Weinrib, *Dimensions of Dignity* (n 5) 96.
[210] Waldron, 'Human Dignity: A Pervasive Value' (n 5) 16.
[211] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 469.
[212] Ibid.
[213] *Fair Housing Act,* 42 USC § 3601 (1994): 'dwelling' means 'any building, structure, or portion thereof which is occupied as, or designed, or intended for occupancy as, a residence by one or more families'. A 'family' includes a single individual, and the Act has been held to regulate nursing homes, college dormitories and time-share apartments, but does not regulate hotels or short-stay accommodation; these are regulated by Federal and State 'public accommodation' laws and the *Civil Rights Act of 1866* (Title II prohibits 'discrimination or segregation' in 'any place of public accommodation'). James D Walsh, 'Reaching Mrs Murphy: A Call for Repeal of the Mrs Murphy Exemption to the Fair Housing Act' (1999) 34 *Harvard Civil Rights–Civil Liberties Law Review* 605; Singer, *An Introduction to Property* (n 83) 546–74. A 'Mrs Murphy' reference originated in Congressional debates about the *Civil Rights Act* but is now used to describe an exemption under the *Fair Housing Act* also.
[214] *Fair Housing Act* §3603(b)(2); *Morris v Cizek* 503 F2d 1303 (7th Cir 1974). There is a large volume of case law about the exemption.
[215] *Fair Housing Act* §3604(c); *United States v Hunter 459* F2d 205 (4th Cir 1972) *cert denied* 409 US 934 (1972).
[216] *Fair Housing Act* §3603(b)(2).
[217] Joseph William Singer, 'Property' in David Kairys (ed), *The Politics of Law* (3rd ed, Basic Books, 1998) 240, 244; Walsh (n 213) 606.
[218] Alexander, *Property and Human Flourishing* (n 100) 191–4.
[219] Ibid 193.

of access must sometimes give way.[220] The exemption is, therefore, an example of liberal rights crystallising around 'the inviolability and security of the person, around free commerce, and around the unhindered exercise of religion … designed to prevent the intrusion of the state into the private sphere'.[221] And an illustration that 'property, in the scale of human well-being, ranks below life, but alongside liberty'.[222]

Analysis of the Mrs Murphy exemption by Joseph Singer, Gregory Alexander and James Walsh, however, finds that the exemption's internal connection of moral contents and coercive law no longer accords with a just political order.[223] These theorists argue that legislators ought re-evaluate the carve-out to ensure the coercive law accords with community expectations as to race, disability, religion and age-related discrimination. They argue strongly that it ought always be immoral and unlawful to exclude on the grounds of race.[224] Nevertheless, the theorists recognise that the enforcement of anti-discrimination norms ought not seek to reach the outer boundaries of owners' moral obligations not to discriminate.[225] For these reasons, and with explicit reference to dignity as the portal to any concrete legislative formulation of a background right to property as a human right, Alexander says the American exemption goes to the type of society American people wish to have.[226] Singer explains that legislators intend anti-discrimination and property rules to 'combat pernicious social hierarchies':

> A major systemic function of legal rules governing property is to mold the social relations that comprise the market. In the case of antidiscrimination laws, such rules prevent the emergence of a particular form of social life inimical to a free and democratic society.[227]

Section 87 of the *Anti-Discrimination Act 1991* (Qld) is in similar terms to the *Fair Housing Act* exemption. The section also mirrors provisions in Federal anti-discrimination statutes, including the *Racial Discrimination Act 1975* (Cth).[228] The object of the *Anti-Discrimination Act* is to promote equality of opportunity for everyone by protecting them from unfair discrimination in areas of activity including accommodation.[229] The *Anti-Discrimination Act*'s provisions prohibit accommodation discrimination on the basis of attributes including sex, relationship status, pregnancy, parental status, age, race, impairment, religious and political belief or religious activity, gender identity and family responsibilities.[230] Section 87 provides though that it is not unlawful for a person deciding who is to

---

[220] Ibid 194; Walsh (n 213) 633–4.
[221] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 468.
[222] Harris, 'Is Property a Human Right?' (n 2) 87.
[223] Ibid; Singer, *An Introduction to Property* (n 83) 551–3.
[224] Alexander, *Property and Human Flourishing* (n 100) 194; Singer *Entitlement* (n 12) 154; Walsh (n 213) 607. Walsh argues the evidence of legislative history is inclusion of the exemption was as much a concession to racism as a recognition of Mrs Murphy's rights of association.
[225] Alexander, *Property and Human Flourishing* (n 100) 194; Singer, *The Edges of the Field* (n 81).
[226] Alexander, *Property and Human Flourishing* (n 100) 191–4.
[227] Singer, *Entitlement* (n 12) 152–4; Harris, 'Is Property a Human Right?' (n 2) 85.
[228] *Racial Discrimination Act 1975* (Cth) s 12.
[229] *Anti-Discrimination Act 1991* s 6.
[230] Ibid s 9.

reside in accommodation to discriminate where the accommodation is both within the 'main home' of the person or a close relative and when the home accommodates no more than four people in total.

Although there is no case law about section 87 and very little about the equivalent Australian provisions,[231] it is unlikely to meet contemporary democratic conditions. Queensland legislators evaluating the correct response of the state to diversity – inquiring into the norms by way of the Stage 2 (property) sub-inquiry – would identify three property institution-specific norms. First, while the section prioritises a valid norm (freedom of association), it contravenes norms of exclusion, allowing discrimination on the basis of attributes otherwise generally protected by the *Anti-Discrimination Act*. Second, the current, wider legislative provisions allow for discrimination. A more recently enacted Queensland statute, the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld) allows rights-based claims to an accommodation exemption on the basis of Torres Strait Islander kinship. Relating as it does to Torres Strait Islander kinship arrangements, the recent statute does not extend to kinship accommodation within Aboriginal kinship groups. Nor does section 87 of the *Anti-Discrimination Act*.

A third shortfall of section 87 is that it does not accord with property law scholarship, with other Queensland legislation, nor with the larger objectives of a property institution 'developed over centuries of human societal evolution'. This issue of property is an example of the hard cases Lametti refers to where it is necessary to look behind the rules to 'make legal sense of the distinctions based on them'.[232] Habermas suggests that, in such hard cases, a 'justified decision … often becomes possible only by appealing to a violation of human dignity whose absolute validity grounds a claim to priority'.[233] In rationalising the arbitrary core of political practice, theory has much to offer legislative practice; for example, Honoré, Taylor and Habermas each have something to say about the norms of the extra-political and secular private domain adopting 'exceptional importance' due to necessary interaction with the public sphere in modern communities.[234] Habermas and Taylor respectively describe both a ''private' space' carved out by people as 'economic agents and owners of property, and an 'intimate' sphere that [is] the locus of their family life'. In modern states though, private (but not intimate) domains are interwoven with the public realm of state authority.[235] The Queensland *Criminal Code*, for example,

[231] *Eksiry v Cantwells Real Estate Pty Ltd* [1996] HREOCA 5.
[232] Lametti, 'Destination' (n 27) 50.
[233] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 469.
[234] Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2004) 101; Honoré, *Making Law Bind* (n 198) 162–3: not all systems attach importance to ownership 'in the full, liberal sense' nor 'regard the same things as capable of being owned'. Accordingly, Honoré distinguishes 'private ownership' from two other forms of ownership: 'things outside commerce, subject not to private ownership but to special regulation by the state' and land in which no person 'had an interest amounting to full, liberal ownership'.
[235] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Polity Press, 1989) ch 2, sections 6–7; Taylor, *Modern Social Imaginaries* (n 234) 101–3: Taylor describes the emergence 'of a new kind of extrapolitical and secular sphere, and economy in the modern sense'.

is consistent with this theory in its defence provisions allowing a level of force to be used to repel intruders into a family home.[236] As currently drafted, section 87 of the *Anti-Discrimination Act* is not.[237]

Attending to such concerns is 'a crucial part of formulating what property means'.[238] However, the Mrs Murphy exemption and its Queensland equivalent demonstrate that, even if there is consensus 'about the goals that society wishes to achieve, it is not easy to define the kinds of relations that should be promoted and those that should be discouraged'.[239] To mediate individual and collective concerns to provide that definition in legislation, legislators seeking to sort through competing norms will likely be assisted by an inquiry into the correct response of the state to diversity – as in the anti-discrimination case study, and the New Zealand Federated Farmers illustration offered by Jeremy Waldron.[240] With the findings of inquiry into the moral dimension of a property question, legislators should be equipped to prescribe 'just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons'.[241] Additionally, the real-world normative tool of property discourse enables Queensland's legislators to answer and decide 'hard questions about justice and equity … the hard way in every individual case'.[242]

Any property rules enacted by legislators must, however, also operate within the doctrinal norms of the Queensland legal system. Accordingly, a third and final stage in the formation of the proposed normative inquiry is analysed in Chapter 4. The aim of the Stage 3 (doctrinal) inquiry is to ensure the legislation is legally coherent, and consistent with current and anticipated legal practice.

[236] *Criminal Code 1899* (Qld), s 267; *R v Cuskelly* [2009] QCA 375.
[237] See also clause 40 of the Religious Discrimination Bill 2022 (Cth).
[238] Singer, *Entitlement* (n 12) 152–4.
[239] Ibid.
[240] Waldron, *The Rule of Law* (n 158) 28–34.
[241] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 5) 469.
[242] Andre van der Walt, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 109, 146.

CHAPTER FOUR: COHERENCE WITH DOCTRINE AND LEGAL PRACTICE

I LEGISLATING WITH CARE

The Stage 3 (doctrinal) inquiry in this chapter is into what, as a matter of legal doctrine, the careful exercise of legislative authority requires. The inquiry is the final stage of the normative property discourse proposed for Queensland legislators, and the chapter examines the doctrinal norms relevant to the making and refinement of rules for a property institution, 'one of the paradigmatic functions of law'.[1] Theory,[2] case law,[3] and scholarly commentary about existing property rules,[4] currently provide legislators with tools for the doctrinal task, but they are rarely used by Queensland legislators.[5] This chapter adds three real-world normative tools useful in achieving doctrinal outcomes.

This first section analyses the theory and the jurisprudence of what it means to legislate with care. The matching tool, from JW Harris's property-specific justice reasons,[6] is the uncovering of property-specific justice reasons for a stable property institution.[7] A number of examples are provided of doctrinal stability. The second section evaluates how legislators achieve internal coherence of property law doctrine, and the coherence of property rules with wider legal doctrine.[8] Needed for that task is rational discourse of the culture (legal and political) in which law operates.[9] The third section analyses the necessity, for coherence of property rules and legal practice,[10] of careful matching of legal concepts with law as it is practised in Queensland. [11] The fourth section of the chapter collates the findings of Part A – from Stages 1, 2 and 3 of the proposed inquiries – and collects together the real-world normative tools.

---

[1] Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) 107.
[2] Stephen Barnes (ed), *The Coherence of Statutory Interpretation* (The Federation Press, 2019); M Gillooly, 'Legal Coherence in the High Court: String Theory for Lawyers' (2013) 87 *Australian Law Journal* 33; Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42 *Monash University Law Review* 360; Andrew Fella, 'The Concept of Coherence in Australian Private Law' (2018) 41 *Melbourne University Law Review* 1160.
[3] *Miller v Miller* (2011) 242 CLR 446 [15]–[16].
[4] Michael Weir, 'An Australian View: The Queensland *Land Title Act 1994*' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (Lexis Nexis, 2003) 295; Eileen Webb and Margaret Stephenson, *Focus: Land Law* (5th ed, LexisNexis, 2020); Anne Wallace, Les McCrimmon and Michael Weir (eds), *Real Property Law in Queensland* (5th ed, Thomson Reuters, 2020); Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge University Press, 2016).
[5] David Runciman, 'Review: Jeremy Waldron's Political Political Theory' (2019) 18(3) *European Journal of Political Theory* 437, 445.
[6] JW Harris, *Property and Justice* (Oxford University Press, 1996) 368.
[7] Runciman, 'Review' (n 5) 445.
[8] JM Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105; Runciman, 'Review' (n 5) 445; Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) 9–10.
[9] Balkin (n 8) 106–8.
[10] Sir Stephen Laws, 'Legislation and Politics' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) 97–8.
[11] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) *Harvard Law Review* 1685.

The premise of an inquiry into the careful exercise of legislative authority is that legislating involves politicians in the making of law.[12] And, although rule-making and refinement are carried out via both legislation and juristic doctrine in modern states, the legislature has 'assumed the paramount power to create new or to modify or eliminate existing forms of property'.[13] One concern arising from the premise is that legislators within the framework would not regard their task as involving doctrinal analysis,[14] but, as Harris explains, these are "[p]olitical and legal decisions … about questions of property distribution and property-institutional design."[15] Doctrinal analysis is essential to these legislative questions,[16] and to the creation of a stable property institution.

Doctrinal analysis is the close textual analysis 'of primary materials in order to reach a conclusion about either a specific problem or a conclusion about a set of rules – a 'doctrine' – of general application'.[17] The methodology continues to be 'the predominant mode of research' undertaken by legal academics in the twenty-first century, 'perhaps more so in real property than in any other area of law'.[18] One finds at least one explanation for this doctrinal predominance in the analysis of property law in the fact that 'some of [its] rules … are highly technical in nature, one might even say hypertechnical'.[19] This technicality follows case law (Harris's term is 'juristic doctrine'[20]) as doctrine 'attempts to balance multiple, competing policy goals in a fine-tuned way'.[21]

The Doctrinal Capabilities of Legislators

For at least four reasons, legislators find the doctrinal analysis of property rules challenging.[22] First, '"property" takes its meaning not from an abstract term of art, but from its context and … the document or Act of Parliament in which it is found'.[23] Second, each 'micro individual entitlement', when 'multiplied thousands of times across time, and … across a physical landscape' creates 'an entire social

[12] Harris, *Property and Justice* (n 6) viii.
[13] Paul T Babie, 'The "Monkey Selfies": Reflections on Copyright in Photographs of Animals Naruto v. Slater 888 F.3d 418 (9th Cir. 2018)' (2018) 52 *UC Davis Law Review Online* 103; DJ Galligan, *Law in Modern Society* (Clarendon Law, 2006) 159–60: 'The power of the state to change the rules by which the whole community is bound is extraordinary. As the only elected institution, parliament alone has sufficient legitimacy to exercise a power of this kind. Parliament embodies the promise of democratic process, through which decisions are made to which all Australians can submit.' Cheryl Saunders, *Australian Democracy and Executive Law-making: Practice and Principle (Part II)* (Papers on Parliament No 66) available at <www.aph.gov.au>.
[14] Jack Beatson, 'Common Law, Statute Law, and Constitutional Law' (2006) 27 *Statute Law Review* 1, 5–11.
[15] Harris, *Property and Justice* (n 6) vii.
[16] Waldron, *The Rule of Law* (n 1) 89–90.
[17] Martin Dixon, 'A Doctrinal Approach to Property Law Scholarship' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 1, 4.
[18] Ibid 4, 7.
[19] Joseph William Singer, *Property* (4th ed, Wolters Kluwer, 2014) [1.3.1].
[20] Harris, *Property and Justice* (n 6) 323–30.
[21] Singer, *Property* (n 19) [1.3.1].
[22] Harris, *Property and Justice* (n 6) viii.
[23] *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1051 (Porter LJ).

and political system or regime'.[24] Third, analysis takes place against what Charles Taylor describes as an 'historically unprecedented amalgam of new practices and institutional forms (science, technology, industrial production, urbanization), of new ways of living (individualism, secularization, instrumental rationality); and of new forms of malaise (alienation, meaninglessness, a sense of impending social dissolution.)'[25] Fourth, the legal rules for a property institution originate from courts and legislatures as 'separate and independent sources of law', and are put in place by way of 'a symbiotic relationship' within public authority.[26]

Stable Doctrine – Some Examples from Theory and Court Jurisprudence

In *Property and Justice*, Harris observes that doctrinal stability is important to a property institution, but that it must be achieved via 'political and legal decisions':

> All societies have property institutions of one kind or another. We all make plans and enter into transactions which take for granted the blindly obvious fact that property institutions exist. We also, from time to time, disagree on moral and political grounds about how property institutions ought to be designed and how property should be allocated among us.
>
> The concern of this book is strictly 'practical', in the ordinary, rather than the philosophic, sense of that term. Political and legal decisions have to be made about questions of property distribution and property-institutional design.[27]

Bennett Moses and Edgeworth also imply political and legal decision-making when describing Australian doctrine as including 'statute law, the interpretation of statutes, and the general law' as 'strands of a large web, each pulling on the other'.[28] The metaphor of a web is used by Bennett Moses and Edgeworth to 'capture the diversity of judicial and academic analysis'.[29] The metaphor of a web suggests also that stability of doctrine is an important consideration for legislators.[30]

---

[24] Cathy Sherry, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property' (2013) 36 *University of New South Wales Law Journal* 280, 5.

[25] Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2004) 1; Aileen McHarg et al, *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010); Paul T Babie, Peter D Burdon and Francesca da Rimini, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 40 *Houston Journal of International Law* 797.

[26] John Basten, 'Statute and the Common Law' (2019) 93 *Australian Law Journal* 985, 986, referring to *Brodie v Singleton Shire Council* (2001) 206 CLR 512 [31] (Gleeson CJ); Saunders (n 13) [under 'The principles at stake']: 'The law-making role of parliament underpins legal doctrines … including the hierarchical ordering of common law and statute and the principles of statutory interpretation that courts recognize and apply'.

[27] Harris, *Property and Justice* (n 6) vii.

[28] Lyria Bennett Moses and Brendan Edgeworth, 'Statutes in a Web of Law' in P Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (The Federation Press, 2019) 2.

[29] Ibid 19.

[30] Laws (n 10) 87; Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (Clarendon Press, 1979) 214–9.

There are also a substantial number of other ways in which legal theorists and judges approach stable doctrine. Jeremy Waldron says we should understand legislation (the strands of statute law) as stable legal rules 'created explicitly by an institution formally dedicated to that purpose'.[31] Joseph Raz states that '[s]tability is essential if people are to be guided by law in their long-term decisions'.[32] Thus, it is 'difficult to imagine a state without stable rules regarding the allocation of resources'.[33] Stable rules are emphasised in Lon Fuller's eight elements of legality.[34] And Lord Bingham insists the first principle of the rule of law is that '[t]he law must be … so far as possible intelligible, clear and predictable'.[35]

There is theory, too, about a stable legislative process orienting legislators towards stable doctrine.[36] Waldron explains that legislating 'is not the same as issuing a decree; it is a formally defined act consisting of a laborious process'.[37] Sir Stephen Laws describes Lon Fuller's eight principles of the internal morality of law as providing 'a useful pragmatic guide to drafters [and legislators] on how to avoid producing legislation that cuts across the grain of the values of the law'.[38] Laws says that while Fuller's theory 'does not draw clear and uncrossable lines', it identifies 'the danger areas'.[39]

Judgments of the Australian High Court similarly emphasise the importance of doctrinal stability,[40] for instance, when developing property rules concerning notations on folios of the register.[41] In *Hutchinson v Lemon*, in the Queensland Supreme Court, Connolly J said that 'only instruments notified by entry or memorial on the certificate of title are sufficiently notified … to defeat the otherwise unqualified title

---

[31] Laws (n 10) 87–104, 87.
[32] Raz (n 30) 214–5.
[33] Tom Allan, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, 2000) 1; Benjamin L Berger, 'Freedom of Religion' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 755.
[34] Lon L Fuller, *The Morality of Law* (Yale University Press, 1964) 38–9; Laws (n 10) 96–7.
[35] Waldron, *The Rule of Law* (n 1) 15; Tom Bingham, *The Rule of Law* (Penguin Books, 2010) 37; and stability is relevant to Lord Mansfield's dictum that '[i]n all mercantile transactions the great object should be certainty'.
[36] Waldron, *The Rule of Law* (n 1) 51.
[37] Waldron, *Political Political Theory* (n 8) 149, 155–7; *Law and Disagreement* (Oxford University Press, 2019) chs 4 and 6; 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373; 'Can There Be a Democratic Jurisprudence?' (Public Law Research Paper No 08-35, NYU School of Law, 2008) 24, available at <https://ssrn.com/abstract=1280923>; Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 123–6.
[38] Waldron, *Political Political Theory* (n 8); Fuller, *The Morality of Law* (n 34).
[39] Waldron, *Political Political Theory* (n 8); Waldron, *The Rule of Law* (n 1) 82: 'Fuller's presentation … was precisely as a discipline incumbent on a legislator, Fuller's rather hapless character, King Rex.'
[40] *Breskvar v Wall* (1971) 126 CLR 376; *Frazer v Walker* [1967] 1 AC 569; *Deguisa v Lynn* (2020) 384 ALR 209 [3].
[41] Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* (Report No 16, 1973) 1–2; *Rock v Todeschino* [1983] Qd R 356 (McPherson J); *Hutchinson v Lemon* [1983] Qd R 369, 374 (Connolly J); Queensland Law Reform Commission, 'A Working Paper of the Law Reform Commission on a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland' (Working Paper No 32, 1989) 48–9, 148–50; *Real Property Act 1988* (Qld) s 119A; s 119A was inserted by the *Real Property Act Amendment Act 1985* and later re-enacted as section 83A of the *Land Title Act*; *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 239 ALR 75.

of the registered proprietor'.[42] The High Court affirmed that statement as doctrinally coherent in *Deguisa v* Lynn, a case about notification of a restrictive covenant, noting the approach in *Hutchinson v Lemon* was approved by an earlier Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd.*[43] The High Court said that, as in that case law, there is 'a distinct [judicial] preference for the firm clarity of the approach [that] is a better fit with the understanding of the Torrens system as a system of title by registration, affirmed in *Breskvar v Wall*'.[44]

Harris on a Role for Juristic Doctrine

Harris offers practical assistance 'to all those concerned with political and legal questions about distribution and property-institutional design'.[45] Harris's counsel is that 'in relation to most difficult questions, the underlying justice reasons ought to be unearthed, much more often than they are when, in legal reasoning, 'ownership' is invoked as a principle'.[46] Although, in their daily work, lawyers and judges 'have to deal with micro questions of distribution and property-institutional design', they 'do not, and are in no position to, raise their eyes to overall yes/no questions about whether their society's property institution is, to the requisite degree, just'.[47] Accordingly, 'juristic doctrine' has a particular part to play in these circumstances.[48] Juristic doctrine 'has a *prima facie* normative status in view of indeterminacy, good-faith controversy, and justified reliance'.[49] Its norms are particularly useful when conventional solutions run 'counter to the balance of property-specific justice reasons' and when the 'balance leaves some issue indeterminate or subject to good-faith controversy'.[50]

In *Property and Justice*, Harris provides illustrations of how underlying justice reasons ought to be unearthed.[51] First, windfall wealth: an issue arising sometimes 'in the interstices of statutory construction' – 'if a resource is genuine windfall wealth, equality of resources is a sound property-

[42] *Hutchinson v Lemon* (n 41) 374 (Connolly J): the case involves notification of an easement; *Deguisa v Lynn* (n 40) [68].
[43] *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528, 531–2: *Deguisa v Lynn* (n 40) [4]: In *Westfield Management Ltd v Perpetual Trustee Co Ltd*, 'the Court unanimously affirmed that the dealings recorded on the certificate of title, together with the information appearing on that folio of the Register Book, provide a purchaser taking his or her title to land from the registered proprietor "with the information necessary to comprehend the extent or state of the registered title to the land in question" so that information extraneous to the certificate of title was immaterial to the indefeasibility of the purchaser's title'.
[44] *Deguisa v Lynn* (n 40) [68]–[70]: 'Within that system, the State's guarantee of the state of the title of the registered proprietor shown by the certificate of title encompasses any qualification to that title by virtue of the interest in the land of a person other than a registered proprietor.'
[45] Harris, *Property and Justice* (n 6) viii.
[46] Ibid 368; David Lametti, 'The Morality of James Harris's Theory of Property' in T Endicott, J Getzler and E Peel (eds), *The Properties of Law: Essays in Honour of James Harris* (Oxford University Press, 2006) 138, 165.
[47] Harris, *Property and Justice* (n 6) 368.
[48] Jim Harris, 'Is Property a Human Right?' in Janet McLean (ed). *Property and the Constitution* (Hart Publishing, 1999) 64, 85; Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984) 74–5.
[49] Harris, 'Is Property a Human Right?' (n 48).
[50] Ibid; Ryan (n 48) 74–5: human 'unsocial sociability' drives private property into the public sphere; HS Reiss (ed), *Kant's Political Writings* (Cambridge University Press, 1991) 42.
[51] Harris, *Property and Justice* (n 6) 368; Lametti, 'The Morality of James Harris's Theory' (n 46) 145.

specific justice reason'.[52] Second, where there is the shell of a natural property right, Harris expands on the principle that 'there are no free-standing natural rights to full-blooded ownership', stating that "substance may be given to the shell of two natural rights based on labour-desert and privacy'.[53] Harris gives the example of legislation to re-allocate property on divorce or death.[54] Waldron says such provisions respond to a felt need for 'a single, determinate community position', and 'one whose enforcement is consistent with the integrity and univocality of justice'.[55] Third, 'the first occupant of a tangible resource ought to be regarded as its owner', whether the first occupancy is by an individual or a community.[56] In the latter case, the position may be more complicated: where the group is 'bound together by cultural and economic ties and … land may be integral to its self-identify', meaning that the claim is not for full-blooded ownership but for communitarian property.[57] Fourth, in circumstances where a person's privacy can be guaranteed effectively only if she 'is granted an open-ended set of use-privileges and control-powers over some resources' with which she is intimately connected, she 'ought to be regarded as owner of that resource'.[58] Harris argues here that, while privacy is 'an important property-specific reason to be taken into account in property-institutional design', 'its importance drowns out any significance which might be attached to metaphysical notions of personhood-constituting'.[59] These illustrations of the unearthing of justice reasons assist legislators evaluating 'the most difficult questions' to go beyond the mere invocation of 'ownership' as a principle.[60]

Past 'Juristic' Law Reform in Queensland

For the Queensland property institution, one consequence of legislators finding doctrinal analysis of property rules challenging was the establishment of the Queensland Law Reform Commission.[61] This means that the unearthing of well-hidden justice reasons is often undertaken by the Commission on a reference from the Attorney-General.[62] Indeed, the *Law Reform Commission Act 1968* (Qld) was enacted to create a Law Reform Commission 'to reform the antiquated property law of Queensland'.[63] Modelled on the *Law Commissions Act 1965* (UK), the Queensland Act entrusted the systematic

[52] Harris, *Property and Justice* (n 6) 314–6.
[53] Harris, 'Is Property a Human Right?' (n 48) 85; Harris, *Property and Justice* (n 6) 209–12.
[54] Harris, *Property and Justice* (n 6) 210.
[55] Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 38–9: the inevitability of disagreement between the sides to a testamentary dispute means, politically, all that is possible is for a view to be identified which can stand as that of the community; Harris, 'Is Property a Human Right?' (n 48) 83–4.
[56] Harris, *Property and Justice* (n 6) 213–20.
[57] Harris, 'Is Property a Human Right?' (n 48) 81.
[58] Harris, *Property and Justice* (n 6) 224–8; Lametti, 'The Morality of James Harris's Theory' (n 46).
[59] Harris, *Property and Justice* (n 6) 228.
[60] Ibid 368.
[61] *Law Reform Commission Act 1968* (Qld); Queensland Law Reform Commission, 'Working Paper' (n 41) 3–4.
[62] Queensland Law Reform Commission, *Review of Queensland's Laws Relating to Civil Surveillance and the Protection of Privacy in the Context of Current and Emerging Technologies* (Report No 77, February 2020); *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015).
[63] Queensland Law Reform Commission, 'Working Paper' (n 41) 3–4.

development of the State's law to a permanent body with prescribed judicial and legal membership,[64] and juristic law reform procedures.[65] The Commission's role precedes evaluation of property questions by legislators, and explicitly includes responsibilities for legal understanding and legal coherence: the Act states '[t]he function of the Commission shall be to take and keep under review all the law applicable to the State with a view to its systematic development and reform'.[66]

Given a broad property law reference when first established, the Commission proceeded with formality and a marked 'discipline of equality'.[67] The Commission published detailed working papers, reports, and draft Bills,[68] and the proposed Bills attached to Commission reports for the property law reference were enacted largely unchanged by the Parliament.[69] Doctrine was presented by the Commission 'as something one can make sense of' and overtly integrated 'particular items into a structure that makes intellectual sense'.[70] Consequently, the political community and the legal profession supported the Commission's recommendations for wide-ranging legislative refinements.[71] Once enacted, the legal reforms were an 'undoubted success … in modernising and simplifying Queensland property law, while at the same time increasing its sophistication'.[72] Further, the Commission's property rules were grounded in formidable scholarship,[73] connected explicitly to 'the fundamental principles (whether described as "liberal" or not) that inform, or (more strongly) are part of, the law itself, such as principles

[64] Queensland, *Parliamentary Debates [Hansard]*, 20 August 1968, 4; *Law Reform Commission Act 1968* (Qld), s 4(1): 'Each person appointed to be a member shall (a) be a person appearing to the Governor in Council to be suitably qualified by the holding of judicial office or by experience as a barrister or as a solicitor or as a teacher of law in a University.'
[65] *Law Reform Commission Act 1968* (Qld); Queensland Law Reform Commission, 'Working Paper' (n 1); *Report No 16* (n 1); Queensland Law Reform Commission, 'A Bill to Consolidate and Amend the Law Relating to Trusts, Trustees and Settled Land, Working Paper' (Working Paper No 5, 1970).
[66] *Law Reform Commission Act 1968* (Qld) s 10(1).
[67] AA Preece, 'Late 20th Century Property Law Reform in Queensland' (Paper delivered to 2001 Real Property Law Teachers Conference, Melbourne, 2001); AA Preece, 'Reform of the Real Property Acts in Queensland' (1982) 2 *QUT Law Review* 41, 6: 'the process followed and results achieved can be an example to other jurisdictions'.
[68] Preece, 'Late 20th Century Property Law Reform' (n 67).
[69] Peter M McDermott, 'Mr Justice BH McPherson – His Contribution to Law Reform in Queensland' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 433, 443.
[70] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3, 18.
[71] McDermott (n 69); David Robin, 'McPherson on Property' in Rahemtula (n 69) 520.
[72] Queensland Law Reform Commission, 'Working Paper' (n 41) 3; Preece, 'Late 20th Century Property Law Reform' (n 67); Preece, 'Reform of the Real Property Acts' (n 67); Patrick Keane, 'The Termination of Contracts for the Sale of Land upon the Failure of a Condition Subsequent' in Rahemtula (n 69) 106, 127.
[73] Robin (n 71) 525; Queensland Law Reform Commission, *Report No 16* (n 41) 1–2.

of fairness or equality'.[74] Michael Weir says the consequence was relatively few amendments and a comparatively low level of litigation.[75]

The work of the Commission shows that creating a stable, viable legal structure for a property institution 'is a complicated business'.[76] The unearthing of property-specific justice reasons requires analysis of legal theory and juristic doctrine.[77] The metaphor of a web appropriately captures 'the diversity of judicial and academic analysis' and indicates the importance of stability.[78] On one hand, a legislator's task is to ensure rules 'consistent with the integrity and univocality of justice'; on the other, it is to ensure that legislation accords with 'a single, determinate community position'.[79] The second aspect of the task – ensuring that property law doctrine is legally coherent – is examined in the next section.

II LEGAL COHERENCE

This section analyses legal coherence as relevant to the framework, where 'legal coherence' means that legal doctrine represents 'a single, determinate community position'[80] and there are no contradictions in the content of the law.[81] In this section, norms of coherence are drawn from High Court jurisprudence and from legal theory. The proposed real-world normative tool is careful thought about the legal and political culture in which proposed property rules are to operate.

Property Rules and Legal Coherence

Enacted property rules must work in with existing legal doctrine and with other property rules – previously enacted or as found in case law.[82] If they do not, legislative rules creating legal contradictions might fail in law if the contradictions would be liable to create unfairness.[83] Contradictions would likely be addressed more robustly if draft Bills were published (enabling a wide range of views to be

[74] Michael Tilbury, 'Book Review: Justice According to Law, a Festschrift for the Honourable Mr Justice B. H. McPherson CBE' (2008) *University of Queensland Law Journal* 11: Tilbury points to an extra-judicial public letter to the then President of South Africa seeking an explanation of the public policy supporting lawgiving that prohibited marriage between a white person and a non-white person; Stanley Jones, 'A Judicial Hero' in Rahemtula (n 69) 14.
[75] Weir, 'An Australian View' (n 4) 296; Crown Law, 'Review of Property Law in Queensland' available at <www.crownlaw.qld.gov.au/resources/publications/review-of-property-law-in-qld>.
[76] Joseph William Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* (Yale University Press, 2015) 6.
[77] Harris, 'Is Property a Human Right?' (n 48) 85.
[78] Moses and Edgeworth (n 28) 2.
[79] Waldron, *The Dignity of Legislation* (n 5) 38–9; Harris, 'Is Property a Human Right?' (n 48) 83–4.
[80] Waldron, *The Dignity of Legislation* (n 5); Barnes (n 2).
[81] Laws (n 10) 97.
[82] Ibid.
[83] Ibid; Fuller (n 34).

considered by legislators, 'not least from experts in the area and those directly affected'), but such rigorous pre-legislative scrutiny rarely occurs.[84]

Legal coherence – consistency in the law and in the way it is applied – is a product, in any event, of careful legislative practice.[85] It results from legislators deploying a real-world normative tool: careful thought about the legal and political culture in which property rules operate.[86] Within a property institution, formal (enacted and common law) and informal property rules govern social and economic interactions as 'individuals and entities carry on their daily activities, engaging in transactions, coordinating with others, satisfying their needs and desires, pursuing their purposes, undergirded by a framework of laws relating to property'.[87] Property rules are remade in response to social changes in these social and economic interactions, and the remaking might necessitate a formal, legislative rule change.[88] When enacted property rules are required, the legislative task involves 'correct interpretation of the situation and … the thing at stake'.[89] For legislators, the real-world normative tool of careful thought about the legal and political culture in which property rules is a process of reaching doctrinal understanding.

Australian case law draws attention to the importance legislators ought to give to legal coherence.[90] Judges and lawyers 'proceed from an assumption that legislation has been passed by the Parliament in a coherent form, and that it evinces a coherent and clear vision of what it seeks to do'.[91] In *Miller v Miller*, about negligence and illegality, the High Court said doctrinal coherence is an important consideration in two respects. At one level, principles applied must be compatible with those applied in other areas of Australian general law.[92] At a second level, doctrinal contradictions are to be avoided, such as by considering whether it would be incongruous for the law to regulate illegal conduct on the one hand, and to allow a remedy (in negligence) on the other.[93]

[84] Burrows, *Thinking About Statutes* (n 37) 118–22; Nye Perram, 'Comment on Paper of Peter Quiggin' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) 97; Peter Quiggin, 'Statutory Construction: How to Construct, and Construe, a Statute' in Williams (op cit).
[85] Balkin (n 8) 106–8; Fuller (n 34) 162. Legal coherence is one of Fuller's eight principles of legality.
[86] Balkin (n 8) 106–8.
[87] Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017) 28; Carol M Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73, 84–5: Rose refers to an 'interpretive community', required if the concept of 'possession' is to operate in property law. It is not enough for a mere claim to be asserted; rather, 'some relevant world must understand the claim it makes and take that claim seriously'.
[88] Tamanaha (n 87) 1, 28.
[89] Jürgen Habermas, *Between Facts and Norms* (Polity Press, 1996) 164.
[90] *Miller v Miller* (n 3) [15]–[16]; *Sullivan v Moody* (2001) 207 CLR 562 [42], [53]–[55]; *CFMMEU v Personnel Contracting Pty Ltd* (2022) 398 ALR 404; Stephen Barnes (n 2); Gillooly (n 2).
[91] Habermas, *Between Facts and Norms* (n 89) 164.
[92] *Miller v Miller* (n 3) [15]–[16].
[93] Ibid.

The Coherence Capabilities of Legislators

An example of doctrinal incongruity, demonstrating legal coherence challenges faced by legislators, is found in *Coleman v Power.*[94] The High Court ruled invalid a provision of the *Police Powers and Responsibilities Act 1997* (Qld) as it was held to infringe the implied constitutional freedom of political communication. The provision made lawful the arrest of a person in a 'public place' for use of insulting words even when the words were used while speaking about political and governmental matters.[95]

As the decision in *Coleman v Power* suggests, legal coherence presents challenges for legislators, and it is foreseeable legal coherence might be a casualty in an age of statutes.[96] When voluminous legislation is passed quickly and on many subjects, it can be difficult for legislators to exercise legislative authority carefully, via a formal process.[97] Legislators without legal training may lack strong technical and theoretical understandings of law,[98] creating for instance contradictions 'between common law and statute', such as where 'legislation [is] passed under a misapprehension as to the law'.[99] Further, 'legislation is very often so complex and the policies and principles it seeks to pursue are such that the noble vision of coherence is an unreal one'.[100] Too much technicality, for example, 'can be a very bad thing; it may divert us from achieving sensible outcomes by creating artificial road blocks' to the balancing of 'multiple, competing policy goals in a fine-tuned way'.[101]

In addition, there is a body of uncomplimentary literature examining the capacities of Queensland's legislators to understand the legislation they enact.[102] In the late twentieth century, the report of the Fitzgerald Inquiry into police corruption warned that '[t]he skills individual members bring to Parliament are often inadequate for the analysis of complex public accounts and transactions and scrutiny of major legislation'.[103] The report recommended wider use of parliamentary committees in Queensland as 'a vital and energetic part of giving effect to democratic processes particularly in respect of complex issues'.[104] Yet recent studies find limited pre-enactment review by committees and that

---

[94] *Coleman v Power* (2004) 220 CLR 1; *Evans v State of New South Wales* [2008] FCAFC 130.
[95] *Coleman v Power* (n 93); *Evans v State of New South Wales* (n 93).
[96] Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) 181; Perram (n 84) 97.
[97] Burrows, *Thinking About Statutes* (n 37) 118.
[98] John Burrows, 'The Interrelation Between Common Law and Statute' (1976) 3 *Otago Law Review* 583; Colin A Hughes, *The Government of Queensland* (University of Queensland Press, 1980) 113–6.
[99] Beatson (n 14) 5–11.
[100] Perram (n 84) 97; Quiggan (n 84).
[101] Singer, *Property* (n 9) [1.3.1].
[102] Hughes, *The Government of Queensland* (n 98) 113–6; Rosemary Whip and Colin A Hughes (eds), *Political Crossroads: The 1989 Queensland Election* (University of Queensland Press, 1991); Peter Coaldrake, 'Overview – Reforming the System of Government' in Scott Prasser, Rae Wear and John Nethercote (eds), *Corruption and Reform: The Fitzgerald Vision* (University of Queensland Press, 1990) 158; Scott Prasser and Nicholas Aroney, 'Real Constitutional Reform After Fitzgerald: Still Waiting for Godot' (2009) 18 *Griffith Law Review* 596.
[103] GE Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council* (Queensland Government Printer, 3 July 1989) 125, available at <www.ccc.qld.gov.au/>.
[104] Ibid 124.

which does occur tends to be dominated by governing party members.[105] Even an additional scrutiny requirement under the *Human Rights Act* has failed to ensure robust legislative scrutiny.[106]

The real-world normative tool proposed to support legislators' doctrinal coherence capabilities is careful thought about the legal and political culture in which property rules operate. The tool emerges from theoretical and judicial arguments that doctrinal coherence has an important and 'intimate relation' with legal understanding.[107] The term 'property' itself, for example, has different definitions in different doctrinal contexts. This means a 'constitution may restrict the States' right to take "property"', or a 'statute may authorize a divorce court to reallocate "property", or stipulate formalities for the transfer of "property", or impose a tax on "property"'.[108]

The relation between doctrinal coherence and legal understanding involves two legislative actions: building legal understanding from careful thought about the legal and political community; and building doctrinal coherence capabilities from legal understanding. The actions are complemented by rational discourse, as examined in Chapter 3. The relation between doctrine and understanding is analysed below, with reference to case law and legal theory assisting legislative capability.

Legal Understanding from Careful Thought About the Legal and Political Community

There are four key points for legislators thinking about the Queensland legal and political community. First, within any given community, 'it will be accepted and understood that certain objects of property can only be used in a particular manner; the bundle of rights that is private property will vary with respect to certain resources'.[109] David Lametti illustrates: 'Arable land is meant to be planted, water needs to be drunk, land needs to be accessible, and, all things being equal, a structurally well-maintained house is better than an amenity such as a swimming pool.'[110] Thus, in Queensland where it is understood arable land is meant to be planted, legislation provides specifically for agricultural fixtures,[111] and rights to the flow of water.[112] And, in *Coleman v Power*, the High Court overturned Coleman's summary

[105] Kate Jones and Scott Prasser, 'Resisting Executive Control in Queensland's Unicameral Legislature – Recent Developments and the Changing Role of the Speaker in Queensland' (2012) 27 *Australasian Parliamentary Review* 67, 68.
[106] Lynda Pretty, 'Queensland's Scrutiny of Proposed Legislation by Parliamentary Committees' (2019–20) 35 *Australasian Parliamentary Review* 54; Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without A Bill of Rights* (Ashgate, 2006) 61, 73–6; Janina Boughey, 'The Scope and Application of the Charters' in Matthew Groves and Tom Campbell (eds), *Australian Charters of Rights a Decade On* (The Federation Press, 2017) 36, 38.
[107] Balkin (n 8) 105.
[108] Ibid.
[109] David Lametti, 'Destination' (2020) 66 McGill Law Journal 47, 51.
[110] Ibid 50.
[111] *Property Law Act 1974*, pt 8, div 2.
[112] *Water Act 2000* (Qld); *Schwennesen v Minister for Environment and Resource Management* [2010] QCA 340 [10]–[12].

conviction because, within the prevailing legal and political culture in Australia, a public place is meant to be available for free political communication.[113]

Second, different legal rules are made for different communities.[114] This is because communities 'vary greatly depending on cultural and religious values, the economic system, the political system and the level of social complexity'.[115] The variations are 'evident in property rights'.[116] Each property institution must accommodate 'the realities of broader competing values, property's rivalrous nature, and its unavoidably critical role in human life'.[117] Therefore, in *Yanner v Eaton*, where the High Court set aside a conviction on one count of taking fauna contrary to the *Fauna Conservation Act 1974* (Qld), the Court emphasised 'property' does not have one specific and precise meaning; it is not a term of art.[118] And in *Deguisa v Lynn*, the Court noted statutory variations between the Australian States and the Northern Territory as to registration of restrictive covenants in common building schemes.[119]

Third, it is via legislation that a state gives notice of proposed systemic change to property norms, and of proposed state choices for systemic change.[120] Legislation identifies the rights and duties to be affected by the state choice, and the ways they are to be affected.[121] A statutory provision constitutes a public declaration that property rights are being promoted, limited or completely reimagined.[122] In *Duncan v State of Queensland*, the High Court said that statute may create property interests unknown to the common law,[123] and 'there is nothing higher among legal rights than a right created by statute'.[124] And it is common for statutes enacted by legislatures to 'go to what many see as the core traditional elements of private ownership such as alienability'.[125] So, from these understandings about notice it

---

[113] *Coleman v Power* (n 94); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[114] Tamanaha (n 87) 127.
[115] Ibid.
[116] Ibid.
[117] Laura S Underkuffler, 'A Theoretical Approach' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 11, 14–5.
[118] *Yanner v Eaton (No 2)* (1999) 201 CLR 351 [17]–[19], [85]–[86]; *Kennon v Spry* (2008) 238 CLR 366 [52], [89]–[90].
[119] *Deguisa v Lynn* (n 40) [12].
[120] Lisa M Austin, 'Property and the Rule of Law' (2014) 20 *Legal Theory* 79, 82–3; it is only legislation, 'properly authorised and made' that can 'unilaterally create or change rights and obligations of citizens generally, or change or affect the operation of the general law': Queensland Government Department of Premier and Cabinet *Queensland Legislation Handbook* [1.2], available at <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook.aspx>.
[121] Austin, 'Property and the Rule of Law' (n 120).
[122] Lisa M Austin, 'The Public Nature of Private Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 1, 19; Vanessa Johnston and Ben France-Hudson, 'Implications of Climate Change for Western Concepts of Ownership: Australian Case Study' (2019) 42(3) *UNSW Law Journal* 869; Michael Robertson, 'Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 239.
[123] *Duncan v State of Queensland* (1916) 22 CLR 556, 578
[124] *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92, 110.
[125] Austin, 'The Public Nature of Private Property' (n 122) 17.

follows that legislation should not be assumed merely to restate general law.[126] Rather, the conception of property enacted should be manifest in a proposed provision; for example, the idea at the heart of a Torrens statute is that, as title by registration derogates the common law, the wording states clearly the curing by registration of transactions void at common law.[127]

Fourth, a political community's property institution requires alteration over time.[128] Property norms are buffeted constantly by political, economic, cultural and technological factors.[129] As a result, the 'package of elements' an institution contains 'varies enormously in time and place and is nowhere static for long'.[130] Commonly, alteration is gradual, with the strands of the large doctrinal web pulling on each other: 'legislation, executive and administrative actions, court decisions, and the everyday activities of lawyers advancing the purposes of clients'.[131] In *Hutchinson v Lemon*, for instance, the question was whether a memorial of registered plan on a Torrens certificate of title was a notification of an easement over that land or merely a notification that a survey of such an easement had been lodged.[132] Connoll J applied the principle of immediate indefeasibility and said that left a legal task that was 'essentially a matter of the construction of the plan', an approach approved by the High Court.[133] In 1985, however, the ruling in *Hutchinson v Lemon* and a similar ruling by McPherson J in *Rock v Todeschino* were nullified; legislators enacted an amending section to prevent easements from arising solely through registration of a plan (now section 83A of the *Land Title Act 1994*).[134] The Queensland Law Reform Commission reported a large volume of case law seeking clarity about the operation of the amending section but recommended the section be retained and clarified.[135]

Legal Understanding and Doctrinal Coherence

Careful thought about legal and political culture promotes legal understanding, addressing doctrinal questions that are multifarious, complex and highly technical,[136] such as questions relating to 'the technicalities of the registration of land titles'.[137] Indeed, legislators thinking about property will find

[126] *Wik Peoples v Queensland* (1996) 187 CLR 1; Austin, 'The Public Nature of Private Property' (n 122) 19.
[127] Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 *UNSW Law Journal* 367; *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425 .
[128] Harris, *Property and Justice* (n 6) 3; Hanoch Dagan, 'The Craft of Property' (2003) 91 *California Law Review* 1517; Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733.
[129] Harris, *Property and Justice* (n 6) 3.
[130] Ibid.
[131] Tamanaha (n 87) 127–8.
[132] *Hutchinson v Lemon* (n 41).
[133] *Deguisa v Lynn* (n 40) [67]–[68]: 'In approving of the decision in *Hutchinson v Lemon* and the remarks of Connolly J in the cited passage in particular, the Court in *Westfield* accepted that only instruments notified by entry or memorial on the certificate of title are sufficiently notified on the certificate of title to defeat the otherwise unqualified title of the registered proprietor.'
[134] Queensland Law Reform Commission, 'Working Paper' (n 41) 48–9; *Rock v Todeschino* (n 41).
[135] Queensland Law Reform Commission, 'Working Paper' (n 41) 51.
[136] Laws (n 10) 98.
[137] Jeremy Waldron, 'Property Law' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd ed, Wiley-Blackwell, 2010) 9, 15.

'there are a number of issues that make little sense unless debated with an awareness of the point of property rules (or specifically, rules of private property)'.[138] Without that activity of understanding, doctrine is 'like an arcane and unintelligible code, to be learned at best by rote'.[139] Registration of fee simple interests is one such technical issue – its source is government grant or sale, not individual settlement,[140] and under the *Land Title Act*, a 'registered owner' of a lot is 'the person recorded in the freehold land register as the person entitled to the fee simple interest in the lot'.[141]

To be adequate to the legislative task, legal understanding must extend to legislation's interactions with doctrine.[142] Proposed property rules must accommodate the forward-looking nature of legislation, and the need for 'value judgments about the appropriate contours' to be reached for indeterminate doctrinal issues.[143] In *Electrolux Home Products Pty Ltd v Australian Workers' Union*,[144] Gleeson CJ explains interactions between legislation and existing doctrine:

> Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules ... Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament … One function of the word 'presumption' in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles.[145]

And legal understanding must include familiarity with the statute book. That is because in Queensland legislation itself states many principles relevant to understanding the legal and political culture in which property law operates. Examples are in sections 30 and 40 of the *Constitution Act 1867*, and provisions in the *Legislative Standards Act 1992* (Qld), *Statutory Instruments Act 1992* (Qld), *Parliament of Queensland Act 2001* (Qld) and *Human Rights Act 2019* (Qld). Specific doctrinal statements are found in provisions of the *Property Law Act 1974* and *Land Title Act 1994*; for example, section 4 of the *Property Law Act* states that the Act should not be taken to confer a right to register a restrictive covenant.[146]

---

[138] Ibid.
[139] Ibid.
[140] *Property Law Act 1974*, s 8; Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387.
[141] *Land Title Act 1994*, s 184(1) and (2), sch 2; *Moreton Bay Regional Council v Mekpine Pty Ltd* (2016) 256 CLR 437.
[142] Harris, *Property and Justice* (n 6) 12; AM Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987) 105–47.
[143] Joseph Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 247.
[144] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309.
[145] Ibid [21] (Gleeson CJ); *R v Home Secretary; Ex parte Pierson* [1998] AC 539 at 587, 589 citing John Bell and George Engel *Cross on Statutory Interpretation* (3rd ed, Lexis Nexis, 1976) 142–3.
[146] *Deguisa v Lynn* (n 40) [12].

Rational Discourse, Legal Understanding, and Legal Coherence

A related real-world normative tool essential to legal coherence is rational discourse. It facilitates legislative synthesis of norms.[147] Through normative discourse, legislators build understandings for doctrinal coherence,[148] including 'the underlying human values property serves and the social relationships it shapes and reflects'.[149] Recall Habermas's explanation that 'one cannot tell simply by looking at accepted social norms whether they exist "by right"'.[150] Legislators can know this 'only about those norms that meet with the carefully considered agreement of all addressees under conditions of a rational discourse'.[151] In *The Theory of Legislation*, Bentham recognised that the legislative process must involve a 'back and forth … between the prejudices of the people and the fallacies of their representatives'.[152] And, via discourse, legislators discern how best a property institution's rules might be refined.[153] As Habermas explains, legislating is 'a means of social integration',[154] and 'legislators alone enjoy unlimited access to normative, pragmatic and empirical reasons'.[155] Via discourse, legislators determine the ways in which 'presumptive (and weak)' property rights might best be promoted and protected by legislation.[156] Rational discourse also equips legislators to enact property rules representing a 'a single, determinate community position',[157] rules that do not contradict existing law.[158] This is because discourse promotes deeper understanding of the legal and political culture in which law operates.[159]

As Brian Tamanaha explains, the property rules formulated in this way will govern the ways in which 'individuals and entities carry on their daily activities, engaging in transactions, coordinating with others, satisfying their needs and desires, pursuing their purposes'.[160] These legal transactions raise a third aspect of a Queensland legislator's doctrinal task – ensuring doctrine does not diverge from law as it is practised. The next section turns to that issue.

---

[147] Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464, 467; Runciman, 'Review' (n 5) 445.
[148] Waldron, *Political Political Theory* (n 8) 9–10.
[149] Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) *Cornell Law Faculty Publications* 11 [1].
[150] Jürgen Habermas, *Philosophical Introductions: Five Approaches to Communicative Reason*, tr Ciaran Cronin (Polity Press, 2018) 102–3.
[151] Ibid.
[152] Jeremy Bentham, *The Theory of Legislation* (K Paul, Trench, Trubner & Co, 1931) 77–8; Waldron, *Political Political Theory* (n 8) 146.
[153] Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016) 19.
[154] Habermas, *Between Facts and Norms* (n 89) 180: legislating is 'a complex network that includes processes of reaching understanding'.
[155] Ibid 192.
[156] Harris, 'Is Property a Human Right?' (n 48) 85.
[157] Ibid.
[158] Laws (n 10) 97.
[159] Balkin (n 8) 106–8.
[160] Habermas, *Between Facts and Norms* (n 89) 180.

III COHERENCE WITH LEGAL PRACTICE

Sir Stephen Laws describes divergence 'between the law and its application in practice' as Fuller's 'last route of failure' for a legal system.[161] In this section, therefore, the specific objective of the proposed Stage 3 (doctrinal) inquiry is the avoidance of divergence between law and its application by careful matching of doctrine with legal practice and the administration of legal transactions occurring within the property institution. The analysis draws upon theory and upon the '*prima facie* normative status' of the juristic doctrine of the High Court.[162] It proceeds via a focus on four rationales offered by Laws for legislation's coherence with legal practice.[163]

Due to their open-ended nature, property rules are 'negotiated case by case by matching actual practices to legal concepts'.[164] Therefore, the *Property Law Act 1974* recognises 'practices that had been followed locally (sometimes contrary to what the law may have provided)'.[165] The Act collected together and enacted 'existing, reformed and new rules covering quite disparate fields'.[166] Its enactment followed legislative recommendations for reform made by the Queensland Law Reform Commission, recommendations aimed at consistency with legal practice.[167] The Act effected 'some dramatic reforms, even controversial ones',[168] including reforms to recognise contracts for the benefit of third parties to ensure consistency with insurance practice,[169] and to alter the obligations of parties to short leases to accord with changes in community expectations as to safety in residential accommodation.[170] A further tranche of reform recommendations was made once the Commission had 'extensively sought submissions from the legal profession on the practical operation of the statute'.[171] As a consequence, the Act was found to be 'arguably the most advanced general property statute in a common law jurisdiction'.[172]

---

[161] Laws (n 10) 97.
[162] Harris *Property and Justice* (n 6) 368.
[163] Laws (n 10) 97–8.
[164] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019) 28; Hanoch Dagan, 'Lawmaking for Legal Realists' (2013) 1 *Theory and Practice of Legislation* 187; Kennedy (n 11).
[165] Michael Weir 'Land Title Act 1994 (Qld) – Statute for a New Millennium?' (2000) 4 *Flinders Journal of Law Reform* 185, 185: the *Land Title Act 1994* further added 'one of the most significant reworkings of the Torrens system in Australia'.
[166] Ibid; Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974–1986* (Report No 37, 1987) 1: '[i]n the early 1970's Queensland possessed probably the most antiquated general property law in the English speaking world'.
[167] Robin (n 71) 520, 522–3; Keane (n 72) 106.
[168] Weir 'Land Title Act 1994 (Qld)' (n 165) 185.
[169] *Property Law Act 1974*, s 55; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1998) 165 CLR 107.
[170] *Property Law Act 1974*, s 106; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.
[171] QLRC, *Report No 37* (n 166) 1.
[172] Ibid, quoting WD Duncan and RJ Vann's *Property Law and Practice in Queensland* (Law Book, 1982) 9.

At times, the matching of actual practices to legal concepts requires substantial change, commonly via legislation effecting systemic change.[173] This was the situation with Australasian testator family maintenance reforms enacted in the early years of the twentieth century.[174] The legal doctrine of testamentary freedom had been received into Australasian colonies,[175] but it became apparent that the doctrine anticipated a level of ongoing legal services unavailable in the colonies.[176] Without access to solicitors for the drafting of wills, testators frequently bequeathed estates in ways that left dependents in indigent circumstances.[177] At that time, moreover, welfare support was not provided by the state.[178] In England, by comparison, 'the vast majority of family estates of any size were settled upon marriage', ensuring 'a businesslike and responsible control over the economic destinies of the family for long periods of time'.[179] Indeed, in the middle of the nineteenth century, 'between one-half and two-thirds of all land in England was entailed and … subject to strict family settlement'.[180]

WA Lee explains the practical effect of the jurisdictional differences in access to legal services, namely,

> the protections afforded by the device of family settlement … were not available so readily to settlers in the colonies. For them the services of a family solicitor, trained in the intricacies of equity drafting were not an every-day matter ... Since family settlements were and are unusual in the Australian and New Zealand context, the English succession laws … ungoverned as they were in the matter of freedom of testation, became a more potent agent in the redistribution of family property rights, and its inability to protect the family became an intolerable disadvantage.[181]

Legislators achieved reform in New Zealand at the turn of the twentieth century,[182] paving the way for legislative change that followed in Australian jurisdictions.[183] Lee says the reforming legislation is 'the most significant development in any western system since Roman times'.[184] The present form of those

---

[173] Waldron, *The Dignity of Legislation* (n 55) 38–9.
[174] *Testator's Family Maintenance Act of 1900* (NZ); *Testator's Family Maintenance Act 1914* (Qld).
[175] WA Lee, *Manual of Queensland Succession Law* (8th ed, Lawbook Co, 2019) 2–3.
[176] Ibid; Rosalind Croucher, 'How Free is Free? Testamentary Freedom and the Battle Between "Family" and "Property"' (2012) 37 *Australian Journal of Legal Philosophy* 9; Queensland Law Reform Commission, *Report to the Standing Committee of Attorneys-General on Family Provision* (Working Paper 28, 1997); NSW Law Reform Commission, *Uniform Succession Laws: Family Provision* (Report 110, 2005); Sylvia Villios and Natalie Williams, 'Family Provision Law, Adult Children and the Age of Entitlement' [2018] *Adelaide Law Review* 11; Virginia Grainer, 'Is Family Protection a Question of Moral Duty' [1994] *Victoria University of Wellington Law Review* 8.
[177] Lee, *Manual of Queensland Succession Law* (n 175) 3.
[178] Ibid.
[179] Pistor (n 164) 37–9.
[180] Ibid.
[181] Lee, *Manual of Queensland Succession Law* (n 175) 3.
[182] *Testator's Family Maintenance Act of 1900* (NZ); Rosalind Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900: The Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 203.
[183] *Testator's Family Maintenance Act 1914* (Qld); Pistor (n 164) 37–9. Meanwhile, in the United Kingdom, by 1880 owners of land had lost control of the Parliament, and reforming legislation there 'triggered a reallocation of land on a scale not seen since the enclosure movement'. In the two decades to the turn of the century, more than 20 per cent of English land changed hands.
[184] Lee (n 175) 2–3; Singer, *No Freedom Without Regulation* (n 76) 112.

testator family maintenance provisions is in Part IV of the *Succession Act 1981* (Qld). The statute allows a dependent of a deceased person to apply to the court for an order for adequate provision where that provision is not made by the person's will or under intestacy laws.[185]

The careful matching of actual practices to legal concepts in each of these two law reform examples – the Commission recommended reforms and the family provision reforms – demonstrates that 'law's value lies in facilitating transactions and making them secure'.[186] Clear property rules enable secure transactions, provided those rules do not cut across existing practices.[187] Laws cautions though that it can be 'unwise' to place undue trust in existing legal practice.[188] Accordingly, legislators should not 'elide the difficult or controversial elements of what is wanted … to rely instead on an understanding with those who administer the law that it will be applied in what is agreed to be a practical and sensible way'.[189] Rather, the careful matching of actual practices to legal concepts is informed by established rationales for doctrinal coherence with legal practice.[190] Laws identifies four rationales, each of which finds illustration in High Court case law.[191]

First, legislation itself might be the best way to establish stable legal practice.[192] Laws refers to the importance of understanding that 'what will happen in practice is likely to be a lot more temporary than the legislation to which it relates'.[193] An Australian illustration is the matching of practice to legal concepts prompted by a decision in *Black v Garnock* about the effect of a writ of execution lodged against a registered proprietor's interest.[194] The High Court held there is a strong principle that a legal judgment does not of itself bind or affect any Torrens land, emphasising the importance of lodgment and the priority it confers.[195] Callinan J referred to an apparent loss of the 'practice of careful conveyancers … to lodge with the officials in charge of the Register, a caveat as soon as the agreement for the relevant dealing was made' and to search the register prior to settlement.[196] The question for the Court would not have arisen 'had those salutary practices not fallen into disuse, whether by reason of electronic recording of dealings or otherwise'.[197] Indeed, at the time *Black v Garnock* was decided, Queensland legislators had put in place a statutory innovation to replace the disused practice of timely searching of titles.[198] As recommended by the Queensland Law Reform Commission, the *Land Title*

[185] *Official Receiver In Bankruptcy v Schultz* (1990) 170 CLR 306.
[186] Laws (n 10) 97–8.
[187] Galligan (n 13) 249; Taylor, *Modern Social Imaginaries* (n 25) 106; Weinrib (n 153) 8.
[188] Laws (n 10) 97.
[189] Ibid; when necessary, legislators will enact legal rules to ensure the stability and integrity of the property institution.
[190] Ibid 97–8, and, although Laws' reasons are stated generally, they are relevant to the work of legislators.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] *Black v Garnock* (2007) 230 CLR 438.
[195] Ibid [18]–[23] (Gleeson CJ).
[196] Ibid [52]–[53] (Callinan J).
[197] Ibid.
[198] *Land Title Act 1994*, pt 7A: originally 'settlement notices'.

Act provided for 'settlement notices' to protect (in addition to caveats) the priority of some unregistered interests.[199] Following *Black v Garnock*, the Queensland reform was adopted in Torrens statutes throughout Australia under the label of 'priority notices'.[200]

Second, there is a 'relatively high risk of successful challenges to understandings about practice, understandings not expressly contemplated' by legislation.[201] The facts and findings in *Deguisa v Lynn* illustrate this rationale.[202] There, registered proprietors of land had planning approval to subdivide their lot for the construction of two townhouses. A dispute arose with the registered proprietors of neighbouring lots whose position was that covenants in a long-standing building scheme prevented subdivision and construction of such dwellings. The aspiring developers contended that, as notice of the covenants had not been given to them, they could not be bound.[203] The High Court upheld the argument of the developers, stating that a person 'who seeks to deal with the registered proprietor in reliance on the State's guarantee of the title of the registered proprietor disclosed by the certificate of title in the Register Book (or its electronic equivalent) is not to be put on inquiry as to anything beyond that which is so notified'.[204]

In reaching its decision, the Court observed that in some Australian jurisdictions legislation makes specific provision for the creation and notification of restrictive covenants, but that in South Australia, Queensland and the Australian Capital Territory there is no such provision.[205] Although lower courts had upheld the 'practice of annexing the restrictive covenant of a common building scheme to an encumbrance which secures the payment of a sum of money' and facilitating registration of an instrument to give notice on the certificate of title of the restrictive covenant,[206] the High Court challenge was successful.[207]

Third, a rule might seem 'perfect in theory', even though in practice it is 'incapable of implementation because of its complexity'.[208] If those who operate the rule 'find it unworkable and apply a more practical and simpler (if less perfect) rule instead, then it is their rule that should be enacted'.[209] In Queensland, the statutory rules for strata title are highly complex due, in part, to the legal and social

[199] Ibid.
[200] Eg *Land and Other Legislation Amendment Act 2017* (Qld) s 39; *Real Property (Priority Notices and Other Measures) Amendment Act 2015* (SA).
[201] Laws (n 10) 97.
[202] *Deguisa v Lynn* (n 40).
[203] Ibid [5]–[7].
[204] Ibid [88].
[205] Ibid [12].
[206] Ibid: 'It must be understood that the rent charge in an encumbrance creates an interest in land, but a restrictive covenant of itself does not.'
[207] Ibid [88].
[208] Laws (n 10) 97.
[209] Ibid.

(including economic and political) relationships arising in strata title.[210] At the same time, strata and community title are 'the fastest growing forms of property title in Australia',[211] and especially notable in South East Queensland.[212] Anticipating doctrinal complexity and rapid change, the Queensland Law Reform Commission recommended strata title not be included in the *Property Law Act*.[213] The unworkability of the *Building Units and Group Titles Act 1980* (Qld) was in issue in *Ainsworth v Albrecht* where a registered proprietor under a strata title scheme sought unilaterally to acquire common property airspace located between two external balconies owned by the applicant.[214] The High Court (by majority) said a body corporate resolution overriding objections from other lot owners would be a matter of some gravity, in that

> adoption of the resolution will have the effect of: appropriating part of the common property to the exclusive use of the owner of another lot, for no return to the body corporate or the other lot owners; altering the features of the common property which it exhibited at the time an objecting lot owner acquired his or her lot; and potentially creating a risk of interference with the tranquillity or privacy of an objecting lot owner.[215]

Fourth, it is to be assumed 'that those subject to the law are entitled to rely on its terms for regulating their conduct'.[216] Harris's term is 'justified reliance'.[217] Beatson agrees that it is necessary for 'law to be accessible to ordinary individuals or their advisers before they commit themselves to a course of action'.[218] The key factor is 'the ability to find out what the law requires' and in some cases, 'there will be a general awareness of what is required even if not of the detail'.[219] Beatson notes the imperatives here of the 'rule of law values of certainty and predictability',[220] examined further in Chapter 5. Juristic doctrine indicates that it can be difficult to meet these imperatives, as in *Beaudesert Shire Council v Smith*, where Smith sought damages from the Council after it removed gravel, destroying a natural

---

[210] *Body Corporate and Community Management Act 1997* (Qld) s 4; Michael Weir 'Strata Title, Dispute Resolution and Law Reform in Queensland' (2018) 26 *Australian Property Law Journal* 361; Department of Justice and Attorney-General (Qld), *Lot Entitlements Under the Body Corporate and Community Management Act 1997 – Final Recommendations* (2016) <https://publications.qld.gov.au/dataset/400d0899-3ce7-4eb0-a242-6db01521e8db/resource/d0803718-372e-41ce-a918-344bdafcf5f6/download/property-law-review-lot-entitlements-re port.pdf>.

[211] Sherry (n 24) 280.

[212] Melissa Pocock, 'Discovering Common Ground: Appropriation of Common Property For Exclusive Use and Scheme Terminations: Reconsidering *Albrecht v Ainsworth & Ors* [2015] QCA 220' (2016) 35 *University of Queensland Law Journal* 393, 397; Queensland Department of Infrastructure and Planning, *Findings from the Gold Coast City Broadhectare Study* (6th ed, 2008) 6.

[213] Building Units and Group Titles Bill 1980 (Qld), Second Reading Speech, available at <www.qldparliament.gov.au>.

[214] *Ainsworth v Albrecht* [2016] HCA 40; *Commonwealth v Registrar of Titles (Vic)* (1918) 24 CLR 348, 354.

[215] Ibid [55]: under the *Body Corporate and Community Management Act 1997* the question for an adjudicator is whether the opposition of lot owners to the proposal is unreasonable.

[216] Laws (n 10) 97.

[217] Harris, *Property and Justice* (n 6) 368.

[218] Jack Beatson *Key Ideas in Law: The Rule of Law and Separation of Powers*(Hart, 2021) 29.

[219] Ibid.

[220] Ibid.

waterhole from which Smith pumped water under licence granted pursuant to the *Water Act 1926* (Qld) (rep).[221] The Court stated the 'enduring principle' that independently of trespass, negligence and nuisance, a person who suffers harm or loss as the inevitable consequence of unlawful, intentional or positive acts of another (even if the acts are unlawful in relation to a third party) is entitled to recover damages.[222] However, a later decision of the Court questioned that application of enduring principle on the facts, including because the taking of gravel by the Council was forbidden by law and not merely 'unlawful', and because on the evidence there was nothing to constitute a finding that damage was foreseeable.[223]

In aggregate, the four rationales identified by Laws – rationales for doctrinal coherence with legal practice – demonstrate again why legislators ought to seek to avoid divergence between the law and its application in practice:[224] avoidance is important because 'law's value lies in facilitating transactions and making them secure'.[225] Thus, the careful matching of doctrine with legal practice (and with the administration of legal transactions occurring within the property institution) is the normative tool available to legislators seeking to achieve this objective. The matching is informed by theory and by the juristic doctrine of the High Court, as demonstrated in this part.

Relevant to doctrinal norms then, three 'real-world normative tools' respectively address aspects of a legislator's doctrinal task when evaluating property questions. The tools are the product of the proposed Stage 3 (doctrinal) inquiry: what, as a matter of legal doctrine, does the careful exercise of legislative authority require? First, the tool for a stable property institution is the unearthing of property-specific justice reasons.[226] Second, the tool for internal legal coherence is rational discourse directed to deeper understanding of the legal and political culture in which law operates.[227] Third, the tool for doctrinal coherence with law as it is practised in Queensland is the careful legislative matching of legal doctrine with legal practice.[228]

However, a final aspect of a legislator's doctrinal task remains. It is to ensure that proposed legislation addresses property in all its richness. As doctrine alone cannot do so,[229] the final part of Chapter 4 draws together institutional, property and doctrinal norms identified at all the three stages of the proposed staged formation of normative argument. In doing so, the final part aggregates Part A findings about the normative tools available to legislators evaluating property questions.

---

[221] *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 155; *Northern Territory v Mengel* (1995) 185 CLR 307.
[222] *Beaudesert Shire Council v Smith* (n 221).
[223] *Northern Territory v Mengel* (n 221) [32]–[33] (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[224] Laws (n 10) 97.
[225] Ibid 97–8.
[226] Runciman, 'Review' (n 5) 445.
[227] Balkin (n 8) 106–8.
[228] Kennedy (n 11).
[229] Ibid.

IV COMPLETING THE STAGED FORMATION OF NORMATIVE INQUIRY

As, on its own, doctrinal analysis is not 'up to the task of explaining law in all its richness',[230] the findings of the proposed Stage 3 (doctrinal) inquiry are now connected explicitly with the inquiries at Stages 1 (institutional) and Stage 2 (property) of the proposed staged formation of property discourse. The connection involves aggregation of the normative tools identified at each stage. For legislators, the explicit connection of the respective norms promotes full appreciation of 'the point of throwing social authority behind' a proposed property rule.[231] The identification of the full range of normative tools equips legislators an array of opportunities to develop – as relevant to proposed legislation – deeper, more integrated understandings of the property institution, the norms of property, and property law doctrine. The understandings can then be put to work, as necessary, to promote and protect 'property rights' under the *Human Rights Act* and at common law.

The proposed Stage 1 (institutional) inquiry commences from the position that in Queensland a property institution has always been in place.[232] The inquiry is into the institution's legal and political arrangements, its larger purposes, and the legal forms of the institution. The normative tool produced from the Stage 1 inquiry is deeper understanding of the bespoke features of the Queensland property institution: there is no one univocal definition of 'property';[233] traditionally, private property has been an important feature of the Queensland institution;[234] and all four ideal-typic categories of property are legal features of the institution.[235] Although a bespoke institution, it is also malleable.[236] With the enactment of the *Human Rights Act*, Queensland is now a state in which there is: a constitution that establishes the conditions for the valid exercise of all public authority; a human rights statute 'that delineates the right of people, by virtue of their dignity, to just governance';[237] and an independent judiciary hearing legal challenges to exercises of public authority.[238] The rules enacted for the Queensland institution must have the characteristics of rules made for a property institution within a modern constitutional state where human dignity is an 'pervasive' constitutional value.[239]

---

[230] Ibid; Sarah Blandy, 'Socio-legal Approaches to Property Law Research' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 24, 27.
[231] Waldron, 'Property Law' (n 137) 15–6.
[232] *New South Wales Constitution Act 1855* (Imp) s 2.
[233] *Yanner v Eaton (No 2)* (1999) 201 CLR 351.
[234] Harris, *Property and Justice* (n 6) 111–4.
[235] Paul T Babie, John V Orth and Charlie Xiao-chuan Weng, 'The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese, and Australian Land Law' (2016) 91 *Tulane Law Review* 739.
[236] Harris, *Property and Justice* (n 6) 140; Harris, 'Is Property a Human Right?' (n 48) 65–9.
[237] Weinrib (n 153) 17.
[238] Ibid.
[239] Jeremy Waldron, 'Human Dignity: A Pervasive Value' (Public Law Research Paper No 20-46, NYU School of Law, 1 July 2019) available at <https://ssrn.com/abstract=3463973>.

The proposed Stage 2 (normative) inquiry asks what justice requires. It recognises, as in the theory of JW Harris, that a property institution must pass a certain threshold of justice, including as to distribution and institutional design.[240] The normative tool comprises, on the one hand, two sub-inquiries from Charles Taylor's theory of distributive justice for modern secular states:[241] 'What is really going on here?' and 'What is the correct response of the state to diversity?' This tool confronts claims to 'property' with justice. For difficult problems, it is argued that claims to 'property' ought to be confronted also with demands for equal respect for human dignity. On the other hand, the normative tool comprises 'rational discourse' – a process by which a norm is subjected to rational discourse to ascertain whether it meets with the carefully considered agreement of all addressees.[242] The Stage 2 normative tools equip legislators to identify the norms of the internal morality of the property institution.[243] Thus equipped, legislators can take more confidence in legislating for property questions. That is, that proposed legislation prescribes 'what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons'.[244]

The proposed Stage 3 (doctrinal) inquiry is: what, as a matter of legal doctrine, does the careful exercise of legislative authority require? Three normative tools are produced, addressing respective aspects of the doctrinal task of legislators: the unearthing of property-specific justice reasons, ensuring a stable property institution;[245] rational discourse of legal and political culture in which law operates, for internal legal coherence;[246] and careful matching of legal doctrine with legal practice, for doctrinal coherence with law as it is practised in Queensland.[247] Finally, the careful exercise of legislative authority requires also the drawing together of institutional, property and doctrinal norms, mediating a legislative response to a property question.

In this way, the 'real-world normative tools' developed in Part A from analysis of legal theory, juristic doctrine, and scholarly commentary about the Queensland property institution, equip legislators working within the framework. Selecting from normative tools, while progressing through the proposed staged inquiry for property discourse, the State's legislators receive 'real-world' normative guidance. Legislators ought to be better equipped, therefore, to navigate the legitimation gap Habermas suggests has opened 'on the circuit between instrumentally conceived power and instrumentalized law'.[248] And legislators should have greater confidence in understanding whether legislative policies are adequate to

[240] Harris, 'Is Property a Human Right?' (n 48) 86; *Property and Justice* (n 6) 305.
[241] Charles Taylor, 'The Nature and Scope of Deliberative Justice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985) 289.
[242] Habermas, *Philosophical Introductions* (n 150) 102–3.
[243] Lametti, 'The Morality of Harris's Theory of Property' (n 46) 148–9.
[244] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 147) 469.
[245] Runciman, 'Review' (n 5) 445.
[246] Balkin (n 8) 106–8.
[247] Kennedy (n 11).
[248] Habermas, *Between Facts and Norms* (n 89) 146.

a property question, and in knowing whether a proposed response would be supported by constituents.[249] In short, legislators understanding the Queensland property institution, its property norms, and its doctrines are well-equipped to evaluate and respond to property questions about *what* property is within the Queensland institution: 'the substantive content of the law' and whether specific property rules 'must conform to certain fundamental values or ideals'.[250]

A further conception of legislating for property questions is examined in Part B. As explained by Beatson, the conception is concerned with 'how the law is made … and not with its content'.[251] Examined are legislative constraints on legislators' authority found in rule of law principles and small 'c' constitutionalism, statutory requirements (including those in sections 38 to 57 of the *Human Rights Act*), judicial dialogue with the legislature, and an appropriate emphasis on human dignity as a legislative value.

[249] Charles Taylor, Patrizia Nanz and Madeleine Beaubien Taylor, *Reconstructing Democracy: How Citizens Are Building from the Ground Up* (Harvard University Press, 2020) 1–2, 4.
[250] Beatson, *The Rule of Law* (n 218) 17.
[251] Ibid.

PART B – LAW AND LEGISLATION

Part B of the thesis is concerned with how legislation is made, not with its content.[1] A legislature, Jeremy Waldron says, 'is a place for making law', and legislating 'is an activity we ought to take seriously' because 'law is a serious matter affecting the freedom and interests of all members of the community'.[2] Legislators come together, representing a community, 'to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and … in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them'.[3] Enacted in this way, a legislative output demands 'acceptance and compliance even by those who oppose' its content and effect.[4] This is because the idea of legislation is 'the idea of making or changing law explicitly, through a process and in an institution publicly dedicated to that task'.[5]

Chapter 5 analyses statutory and common law controls on Queensland legislators. High Court jurisprudence is complemented by theory of Australian common law constitutionalism,[6] and Ronald Cass's analysis of property rights systems and the rule of law.[7] Legal controls examined are rule of law objectives,[8] statutory requirements for legislative scrutiny,[9] judicial mediation of the constitutional balance, including under the *Human Rights Act 2019*,[10] and *Human Rights Act* protection and promotion of 'a right to property'.[11]

Chapter 6 examines, initially, the dignity of legislation – concerted, cooperative, coordinated or collective action in the circumstances of politics. Seven principles of legislation developed by Waldron are real-world normative tools equipping legislators, David Runciman contends, to reach deeper layers of dignitarian value.[12] Thus equipped, legislators can put dignity to work as an integrating value when legislating, to manage and resolve disagreement, and to ensure equal justice according to law.

Part B shares with Part A the task of addressing the capacities of legislators working within the framework. To date, legal and political theory identifies but has not fully addressed four disjuncture

---

[1] Jack Beatson, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (Hart, 2021) 17.
[2] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) 145.
[3] Ibid 2.
[4] Ibid 166.
[5] Ibid 153–4.
[6] Robert French, 'Common Law Constitutionalism' (2016) 14 *New Zealand Journal of Public and International Law* 153; Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45 *Melbourne University Law Review* (Advance).
[7] Ronald A Cass, 'Property Rights Systems and the Rule of Law' in Enrico Colombatto (ed), The *Economics of Property Rights* (Edward Elgar, 2004) 222.
[8] Ibid; Jeremy Waldron, *The Rule of Law and The Measure of Property* (Cambridge University Press, 2012) 18.
[9] *Legislative Standards Act 1992* (Qld); *Statutory Instruments Act 1992* (Qld); *Parliament of Queensland Act 2001* (Qld).
[10] *Human Rights Act 2019* (Qld) pt 3.
[11] Ibid s 24; Kent Blore and Nikita Nibbs, 'A Theory of the Right to Property Under the *Human Rights Act 2019* (Qld) (2022) 30 *Australian Property Law Journal* (Advance).
[12] David Runciman, 'Review: Jeremy Waldron's Political Political Theory' (2019) 18(3) *European Journal of Political Theory* 437, 445

points creating the disconnect between the problem-solving of legislators and the effective public normativity of legislation. The first is the perception that legislators are 'motivated by exclusively political considerations, specifically the desire to be re-elected'.[13] The second is that legislation is a neglected area of scholarship,[14] arguably because orthodox legal theorists do not trust and are not interested in the work of legislators.[15] A third disjuncture point arises from a rapid, unceasing cycle of 'legislative enactment, amendment and re-amendment', producing outputs of questionable quality due to pressures upon drafters and legislators, outputs too voluminous to inspire confidence that they represent considered lawgiving.[16] These problems are compounded by voluminous delegated legislation receiving limited parliamentary and judicial review.[17] The fourth is concerns about legal coherence as a casualty in the age of statutes.[18] Legal consideration of interactions between legislative proposals and existing statutes and general law is inadequate, including because many legislators lack strong technical and theoretical understandings of law.[19]

The role of legislators, and the dignity of legislation will be affirmed in Part B. Human dignity as a normative concept – from the theory of Waldron, Habermas, and Weinrib – fashions a normative theory for legislators making law in the circumstances of politics.[20] Dignity mediates the legal and the political. Consistent with Jürgen Habermas's theory, Part B aspires to vital and perceptive legislative normative discourse marking out the shape of 'a population's imagination and sense of justice'.[21] Consistent with Waldron's theory, Part B adopts a 'rosy' and constructive view of the work of legislators,[22] affirming

[13] Edward L Rubin, 'Statutory Design as Policy Analysis' (2018) 55 *Harvard Journal on Legislation* 143; Ittai Bar-Siman-Tov, 'Beyond Neglect and Disrespect: Legislatures in Legal Scholarship' in Cyril Benoît & Olivier Rozenberg (eds), *Handbook Of Parliamentary Studies: Interdisciplinary Approaches To Legislatures* (Edward Elgar, 2020) 10; Waldron, *Political Political Theory* (n 2) 1–3.
[14] Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *UNSW Law Journal* 367; S Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash Law Review* 1; W Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) 1–37; M Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 *UNSW Law Journal* 1002; Lyria Bennett Moses and Brendan Edgeworth, 'Statutes in a Web of Law' in P Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (The Federation Press, 2019) ch 8.
[15] Richard A Posner, 'Review: Review of Jeremy Waldron, "Law and Disagreement"' (2000) 100(2) *Columbia Law Review* 582, 583; Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' (Public Law Research Paper No 08-35, NYU School of Law, 2008) 12, available at <https://ssrn.com/abstract=1280923>: government has become too complex to suit positivism's austerity.
[16] Jack Beatson, 'Common Law, Statute Law, and Constitutional Law' (2006) 27 *Statute Law Review* 1, 2.
[17] Lorne Neudorf, 'Reassessing the Constitutional Foundation of Delegated Legislation in Canada' (2018) 41 *Dalhousie Law Journal* 519; 'Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia' (2021) 43(8) *Law Society Bulletin* 10.
[18] Beatson, 'Common Law, Statute Law' (n 16) 2.
[19] Ibid; John Burrows, 'The Interrelation Between Common Law and Statute' (1976) 3 *Otago Law Review* 583.
[20] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 19.
[21] Jürgen Habermas, *Philosophical Introductions: Five Approaches to Communicative Reason*, tr Ciaran Cronin (Polity Press, 2018) 132.
[22] Waldron, *Law and Disagreement* (n 20) chs 4–6; Charles Beitz, *Political Equality* (Princeton University Press, 1989).

'the dignity of legislation' as a 'tribute we should pay to the achievement of concerted, co-operative, co-ordinated, or collective action in the circumstances of modern life'.[23]

[23] Waldron, *Law and Disagreement* (n 20) 101; *The Dignity of Legislation* (Cambridge University Press, 1999) 2, 158; John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 126–30.

CHAPTER FIVE: LEGISLATIVE AUTHORITY

I THE RULE OF LAW

Legislators operate within legal controls as well as political ones when exercising legislative authority.[1] The legal controls – formed by common law and statute working together – confine legislative authority within the legal and constitutional limits expected by the polity.[2] This chapter analyses the bespoke Queensland legal controls, examining the rule of law jurisprudence of the Australian High Court and legal theory of common law constitutionalism. One jurisprudential model adopted is Australian common law constitutionalism.[3] David Feldman argues constitutionalism 'can be globally useful for analytical, exegetical, and critical purposes'.[4] In this chapter, it will prove 'capable of making normative sense of legislation as a genuine form of law, of the authority it claims, and of the demands that it makes on the other actors in a legal system'.[5] It is complemented by Ronald Cass's approach to analysing property rights systems and the rule of law.[6] Cass states that '[c]onformity to the rule of law … cannot be measured in discrete increments but must be viewed as the product of a set of related considerations'.[7] Thus, the ways common law and statute work together in Queensland to control legislative authority are examined successively, in four stages: (i) rule of law objectives;[8] (ii) statutory requirements for legislative scrutiny;[9] (iii) judicial mediation of the constitutional balance, including under the *Human Rights Act 2019*;[10] and (iv) *Human Rights Act* protection and promotion of 'a right to property'.[11] Each is considered in turn.

The rule of law, John Finnis explains, is '[t]he name commonly given to the state of affairs in which a legal system is legally in good shape'.[12] Similarly, Joseph Raz says the term is shorthand for the positive

---

[1] Jack Beatson, *The Rule of Law and the Separation of Powers* (Hart, 2021) 6–7; AV Dicey, *Introduction to the Law of the Constitution* (10th ed, Macmillan, 1964).
[2] Beatson, *The Rule of Law* (n 1) 27–8; John Laws, *The Constitutional Balance* (Hart Publishing, 2021) 8–10.
[3] Robert French, 'Common Law Constitutionalism' (2016) 14 *New Zealand Journal of Public & International Law* 153; Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45 *Melbourne University Law Review* (Advance).
[4] David Feldman, '"Which in Your Case You Have Not Got": Constitutionalism at Home and Abroad' (2011) 64 *Current Legal Problems* 117.
[5] Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 1; 'Can There Be a Democratic Jurisprudence?' (Public Law Research Paper No 08-35, NYU School of Law, 2008), available at <https://ssrn.com/abstract=1280923>.
[6] Ronald A Cass, 'Property Rights Systems and the Rule of Law' in Enrico Colombatto (ed), The *Economics of Property Rights* (Edward Elgar, 2004) 222.
[7] Ibid 223.
[8] Ibid; Jeremy Waldron, *The Rule of Law and The Measure of Property* (Cambridge University Press, 2012) 18.
[9] *Legislative Standards Act 1992* (Qld); *Statutory Instruments Act 1992* (Qld); *Parliament of Queensland Act 2001* (Qld).
[10] *Human Rights Act 2019* (Qld), Part 3.
[11] Ibid s 24; Kent Blore and Nikita Nibbs, 'A Theory of the Right to Property Under the *Human Rights Act 2019* (Qld) (2022) 30 *Australian Property Law Journal* (Advance).
[12] John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series, 1980) 270.

aspects of any given political system.[13] And Lord Bingham's attempt at a 'partial definition' encapsulates the 'core of the existing principle'.[14] The partial definition is that the rule of law requires 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'.[15]

Stating the ''agreed beginning' for debates about the rule of law', the Australian High Court cites the common law constitutional theory of Sir John Laws;[16] namely, 'that State power must be exercised in accordance with promulgated, non-retrospective law made according to established procedures'.[17] For property rules, Cass similarly highlights law-making procedures:

> The degree to which a society is bound by law, is committed to the processes that allow property rights to be secure under legal rules that will be applied predictably and not subject to the whims of particular individuals, matters. The commitment to such processes is the essence of the rule of law.[18]

Common to these statements (from the High Court citing Laws, and from Cass, at least) are three rule of law objectives: predictability of promulgated rules; a commitment to established procedures; and a society bound by law.[19] Together, the three objectives form the first piece of the set of related considerations for rule of law conformity. It will be seen that each objective is relevant to debates about the rule of law in Queensland, and to the rule of law conformity of Queensland's legislation.

As a prelude to that analysis though, Cass's reference to 'the whims of particular individuals' points to a threshold issue.[20] Described by Roberto Mangabeira Unger as one of the 'dirty little secrets of contemporary jurisprudence', it might explain the 'discomfort with democracy' seen in contemporary jurisprudence about legislation.[21] Ittai Bar-Siman-Tov identifies a resulting preoccupation (in the United States especially) with perceived misuses of legislative authority:[22] legislators acting as

---

[13] Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 210.
[14] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 8, 38: Lord Bingham notes further Lord Mansfield's principle that, 'The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case'; *Hamilton v Mendes* (1761) 2 Burr 1198, 1214.
[15] Ibid.
[16] *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590, 612; Laws (n 2) 8–10.
[17] Ibid; *Palmer v Western Australia* [2021] HCA 31 [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward, Gleeson JJ).
[18] Cass (n 6) 222; Waldron, *The Rule of Law* (n 8)18.
[19] Ibid; *MZAPC v Minister for Immigration and Border Protection* (n 16) 612.
[20] Ibid.
[21] Roberto Managabeira Unger, *What Should Legal Analysis Become?* (Verso, 1996) 72–3, 115; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 8.
[22] Ittai Bar-Siman-Tov, 'The Global Revival of Legisprudence: A Comparative View on Legislation in Legal Education and Research' in Ittai Bar-Siman-Tov (ed), *Conceptions and Misconceptions of Legislation* (Springer, 2019) 233, 235–7: it is noted, in this comparative analysis, that European scholars have followed Waldron's lead

'interest-driven, power hungry horse traders … bound to the infantile desires of constituents'.[23] Legislation is thought 'apt to take whatever form the enacting body gives it'.[24] Waldron observes 'the casual humours and characters of particular men' have long given rise to perceptions of detriment to the reputation of legislators, legislatures and statutes enacted.[25] Hume's essays, James Madison's *The Federalist Papers*, and Lon Fuller's jurisprudence, for example, examine 'fools and knaves who know or care nothing for justice and the common good'.[26]

Scholarly discomfort with democracy is manifest in scholarly 'marginalisation' of legislation,[27] leading to a 'paucity of scholarly analysis of legislation'.[28] Richard Posner suggests scholarship confines itself to 'interstitial issues of policy that ha[ve] no compelling moral dimension'.[29] Legislation is never given credit 'as a basis for legal growth and progress',[30] treated instead as 'a subsidiary last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies'.[31] Contemporary legal scholarship finds enacted law to be: lacking roots in social practice;[32] made via exercise of largely unfettered discretion held by both legislatures and bodies exercising delegated legislative power;[33] and only weakly constrained by constitutional and human rights.[34] Andrew Burrows says this is especially true of academics 'specializing in private law'.[35] Lord Steyn states that 'the academic profession and universities have not entirely caught up with the reality that statute law is the dominant source of law of our time'.[36]

---

and moved to a more mature, developed idea of legislation, but that generally scholars in common law jurisdictions have not yet done so.

[23] R West, 'Toward the Study of the Legislated Constitution' (2011) 72 *Ohio State Law Journal* 1343.

[24] Bar-Siman-Tov, 'The Global Revival of Legisprudence' (n 22) 35–7: the big issues were 'consigned to the courts'.

[25] Waldron, *Political Political Theory* (n 2) 1–3, referring to David Hume, 'That Politics May be Reduced to a Science' in Eugene F Miller (ed), *David Hume, Essays: Moral, Political, Literary* (Liberty Classics, 1985) 14; Edward L Rubin, 'Statutory Design as Policy Analysis' (2018) 55 *Harvard Journal on Legislation* 143; Bar-Siman-Tov, 'Beyond Neglect and Disrespect: Legislatures in Legal Scholarship' in Cyril Benoît & Olivier Rozenberg (eds), *Handbook Of Parliamentary Studies: Interdisciplinary Approaches To Legislatures* (Edward Elgar, 2020) 10.

[26] Waldron, *Political Political Theory* (n 2) 7: in Fuller's account, 'bad things happen mainly in the dark … and unjust aims do not have the same coherence as good ones'; David Hume, 'Of the Independency of Parliament' in *Essays: Political* (Cambridge University Press, 2008); George W Carey and James McLellan (eds), *Alexander Hamilton, John Jay and James Madison The Federalist Papers* (Liberty Fund, 2012); Lon L Fuller, *The Morality of Law* (2nd ed, Yale University Press, 1969).

[27] Waldron, *Political Political Theory* (n 2) 3.

[28] Eloise Scotford, 'Legislation and the Stress of Environmental Problems' (2021) 74 *Current Legal Problems* 299, 302.

[29] Richard A Posner, 'Book Review (reviewing Jeremy Waldron, Law and Disagreement (1999))' (2000) 100 *Columbia Law Review* 582, 583; Unger (n 21) 72–3, 115. Unger refers to the 'marginalisation' of legislation.

[30] Waldron, *Law and Disagreement* (n 21) 8.

[31] Unger (n 21) 72–3, 115.

[32] DJ Galligan, *Law in Modern Society* (Oxford University Press, 2006) 259.

[33] Ibid 260, 280.

[34] Ibid 258; Rubin (n 25) 144.

[35] Andrew Burrows, *Thinking About Statutes* (Cambridge University Press, 2018) 1.

[36] Ibid 2; Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5.

In Queensland, scholarly discomfort with democracy and therefore statute law is exacerbated by a unicameral parliament that provides minimal 'countervailing force to executive government dominance';[37] the legislature 'sits too infrequently, legislation is often rushed, debate truncated'.[38] Governments from each side of politics have introduced draconian statutes and passed them as urgent Bills.[39] The report of a commission of inquiry into police corruption and maladministration conducted towards the end of the twentieth century – the Fitzgerald inquiry – observes that '[t]he selfish and corrupt are infinitely flexible in their ability to adapt and work around' laws and structures.[40] These legislators, the report says, seek to 'manipulate and exploit laws and institutions'.[41] Colin Hughes highlights an editorial in the *Australian Financial Review* published during the time of the Bjelke-Petersen Government, at the height of the corruption and maladministration later found by the Fitzgerald inquiry:

> What is happening in Queensland at the moment is the most corrosive alchemy that has ever been applied to the Australian political system.
>
> We have a State Premier, supported in power by an electoral gerrymander, a pusillanimous coalition partner and an intimidated governing party riding roughshod over all the conventions of mature, clean, open and rational government …
>
> Parliament is kept in a position of suspended animation, meeting rarely and briefly. A power station is located, and a coal contract is awarded in a way which enhances the Premier's electoral position in spite of contrary advice of the State Electricity Commission.
>
> As far as Queensland is concerned the community at large is pretty well unshockable …[42]

Drawing upon Machiavelli's observations, Waldron argues that corrosive politics should not diminish legislative authority, as good legislation can eventuate 'from those tumults that many inconsiderately condemn'.[43] Waldron points to the importance of what legislators do: 'they exercise power; they have

---

[37] Scott Prasser and Nicholas Aroney, 'Real Constitutional Reform After Fitzgerald: Still Waiting for Godot' (2009) 18 *Griffith Law Review* 596, 614; Nicholas Aroney, 'Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' (2008) 29 *Adelaide Law Review* 205.

[38] Kate Jones and Scott Prasser, 'Resisting Executive Control in Queensland's Unicameral Legislature' (2012) 27 *Australasian Parliamentary Review* 67, 68; Mark Aronson, 'Subordinate Legislation: Lively Scrutiny or Politics in Seclusion' (2011) 26 *Australasian Parliamentary Review* 4; Lynda Pretty, 'Queensland's Scrutiny of Proposed Legislation by Parliamentary Committees' (2019–20) 35 *Australasian Parliamentary Review* 54.

[39] Scott McDougall, 'Making Rights Real: The Promise and Potential Pitfalls of the Human Rights Act 2019 (Qld)' [2020] *Bond Law Review* 115, 118.

[40] Report on 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct' (1989) 6, available at <https://www.ccc.qld.gov.au/publications/fitzgerald-inquiry-report>.

[41] Ibid.

[42] Colin A Hughes, *The Government of Queensland* (University of Queensland Press, 1980) 10–11, quoting Editorial, *Australian Financial Review* (26 April 1978).

[43] Waldron, *Political Political Theory* (n 2) 131; Nathan Tarcov and Harvey Mansefield (eds), *Niccolò Machiavelli: Discourses on Livy* (University of Chicago Press, 1996) 16.

an impact on people's lives; they bind whole communities; they impose costs and demand sacrifices'.[44] Theory provides assurance that 'we can devise structures and processes to balance the self-interest of men against one another to promote the common good, even when that is not the prime aim of the individuals whose political habitat we are designing'.[45] The structures and processes include a legislature and legislative procedure: 'an institution set up explicitly – dedicated explicitly – to the making and changing of the law'.[46] Commonly, an objective of functional rule of law tests is to prevent legislators controlling and manipulating legislation as a tool for their own purposes.[47] The legislature is a 'constitutionally designated' institution 'for giving assent to measures of public policy, that assent being given on behalf of a wider political community rather than the body devising them. Without that assent, those measures are not the law of the land'.[48]

Consistent with Waldron's argument from theory, despite the 'corrosive alchemy' of the Bjelke-Petersen Government, Queensland legislators enacted property rules that became the law of the land, promoting the common good.[49] The legislation modernised and simplified Queensland real property law, 'increasing its sophistication'.[50] Moreover, the property rules connected explicitly to 'the fundamental principles (whether described as 'liberal' or not) that inform, or (more strongly) are part of, the law itself, such as principles of fairness or equality'.[51] A further example from that era also demonstrates that scholarly discomfort with democracy may be misguided: from Oxford University, Finnis provided constitutional advice to the Bjelke-Petersen Government about Queensland's residual constitutional ties to the United Kingdom, advice that was invariably followed.[52]

Turning to the three objectives informing debates about the rule of law, the first objective is that promulgated rules will be predictable.[53] Hannah Arendt refers to predictability in the objective, artificial

---

[44] Waldron, *Political Political Theory* (n 2) 150.
[45] Ibid 1–2; David Hume, 'On the Independence of Parliament' in *David Hume: Essay: Moral, Political, Literary* (n 48) 42.
[46] Waldron, *The Rule of Law* (n 8) 95.
[47] Ibid 88; Edward Rubin, 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369, 372–3; Finnis (n 12) 270; John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 236–9.
[48] Philip Norton, 'Global Legislative Responses to Coronavirus' (2020) 8 *The Theory and Practice of Legislation* 237.
[49] Queensland Law Reform Commission, 'A Working Paper of the Law Reform Commission on a Bill in respect of an Act to Reform and Consolidate the Real Property Acts of Queensland' (Working Paper No 32, 1989) 3.
[50] AA Preece, 'Late 20th Century Property Law Reform in Queensland' (Paper delivered to 2001 Real Property Law Teachers Conference, Melbourne, 2001); AA Preece 'Reform of the Real Property Acts in Queensland' (1982) 2 *QUT Law Review* 41; Patrick Keane, 'The Termination of Contracts for the Sale of Land upon the Failure of a Condition Subsequent' in Aladin Rahemtula (ed), *Justice According to Law* (Supreme Court of Queensland Library, 2006) 106, 127.
[51] Michael Tilbury, 'Book Review: Justice According to Law, a Festschrift for the Honourable Mr Justice B. H. McPherson CBE' (2008) *University of Queensland Law Journal* 11; Stanley Jones, 'A Judicial Hero' in Rahemtula (n 50) 14.
[52] Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (The Federation Press, 2006) 193–4, 239–40; 'Keeping the Queen in Queensland – How Effective is the Entrenchment of the Queen and Governor in the Queensland Constitution?' (2009) 28 *University of Queensland Law Journal* 81.
[53] *MZAPC v Minister for Immigration and Border Protection* (n 16) 612; Cass (n 6) 222–3.

structures of democratic representation, 'more rigid and durable than the actions they accommodate',[54] when she identifies a felt need for democratic representatives to act within a 'stable worldly structure to house their combined power of action'.[55] Arendt's use of 'worldly', Waldron suggests, indicates a focus on structures more enduring than the actions and legislators they house, structures which exist as features of a world humans have made for themselves.[56] Benjamin Berger describes legislating as overcoming a modern tendency to see individual imperatives far more clearly than the collective concerns of the diversity of private persons.[57] And the human need for a system of positive law adequate to the human dignity of the free and equal persons subject to it is a key concern of Jacob Weinrib's theory of public law.[58]

In Australian jurisdictions, consistent with that theory, it is accepted that a legislature 'embodies the promise of democratic process, through which decisions are made to which all Australians can submit'.[59] Cheryl Saunders explains that '[t]he power of the state to change the rules by which the whole community is bound is extraordinary. As the only elected institution, parliament alone has sufficient legitimacy to exercise a power of this kind.'[60] In each Australian jurisdiction,

> []n its composition and way it operates, parliament is designed as the appropriate institution for law-making; competing voices representing diverse community views; it meets in public, requires new laws be justified in advance and allows voters to hold representatives to account, including for a stance on particular decisions. Relative care is devoted to the drafting of laws made by the parliament, which are published in forms that are relatively accessible.[61]

A legislative process in which competing voices represent diverse community views is consistent with Rawls' 'comprehensive views of the good'.[62] Legislators ought to recognise therefore, Charles Taylor and John Milbank argue, that any one legislative measure will be directed to more than one shared public good valued by a community.[63] An undue focus on one 'essential' value hides from view 'the

---

[54] Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 194.
[55] Ibid 41; Waldron, *Political Political Theory* (n 2) 147: principles of legislation 'can be shared by the adherents of rival theories of justice' and 'among rival agendas for public policy'; Gerald J Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, 2011) 565.
[56] Waldron, *Political Political Theory* (n 2) 293.
[57] Benjamin L Berger 'Freedom of Religion' in Nathalie Des Rosiers, Patrick Macklem and Peter Oliver (eds), *Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 755, 767; Charles Taylor, 'Modernity and the Rise of the Public Sphere' (The Tanner Lectures on Human Values, Stanford University, 25 February 1992) available at <https://tannerlectures.utah.edu/_resources/documents/a-to-z/t/Taylor93.pdf>.
[58] Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016) 15; Jim Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 85–6.
[59] Cheryl Saunders *Australian Democracy and Executive Law-making: Practice and Principle (Part II)* (Papers on Parliament No 66) available at <www.aph.gov.au>.
[60] Ibid; Hughes (n 42) 10–2.
[61] Saunders (n 59).
[62] Rawls (n 47) 392.
[63] Charles Taylor, 'The Diversity of Goods' in *Philosophical Papers, Volume 2: Philosophy and the Human Sciences* (Cambridge University Press, 2012) 230; 'The Nature and Scope of Distributive Justice' in *Philosophical Papers* (above) 289.

real dilemmas that we encounter',[64] and affects the predictability of legislation. Taylor refers to 'fetishisation' occurring because a modern democratic state requires a political community with a strong collective identity and, at the same time, a plurality of private people acting with collective agency.[65] Milbank's term, applied to private property, is 'sacralisation'.[66] In each case, Taylor and Milbank describe a modern tendency to see individual imperatives more clearly than the collective concerns of the diversity of private persons.[67] For legislators, Taylor explains, the tendency occurs because contemporary democracy obliges 'much more solidarity and much more commitment to one another in our joint political project than was demanded by the hierarchical and authoritarian societies of yesteryear'.[68] However, where 'goods' are shared – sought after and valued in common – their common appreciation is constitutive of a community.[69] This means property ought to be understood 'on just and principled lines as granted on certain conditions and in relation to the performance of certain responsibilities'.[70] Indeed, in *McKinlay's case*, Murphy J said in the Australian High Court that '[t]he exaltation of property rights over civic and political rights is a reflection of a bygone era'.[71]

The second rule of law objective is commitment to established procedures.[72] There must be 'an authoritative process for the promulgation of legal rules',[73] a process ensuring 'a democratic mode of law giving'.[74] Many scholars argue though that an authoritative, democratic process is diminished by a change in the work of legislators first observed by Maitland at the time of the *Great Reform Act 1832* (UK).[75] The change heralded an ever-increasing pace of enactment, amendment and re-amendment,[76] with associated pressures on drafters and legislators 'and on the quality of their product'.[77] Burrows describes statutes 'swallowing up our common law',[78] because a political community expects

[64] Charles Taylor, 'The Meaning of Secularism' (2010) *The Hedgehog Review* 23, 29; 'The Nature and Scope of Distributive Justice' (n 63) 290–3.
[65] Taylor, 'The Meaning of Secularism' (n 64) 29.
[66] John Milbank, 'Dignity Rather than Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2012) 189, 198.
[67] Berger, 'Freedom of Religion (n 57) 767; Taylor, 'Modernity and the Rise of the Public Sphere' (n 57).
[68] Taylor, 'The Meaning of Secularism' (n 64) 29; 'The Nature and Scope of Distributive Justice' (n 63) 289.
[69] Taylor, 'The Nature and Scope of Distributive Justice' (n 63) 289.
[70] Milbank (n 66) 198.
[71] *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 76 (Murphy J).
[72] *MZAPC v Minister for Immigration and Border Protection* (n 16) 612; Cass (n 6) 222–3; Weinrib (n 58) 52; Waldron, *The Rule of Law* (n 8) ch 3.
[73] Weinrib (n 58) 52.
[74] Ibid 15; Harris, 'Is Property a Human Right?' (n 58) 85–6.
[75] Aronson (n 38) 8: 'Maitland had singled out 1832 as particularly significant because the *Great Reform Act* of that year had started the democratisation of the electoral system. His argument was that parliamentarians started to trust an elected executive, where previously they had good reason not to trust the crown'; Waldron, *The Dignity of Legislation* (n 5) 8; John Seeley, *Introduction to Political Science: Two Series of Lectures* (Macmillan, 1896); Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) 181.
[76] Beatson 'Common Law, Statute Law, and Constitutional Law' (n 16) 2: frequent change is effected by 'textual amendment of earlier statutes'; John Basten, 'Statute and the Common Law' (2019) 93 *Australian Law Journal* 985, 986.
[77] Beatson 'Common Law, Statute Law, and Constitutional Law' (n 76) 2.
[78] Burrows (n 35) 1.

legislation on important matters, and demands continual making and unmaking of laws.[79] Consequently, legislation addresses diverse subjects, and legislation is detailed, voluminous, and broad in scope and application.[80]

Cass observes, however, that there is 'no way to bar change in the law or to make property rights absolutely secure against such change'.[81] As change 'is a natural part of any legal system … efforts to limit change must be seen not as ends in themselves but as part of a larger framework for assuring predictable, valid, law-based governance'.[82] Indeed, as John Stuart Mill states, '[*e*]*very* law restricts liberty' and proscribes acts otherwise permitted and unpunishable.[83] Thus 'everything depends on the mode of such changes':[84] a right to full compensation, for example, does not prevent a compulsory acquisition from being arbitrary.[85] Laws also situates formality at the core of the 'functional tests' set for those enacting legislation,[86] to ensure legislators make law 'through a procedure dedicated publicly and transparently to that task'.[87] Even when legislative authority is delegated, rules must be made properly in accordance with legal controls.[88]

The third rule of law objective is a society bound by law.[89] The 'cardinal principle' of the rule of law, the High Court states, is 'that Government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen'.[90] Waldron thinks the cardinal principle makes legislators hesitant to engage with rule of law theory,[91] because legislators perceive the rule of law is a way of limiting the power of the state,

---

[79] Ibid 2; Aronson (n 38) 5: an Australian legislator laments that 'people expect things to be done urgently … when there are considerable pressures on Parliaments to consider the legislation put before them'.
[80] Burrows (n 35) xv.
[81] Cass (n 6) 222–3; Waldron, *The Rule of Law* (n 8) 28–30, 102–9.
[82] Ibid.
[83] Jeremy Waldron, 'Mill on Liberty and on the Contagious Diseases Acts' in N Urbinati and A Zakaras (eds), *JS Mill's Political Thought: A Bicentennial Reassessment* (Cambridge University Press, 2007) 11, 30–1; Jeremy Bentham, *The Theory of Legislation* (K Paul, Trench, Trubner & Co, 1931) 93–4; FB Smith, 'Ethics and Disease in the Late Nineteenth Century: The Contagious Diseases Acts' (1971) 15 *Historical Studies* 118.
[84] Waldron, *The Rule of Law* (n 8) 102, 106; Cass (n 6) 223.
[85] *Grace Brothers v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J); *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* (2009) 237 CLR 603; Tom Allen, 'The Human Rights Act (UK) and Property Law' in McLean (n 58) 147.
[86] Stephen Laws, 'Legislation and Politics' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) 87; Raz, 'The Rule of Law and its Virtue' (n 13) 214–9; Beatson, *The Rule of Law* (n 1) 27–8: Laws' analysis of the rule of law is pragmatic but 'heavily influenced by philosophy', whereas Lord Bingham's is 'an analysis heavily influenced by the evidence of history'.
[87] Laws, 'Legislation and Politics' (n 86) 95.
[88] Waldron, *The Rule of Law* (n 8) 108, 12: Waldron notes 'an interesting parallel between the failure of some of our leading theorists of the Rule of Law to highlight procedural (as opposed to formal) considerations and the failure of our leading legal philosophers to include procedural and institutional elements in their conception of law itself'.
[89] *MZAPC v Minister for Immigration* (n 16) 612; Cass (n 3) 222–3; Weinrib (n 58) 52; Waldron, *The Rule of Law* (n 8) ch 3.
[90] *MZAPC v Minister for Immigration* (n 16) 612; *Palmer v Western Australia* (n 17) [8]; Waldron, *Political Political Theory* (n 2) 9–10.
[91] Bingham, *The Rule of Law* (n 14) 40–2.

and of keeping its legislators under control.[92] However, rather than believing that the rule of law enables a state to govern, Waldron urges legislators to appreciate that the people in a political community want 'a Rule-of-Law state'.[93] Appreciating the rule of law in this way, legislators would act in accordance with essential understandings about law, legal systems, and the role of legislators.[94] And, for property institutions, Cass similarly states, a 'critical aspect of the commitment to the rule of law is the definition and protection of property rights – rights to control, use, or transfer things (broadly conceived), including rights in intangibles such as intellectual property'.[95]

Waldron argues legislators ought to commit therefore to two fundamental values of rule of law theory:[96] legal formality and respect for human dignity.[97] In legal theory, the values are inseparable because dignity motivates 'the traditional formal/procedural aspect of the Rule of Law'.[98] An absence of formality conveys 'indifference' to people's 'powers of self-determination'.[99] Moreover, the two fundamental values synthesise the three rule of law objectives in debates: the formality of legislating contributes to predictability; predictability is indispensable to freedom; and an 'adequate conception' of the rule of law envisages legislated change yet demands also that any change be subjected to formal criteria.[100] As Waldron explains,

> [t]he Rule of Law will insist on changes enacted openly through procedures that are transparent and clear, changes that are formulated prospectively in general terms, changes that take the form of established schemes that people can expect to see upheld and enforced in the medium and long term, changes set out publicly in intelligible legal texts and then given to independent judicial tribunals for interpretation, administration, and enforcement.[101]

Waldron points to the identification of the two fundamental values in modern legal theory.[102] In Ronald Dworkin's theory, Waldron identifies a clear relationship between human dignity and 'the principles

---

[92] Waldron, *The Rule of Law* (n 8) 88.
[93] Ibid; Bingham, *The Rule of Law* (n 14) 5: 'Professor Jeremy Waldron, commenting on the decision of the US Supreme Court in *Bush v Gore* – the case which decided who had won the presidential election in 2000, and in which the rule of law had been invoked by both sides – recognized a widespread impression that utterance of those magic words meant little more than "Hooray for our side".'
[94] *MZAPC v Minister for Immigration* (n 16) 612; *Palmer v Western Australia* (n 17) [8].
[95] Cass (n 6) 222–3.
[96] Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200.
[97] Waldron, *Political Political Theory* (n 2) 9–10.
[98] Waldron, *The Rule of Law* (n 8) 50.
[99] Ibid.
[100] Ibid 88–90: Waldron explains that Hayek's 'discomfort' with legislation is with its inherently managerial mentality, but that Hayek acknowledges legislation may be necessary 'if law's implicit development has led us into some sort of *cul-de-sac*'; FA Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) chs 9–10.
[101] Waldron, *The Rule of Law* (n 8) 106–7.
[102] Ibid 50.

and policies that a legal system has committed itself to implicitly'.[103] From Fuller's theory, Waldron notes the norms applied to conduct are valued for the way they respect human dignity:[104] people within a political community subject themselves to the discipline of rule of law principles because they wish to 'be governed in a way that respects [their] dignity in the forms and procedures that are used'.[105] This means 'we don't insist on clarity, generality, publicity, prospectivity, and due process for their own sake; we do so because of the way they serve liberty or (in Fuller's account and in Raz's account) because of the way they enable law to respect human dignity'.[106] Waldron draws attention to Joseph Raz's statement that '[r]especting human dignity entails treating humans as persons capable of planning and plotting their future'.[107]

Drawing the dignity, formality and rule of law threads together, Waldron argues that legislation ought be understood as 'created explicitly by an institution formally dedicated to that purpose',[108] and that values of legal formality and human dignity ought 'inform our understanding of legislation'.[109] Legislators ought, therefore, on the one hand, to be mindful of 'how the law is made and applied and not with its content' and, on the other, ensure that property rules conform to fundamental values of respect for human dignity.[110] Similarly, Cass states that '[t]he ways in which systems manage changes in property rights and in legal rules that affect property rights … are the keys to the effectiveness of the rule of law'.[111]

Together, the three rule of law objectives – predictability of promulgated rules, a commitment to established procedures, and a society bound by law – form the first piece of the set of related considerations for rule of law conformity. Waldron and Cass each argue that commitment to these rule of law objectives assists legislators to perform their legislative role, with Waldron also pointing to underlying values of legal formality and human dignity. In Queensland, the rule of law objectives and the two fundamental values of formality and human dignity are stated in statutes governing legislative

---

[103] Jeremy Waldron, 'Ronald Dworkin: An Appreciation' (Public Law & Legal Theory Research Paper Series, Working Paper No.13-39, New York University School of Law, July 2013) 6: a principle of dignity was the 'unifying ethical vision' that in *Justice for Hedgehogs* brought together different facets of Dworkin's comprehensive theory of justice; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011.
[104] Waldron, *The Rule of Law* (n 8) 106–7; Fuller (n 26) 162.
[105] Waldron, *The Rule of Law* (n 8) 110.
[106] Ibid 50.
[107] Waldron, *Political Political Theory* (n 2) 221.
[108] Ibid 149, 155–7; *Law and Disagreement* (n 21) chs 4 and 6; 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373; 'Can There Be a Democratic Jurisprudence?' (n 15) 24; Burrows (n 35) 123–6.
[109] Waldron, *Political Political Theory* (n 2) 153, 145–9; legislating 'is not the same as issuing a decree; it is a formally defined act consisting of a laborious process'.
[110] Ibid; Ronald Dworkin *A Matter of Principle* (Harvard University Press, 1985) 11–2.
[111] Cass (n 6) 222; Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3, 4: 'legal philosophers discussing the rule of law tend to emphasise the *form* of the norms applied to the conduct of people'; *Political Political Theory* (n 2) 9–10; Jan Pieter Beetz, 'Political Political Theory: Essays on Institutions' (2017) 16 *Contemporary Political Theory* 553, 553: Beetz argues that '[s]afeguards can themselves be a form of abuse'.

authority. The statutes, and their requirements for legislative scrutiny, comprise the second piece of the set of rule of law considerations. They are examined in the next section.

II LEGISLATIVE SCRUTINY

In Queensland, legislation provides a bespoke statutory basis for the scrutiny of proposed legislation for consistency with 'fundamental legislative principles' and statutory human rights.[112] The provisions are the second piece of the set of considerations about rule of law conformity. This section considers the relevant statutes: the *Legislative Standards Act 1992* (Qld); *Statutory Instruments Act 1992* (Qld); *Parliament of Queensland Act 2001* (Qld); and Part 3 of the *Human Rights Act*.

Under section 2 of the *Constitution of Queensland 1867*,[113] legislative authority is conferred on the legislature and the Queen 'to make laws for the peace welfare and good government of the colony in all cases whatsoever'.[114] The High Court says the authority is 'a plenary power and it was so recognized, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies'.[115] Since 1922, Queensland has had the only unicameral State legislature in Australia;[116] with statutes enacted by the Legislative Assembly and the Governor representing the Queen.[117] Section 2 is both preserved and restated in the consolidated *Constitution of Queensland 2001*.[118]

Section 2 implicates foundational presumptions about legislative authority common to representative democracies in Australia.[119] The presumptions are so strongly embedded in the foundations of democracy that they are unstated, even in written State constitutions.[120] They include that law is made

---

[112] Queensland Department of Premier and Cabinet, *Queensland Legislation Handbook*, available at <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook.aspx>.

[113] *Constitution of Queensland 2001* s 8: 'The *Constitution Act 1867*, section 2 provides for law-making power in Queensland.'

[114] *Constitution Act 1867* (Qld) s 2: 'Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws'; s2A: '(1) The Parliament of Queensland consists of the Queen and the Legislative Assembly referred to in sections 1 and 2'; '(2) Every Bill, after its passage through the Legislative Assembly, shall be presented to the Governor for assent by or in the name of the Queen and shall be of no effect unless it has been duly assented to by or in the name of the Queen'; s 1 establishes the Legislative Assembly.

[115] *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 [14] (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[116] Hughes (n 42) 10–12.

[117] *Constitution Amendment Act 1922* (Qld): abolished the Legislative Council; Twomey, *The Chameleon Crown* (n 52) 146–60.

[118] *Constitution of Queensland 2001* s 9: the Legislative Assembly and its members and committees have the powers, rights and immunities conferred by any statute and, in default, the powers of the House of Commons as at 1 January 1901; Stephen Gardbaum, 'Reassessing the new Commonwealth model of constitutionalism' (2010) 8(2) *International Journal of Constitutional Law* 167.

[119] Saunders (n 59); Dennis Pearce and Andrew Geddes, *Statutory Interpretation in Australia* (9th ed, LexisNexis, 2019) ch 1.

[120] Ibid.

by the legislature,[121] the legislature may delegate legislative power but may not abdicate it,[122] and courts determine the legality of statutes and delegated legislation made in exercise of public authority.[123] Robert French describes the presumptions as 'small 'c' constitutional' functions,[124] and Laws says they are an aspect of common law constitutionalism.[125] Crucially, as Cheryl Saunders explains, their effect is that legislative authority is not to be exercised 'for the benefit of parliament itself'.[126] Rather, the requirement for law to be made by legislators, with all that flows from it, 'exists for the benefit of the people who will be subject to the law and from whom the authority to make new law derives'.[127] This is because '[w]ithout such a requirement, the rationales for respect for law fail'.[128]

In Queensland, the Fitzgerald inquiry convinced 'ordinary people that issues … which were for a long time treated as worthless, are important for maintaining a healthy community fabric'.[129] That popular conviction led to the enactment of a number of statutes making plain the small 'c' constitutional requirements governing the work of legislators.[130] The result is that '[t]he structure of Queensland's statutory regime for legislative scrutiny of proposed laws is slightly more elaborate than in other jurisdictions'.[131] The structure now includes the *Legislative Standards Act*, *Statutory Instruments Act*, *Parliament of Queensland Act*, and the *Human Rights Act*. Each Act makes plain the connection between legislative authority, democracy, and the rule of law.[132]

Legislative Standards Act 1992

The *Legislative Standards Act* has the object of ensuring 'Queensland legislation is of the highest standard'.[133] One way in which the object is to be achieved is by legislators examining whether proposed

---

[121] J Edelman, 'Foreword' in Janine Boughey and Lisa Burton Crawford, *Interpreting Executive Power* (The Federation Press, 2020); *Queensland Legislation Handbook* (n 135) [1.1]: 'In Australia, only a Parliament may make legislation or authorise the making of legislation.'
[122] *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73; *Stephens v WA Newspapers* (1994) 182 CLR 211 (Mason CJ Toohey and Gaudron JJ, Brennan J); Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000) [4.4].
[123] *McEldowney v Ford* [1969] 2 All ER 1039 (Diplock LJ); *Swan Hill v Bradbury* (1937) 56 CLR 746 (Dixon J).
[124] French (n 3) 154; John Latham, 'Australia' (1960) 76 *Law Quarterly Review* 54, 57.
[125] Laws, *The Constitutional Balance* (n 2) 8–10.
[126] Saunders (n 59).
[127] Ibid.
[128] Ibid.
[129] Peter Coaldrake, 'Reforming the System of Government: Overview' in Scott Prasser, Rae Wear and John Nethercote (eds), *Corruption and reform: the Fitzgerald vision* (The University of Queensland Press, 1990) 157, 159.
[130] *Legislative Standards Act 1992* (Qld) s 3; Legislative Standards Bill 1992 (Qld), Explanatory Notes, 2, available at <https://documents.parliament.qld.gov.au/tableoffice/tabledpapers/1992/4692T1706.pdf>; Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 75; Coaldrake (n 129) 145–7.
[131] Horrigan (n 130) 73; Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Campbell, Goldsworthy and Stone (n 130) 197, 215.
[132] Ibid.
[133] *Legislative Standards Act 1992* (Qld) s 3.

legislation has sufficient regard to 'fundamental legislative principles'.[134] Complementary requirements in the *Statutory Instruments Act* are to ensure 'that Queensland subordinate legislation is of the highest standard'.[135] The *Legislative Standards Act* also achieves its object by governing parliamentary drafting by an independent office, and by stating principles of individual rights and democracy fundamental to the exercise by legislators of legislative authority.[136]

Legislation of the highest standard is at the core of the functions of the Office of the Queensland Parliamentary Counsel.[137] The Act establishes the Office and confers functions to 'provide advice on the nature and appropriateness of legislative proposals'.[138] The benefits of the statutorily-based functions include the enhanced quality of statutes,[139] and proper respect from government officials for the challenging function of parliamentary drafting.[140] As well, the legislative basis for the Office structures and disciplines rule of law demands made of drafters and legislators.[141]

The *Legislative Standards Act* also prescribes 'fundamental legislative principles'; namely, 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'.[142] The Explanatory Notes say that '[p]roviding fundamental legislative principles with a statutory basis is a significant step in the preservation and enhancement of individual rights and liberties'.[143] The principles, defined in section 4, state the expectation that legislation will have sufficient regard to 'rights and liberties of individuals' and 'the institution of Parliament'.[144] The Explanatory Notes further elaborate the expectation:

> Basic democratic values, as well as common law presumptions and increasingly international law, contain a number of principles which underpin much legislation and against which legislation must constantly be assessed.
>
> The principles generally require that sufficient regard be given to the institution of Parliament and to preserving individual rights and freedoms when drafting Bills and subordinate legislation.

---

[134] Ibid; Legislative Standards Bill 1992 (Qld) Explanatory Notes (n 130).
[135] *Statutory Instruments Act 1992* (Qld) s 2(d).
[136] Legislative Standards Bill 1992 (Qld) Explanatory Notes (n 130) 1: 'The Fitzgerald Report implied that appropriate independence is required for the Office of Parliamentary Counsel in undertaking its role of advising on the appropriateness of legislative proposals.'
[137] Ibid.
[138] *Legislative Standards Act 1992* (Qld) s 7; Legislative Standards Bill 1992 (Qld) Explanatory Notes (n 130) 2.
[139] Burrows (n 35) 104, 127; Daniel Greenberg, *Laying Down the Law* (Sweet & Maxwell, 2011) 32–3: a former United Kingdom Parliamentary Counsel states 'I estimate that well in excess of 99 per cent of the words of the statute book not only are chosen by Counsel but are not seriously questioned or tested by anyone else before enactment'; Nye Perram, 'Comment on Paper of Peter Quiggan' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) 95–9.
[140] Burrows (n 35) 105–8; Peter Quiggan, 'Statutory Construction: How to Construct, and Construe, a Statute' in Williams (n 139) 78, 79–81.
[141] Burrows (n 35) 148.
[142] *Legislative Standards Act 1992* s 4(1).
[143] Legislative Standards Bill 1992 (Qld) Explanatory Notes (n 130) 2.
[144] *Legislative Standards Act 1992* ss 4(1) and (2).

> While these principles may not be absolute, it is important that proper regard be paid to them in drafting legislation.[145]

Legislators and those making legislation under delegated legislative authority are to have regard for fundamental legislative principles, with an explanatory note addressing 'sufficient regard' tabled in the Parliament.[146] The intention behind 'sufficient regard' is to reveal 'the evaluative judgment in play'.[147] Bryan Horrigan notes the judgment 'is not always purely legal in character'.[148] Examples of 'sufficient regard' for rights and liberties of individuals are set out in section 4(3).[149] Legislation is to be 'unambiguous and drafted in a sufficiently clear and precise way'.[150] It should confer 'power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer' and provide for 'the compulsory acquisition of property only with fair compensation'.[151] The Supreme Court holds that section 4 expectations are 'aspirational'.[152] Section 4 cannot support judicial interference in the passage of legislation,[153] and failure by legislators to comply with section 4 does not of itself invalidate legislation.[154]

Parliament of Queensland Act 2001

Legislative scrutiny is required also by the *Parliament of Queensland Act 2001*.[155] That Act establishes parliamentary portfolio committees and confers the committees with responsibilities for scrutiny of proposed legislation.[156] The committees examine Bills and subordinate legislation and report to the Legislative Assembly on:[157] the policy to be given effect by the legislation; and the consistency of the legislation with the *Legislative Standards Act* and the *Statutory Instruments Act*.[158] The scrutiny reports can be used by judges if legislative drafting is ambiguous.[159]

---

[145] Legislative Standards Bill 1992 (Qld) Explanatory Notes (n 130) 2.
[146] *Legislative Standards Act 1992* ss 23 and 24.
[147] Horrigan (n 130) 75, 81–2; Aronson (n 38).
[148] Horrigan (n 130) 81–2.
[149] See *Legislative Standards Act 1992* s 4(4) as to sufficient regard to the institution of Parliament; Brian Galligan and Emma Larking, 'Rights Protection: The Bill of Rights Debate and Protection in Australia's States and Territories' (2007) 28(1) *Adelaide Law Review* 177.
[150] *Legislative Standards Act 1992* s 4(3)(k).
[151] *Legislative Standards Act 1992* ss 4(3)(e) and (i); *Bell v Beattie* [2003] QSC 333 [23] (Mackenzie J): 'since they are only examples, the categories are not closed'.
[152] *Bell v Beattie* (n 151) [23] (Mackenzie J).
[153] *Eatts v Gundy* [2014] QCA 309 [19]; *Gundy v Joslin Eatts (As Administratrix of the Estate of the late Doreen ('Dolly') Mary-Ann Eatts, Deceased, Late of Winton, Queensland* [2015] HCATrans 275; *TRG v The Board of Trustees of the Brisbane Grammar School* [2020] QCA 190 [19].
[154] *Legislative Standards Act 1992* s 25.
[155] *Parliament of Queensland Act 2001* (Qld) s 93.
[156] *Parliament of Queensland Act 2001* (Qld) pt 2.
[157] Evans (n 131) 215–6; Horrigan (n 131) 73–6.
[158] *Parliament of Queensland Act 2001* (Qld) s 93(1).
[159] *Acts Interpretation Act 1954* (Qld) s 14B.

Human Rights Act 2019, Part 3

Parliamentary committee scrutiny for compatibility with statutory human rights occurs under Part 3 of the *Human Rights Act*.[160] Each legislator who is a member of the parliamentary committee with responsibility for rights scrutiny is, under the Act, deemed a 'public entity'.[161] In this way, each of these legislators is made individually responsible for examining the rights compatibility of Bills introduced into the Legislative Assembly.[162] This is 'arguably the most important component of the *Human Rights Act*',[163] and given traction by a statutory requirement for statements of incompatibility.

All Bills and delegated legislation are to be accompanied by a statement addressing compatibility with human rights and the nature and extent of any incompatibility.[164] A statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with the general limitations section.[165] A limitations section (section 13) states an overall legislative standard, stating that a right may be limited 'only to the extent that can be demonstrably justified in a free and democratic society based on human dignity, equality, and freedom'.[166] Under Part 3 of the *Human Rights Act*, the legislature as a whole may allow legislation to override identified incompatibility.[167] In 'exceptional circumstances',[168] an 'override declaration' ensures the *Human Rights Act* will not apply while the declaration is in force.[169] A statement to the legislature is to explain the exceptional circumstances justifying the override declaration.[170]

These provisions in Part 3 of the *Human Rights Act* set out 'processes aimed at enhancing parliamentary scrutiny of legislation, with human rights in mind'.[171] The processes demonstrably conform with common law constitutionalism and rule of law considerations. As the Australian Law Reform Commission says, '[i]dentifying and critically examining laws that limit rights is a crucial part of protecting rights, and may inform decisions about whether, and if so how, such laws might need to be

[160] *Human Rights Act 2019* (Qld) ss 4 and 39.
[161] Ibid s 4(d); s9: members of portfolio committees are public entities and bound by the Act.
[162] Ibid.
[163] McDougall (n 39) 115, 120.
[164] *Human Rights Act 2019* s 41.
[165] Ibid s 8.
[166] Ibid s13; George Williams, 'The Distinctive Features of Australia's Human Rights Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (The Federation Press, 2017) 22, 29–32.
[167] *Human Rights Act 2019* ss 38–47.
[168] Ibid s 43(4): 'It is the intention of Parliament that an override declaration will only be made in exceptional circumstances', and examples of 'exceptional circumstances' stated are: 'war, a state of emergency, an exceptional crisis situation constituting a threat to public safety, health or order'.
[169] Ibid ss 43–45.
[170] Ibid s 44; McDougall (n 39) 119: in Victoria, an override declaration 'has happened on just two occasions'.
[171] Janina Boughey, 'The Scope and Application of the Charters' in Groves and Campbell (n 166) 36, 37; *Human Rights Act 2004* (ACT).

amended or repealed'.[172] Legislators 'are pushed to consider whether proposed laws are consistent with protected rights', and the tabled statement of rights compatibility ensures legislators 'have access to relevant information and arguments to enable them to turn their mind to balancing rights and public interests'.[173] Australian rights statutes are drafted therefore to enhance the role of legislators – they direct attention to the role of legislators in legislative scrutiny.[174]

Thus, the *Human Rights Act* encourages legislators to enact rights-consistent legislation and to think seriously about limits on rights and whether they are justified in a free and democratic Queensland society based on human dignity, equality, and freedom.[175] The Human Rights Commissioner notes the greater rigour in legislative scrutiny under Part 3 when compared with sufficient regard for fundamental legislative principles as 'these did not articulate rights and freedoms in the way that is now comprehensively covered by the twenty-three rights protected by the *Human Rights Act*'.[176]

Indeed, Queensland's bespoke legislative scrutiny requirements provide a solid statutory basis for active scrutiny by legislators. The statutes complement the first piece of the set of rule of law considerations – the three rule of law principles. Together, the two pieces ensure the legislature makes law 'for the benefit of the people who will be subject to the law and from whom the authority to make new law derives'.[177] The first two pieces are further complemented by a third, examined in the next section. It is court interpretation of legislation, including for compatibility with human rights, and review of legislation for lawfulness. In carrying out these functions within Queensland's common law and statutory framework, courts mediate exercises of legislative authority and maintain 'the constitutional balance'.[178]

III THE CONSTITUTIONAL BALANCE

Judicial mediation is another instance of common law and statute working together to control legislative authority: Laws describes 'the constitutional balance', a medium 'through which democracy and the rule of law … become a unified force in the service of just government in a free polity'.[179] Analysis in

[172] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2016) [2.9], available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>; Evans (n 131) 217–8. Evans warns a superficial, or less than objective, statement of compatibility will be possible without a mechanism to ensure real compliance with a rights statute's intention.
[173] Boughey (n 171) 37.
[174] Williams (n 166) 29–32.
[175] Boughey (n 171) 38.
[176] McDougall (n 39) 118.
[177] Saunders (n 59).
[178] Laws *The Constitutional Balance* (n 2) 8–10; Beatson, *The Rule of Law* (n 1) 6–7.
[179] Laws *The Constitutional Balance* (n 2) 8–10; Beatson, *The Rule of Law* (n 1) 6–7.

this section is of judicial mediation of legislation occurring when courts interpret legislation,[180] examine legislation for lawfulness;[181] and engage in human rights 'dialogue' with legislators.[182] Judicial mediation of legislation will be seen to bring 'an additional set of public norms',[183] to the constitutional balancing of 'the immediacy of political will and the gradual processes of the common law'.[184] In the United States, Justice Kennedy's jurisprudence demonstrates a strong belief in the power of the Supreme Court to enforce the promises of the Constitution.[185]

As politically-enacted statutes loom large over the legal landscape,[186] a significant portion of the work of Australian courts lies in the interpreting statutes and reviewing the lawfulness of legislative provisions.[187] Murray Gleeson says:

> One of the changes making the work of modern judges different from that of their predecessors is that most of the law to be applied is now to be found in Acts of Parliament rather than judge-made principles of common law … [T]here has been a surge of legislative activity reaching into areas that once were occupied exclusively by lawyers' law. This has been described as an 'orgy' of legislation. The imagery is colourful, if disconcerting.[188]

Within a democratic system, courts are well-positioned to interpret and review statutes.[189] They are relatively detached from 'everyday political disputes and the competition for political power to make them', and thus 'an obvious choice for the role of an impartial umpire to oversee the democratic political process to keep it democratic both in process and in outcome'.[190] This 'final and authoritative

[180] TRS Allan 'Book Review: Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law' (2018) 68 *University of Toronto Law Journal* 312, 314.
[181] *Judicial Review Act 1991* (Qld); Waldron, *Law and Disagreement* (n 21) 15.
[182] *Human Rights Act 2019* (Qld) ss 48–57.
[183] Lisa M Austin, 'The Public Nature of Private Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Oxford University Press, 2018) 1.
[184] Laws *The Constitutional Balance* (n 2) 16; *The Common Law Constitution* (Cambridge University Press, 2014) 31; Beatson, *The Rule of Law* (n 1) 27–8; Feldman, 'Constitutionalism at Home and Abroad' (n 4) 17–49.
[185] Jedediah Purdy, 'Response – A Few Questions about the Social-Obligation Norm' (2009) 94 *Cornell Law Review* 948.
[186] Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52, 52.
[187] Alan Rodger, 'The Form and Language of Legislation' in Feldman (n 86) 65, 66; Burrows (n 35) 46: Lord Rodger of Earlsferry suggests lawyers find legislation 'somewhat dull' and yearn for 'the open spaces of the older law where the accretion of case law to the original statutes meant that there were anomalies to unearth and decisions to distinguish'. Moreover, 'the neglect of the study of statutes in a common law system … is also because, at least on the face of it, cases are so much more interesting and entertaining than statutes'.
[188] Hon Murray Gleeson, 'The Meaning of Legislation' (2009) *Public Law Review* 26, 26.
[189] Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Campbell, Goldsworthy and Stone (n 130) 319, 326; S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 327; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *The Yale Law Journal* 1346.
[190] Ibid; Weinrib (n 58) 3: the judicial role is an integral dynamic of a modern constitutional state; Beatson, *The Rule of Law* (n 1) ch 7; *Constitution of Queensland 2001* ch 4.

interpretation' of statutes by courts is a small 'c' constitutional function.[191] Frederick Pollock, for example, placed the functions of public courts interpreting the law and adjudicating between parties 'at the heart of the common law'.[192] The nuance and adaptability of legislative authority is captured in '[t]he meeting of Parliament and the common law, in the crucible of statutory interpretation'.[193] Interpretation, after all, 'is essentially judge-made and derives from the common law, as do many of the substantive principles of interpretation'.[194] A standard point of reference is a statement by AV Dicey:

> Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land … who are influenced … by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.[195]

Dicey's statement captures the common law dynamism of an active 'dialogue' between judges and legislators, 'an aspect of the common law constitution manifested in the relationships between the branches of government inherited from the United Kingdom'.[196] Additionally, separation of powers influence from the United States results in a written Constitution in each Australian jurisdiction and limited parliamentary powers. The combined effect, Robert French says, is that a uniform Australian approach to common law constitutionalism is not easily discerned,[197] but may 'best be thought of in terms of parliament's legislative supremacy when acting within the scope of the powers accorded it'.[198] Thus, '[c]ommon law constitutionalism is about the authority of the courts in their relationship with other branches of government and the extent to which it can be defined by the courts themselves'.[199]

---

[191] French (n 3) 154; Latham (n 124) 57; Robin Cooke, 'Foreword' in BD Gray and RB McClintock (eds), *Courts and Policy: Checking the Balance* (Brookers, 1995): the function can be understood as 'an exercise in line-drawing'.
[192] French (n 3) 154; Frederick Pollock *The Expansion of the Common Law* (Stevens and Sons, 1904) 51.
[193] Laws, *The Constitutional Balance* (n 2) 16; *The Common Law Constitution* (184) 31; Beatson, *The Rule of Law* (n 1) 27–8; Crawford (n 3) 17.
[194] Ibid; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17: In the theory of Laws and TRS Allan, 'the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of common law'; TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003); *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013).
[195] Dicey (n 1) 413–4; Laws, *The Constitutional Balance* (n 2) 16–7; Beatson, *The Rule of Law* (n 1) 28.
[196] French (n 3) 155.
[197] Ibid 153: 'Common law constitutionalism is about the authority of the courts in their relationship with other branches of government'.
[198] Ibid; Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7; Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 *UNSW Law Journal* 1002; Bant (n 14).
[199] French (n 3) 153.

The authoritative relationship of the courts with the legislature affords important assistance to legislators, even though the ambit of the court's legal control is uncertain.[200] Under 'thin' applications of common law constitutionalism, courts examine and possibly confine the application of statutes, including as consistent with the principle of legality.[201] That principle is 'a common law interpretive approach that requires a strict reading of legislation that might remove or narrow fundamental rights'.[202] The 'thickest' application of constitutionalism allows legislation to be tested against institutional norms,[203] and possibly invalidated.[204] Jeffrey Goldsworthy argues against the thickest application as it inverts the traditional relationship between legislation and the common law, replacing legislative supremacy with judicial supremacy.[205] In *South Australia v Totani*, French CJ likewise states it is 'self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified'.[206] Extra-curially, French later said the question 'whether fundamental common law principles can qualify legislative power has not been definitively answered in Australia' although the omens 'are not promising for the proponents of a free-standing common law limitation'.[207] Lisa Burton Crawford suggests that, in the end, court-legislature legal controls are directed to legislative authority's coherence 'with the nature of legislation and the respective constitutional roles of Parliament and the courts'.[208]

In this context, contemporary United Kingdom-focused contributions to the literature from Beatson and Laws are relevant to the practical questions confronting Queensland's legislators.[209] Beatson draws attention to the formal and legal sovereignty of the Parliament.[210] Legislative authority has been described, he notes, as 'the bedrock of the British Constitution' and is its 'general principle'.[211] Legislative authority is exercised 'for a liberal democracy founded on particular constitutional

---

[200] ALRC, *Traditional Rights and Freedoms* (n 172) [2.22], [2.23]: the Commission suggests that 'the power of the common law constitution to protect fundamental rights' should not be underestimated; TRS Allan, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' (2009) 22 *Canadian Journal of Law & Jurisprudence* 187, 190; Laws, *The Common Law Constitution* (n 184) 29.
[201] Ibid [2.26], [3.37]; James Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.
[202] ALRC, *Traditional Rights and Freedoms* (n 172) [2.26], [3.37]; Matthew Groves, 'Interpreting the Effect of Our Charters' in Groves and Campbell (n 166) 2,11.
[203] Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 *The Modern Law Review* 463, 463.
[204] Justice Michael Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights' (Speech, New Zealand Research Foundation Conference, Auckland, 4 April 1997).
[205] Goldsworthy, *Parliamentary Sovereignty* (n 194) 15; Poole (n 203) 463.
[206] *South Australia v Totani* (2010) 242 CLR 1 [31].
[207] French (n 3) 163.
[208] Crawford (n 3).
[209] Beatson, *The Rule of Law* (n 1); Laws, *The Constitutional Balance* (n 2).
[210] Beatson, *The Rule of Law* (n 1) 8.
[211] Ibid.

principles and traditions'.[212] Laws argues that there is no need for a sharp edge to the debate about the size of legislative authority.[213] Legislation has effect 'through the methods of the common law', as the common law 'is the interpreter of our statutes, and it is the crucible which gives them life'.[214] Thus, the 'gifts of the common law' – reason, fairness and the presumption of liberty – are the key to appreciating that legislative supremacy 'is not set in stone'.[215] The gifts position legislative authority as 'an evolving legal construct',[216] forming a principle, rather than a rule:

> [T]he constitutional balance, the compromise between the immediacy of political will and the gradual processes of the common law, ought to tell us that the power of the legislature is far more nuanced. The common law's necessary mediation of statute gives us the moderate and orderly development of state power; and so the legislature is allowed efficacy but forbidden oppression.[217]

In Australia, Lisa Burton Crawford conceptualises the nuance of legislative authority as courts working to shift the weights on an interpretive scale.[218] Commonly that shift is described as the protections common law affords to 'traditional' rights and freedoms.[219] Brennan J says in *Re Bolton* that '[m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force'.[220] In *Electrolux Home Products Pty Ltd v Australian Workers' Union,* Gleeson CJ says generally applying legislative presumptions operate 'as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts'.[221] The legislative presumptions 'are not easily displaced by a statutory text',[222] but extremes of judicial and parliamentary lawgiving are inimical to common law constitutionalism.[223] So, Australian courts cannot

---

[212] Ibid 10.
[213] Laws, *The Common Law Constitution* (n 184) 27–9: 'The reality of legislative sovereignty is that it is variable. It is bigger in some places than in others'; Goldsworthy, *Parliamentary Sovereignty* (n 194); Waldron, *Law and Disagreement* (n 21) 15.
[214] Laws, *The Common Law Constitution* (n 184) 3.
[215] Ibid 27–8; Waldron, *Political Political Theory* (n 2) 25–6.
[216] Laws, *The Common Law Constitution* (n 184) 28.
[217] Ibid 28–9.
[218] Crawford (n 3) 3.
[219] ALRC, *Traditional Rights and Freedoms* (n 172) chs 22–3; [18.1]: the rights include 'a person's property rights''; Poole 'Dogmatic Liberalism?' (n 203) 32.
[220] *Re Bolton* (1987) 162 CLR 514, 521 (Brennan J).
[221] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 [21] (Gleeson CJ).
[222] *Coco v The Queen* (1994) 179 CLR 427; *Evans v New South Wales* [2008] FCAFC 130; *R v Home Secretary; Ex parte Pierson* [1998] AC 539 at 587, 589 citing John Bell and George Engel, *Cross Statutory Interpretation* (3rd ed, Lexis Nexis, 1976) 142–3.
[223] Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton University Press, 2000); Waldron, *Political Political Theory* (n 2) 41–2.

allow statutes 'a meaning their text will not bear'.[224] Nor, can judges and legislators 'cross a boundary between judicial and legislative functions'.[225]

For property rules, then, an interpretive or judicial review decision of a court mediates the immediate political will and the gradual processes of the common law.[226] Mediation is of 'the property, or the civil rights, of parties to litigation and, perhaps, of many other people as well'.[227] The common law and statutory interaction is explained by French CJ in *R & R Fazzolari v Parramatta City Council*:

> Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights.
>
> Blackstone said that the common law would not authorise the 'least violation' of private property notwithstanding the public benefit that might follow. He accepted however that the legislature could compel acquisition and in so doing wrote: 'All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.'[228]

In Queensland, common law judicial mediation of legislation is complemented by Part 3 of the *Human Rights Act*.[229] Interpretive provisions in Part 3 are drafted to avoid extremes of judicial and legislative supremacy, including by providing for a court-legislature 'dialogue' about rights and legislation.[230] Explanatory Notes to the Human Rights Bill 2018 (Qld) state:

> The 'dialogue' is said to occur between the parliament and the judiciary, principally through a process of Ministers addressing human rights in statements of compatibility when making new laws, and courts issuing declarations of incompatibility when they find that a law is incapable of being interpreted consistently with human rights.[231]

In a human rights context, the metaphor of 'dialogue' originated in Canada: the term 'Charter dialogue' was developed 'to describe the process where the legislature responded to judicial concerns regarding

---

[224] French (n 3) 155.
[225] Ibid; Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245; Leighton McDonald, 'Rights, 'Dialogue' and Democratic Objections to Judicial Review' (2004) *Federal Law Review* 1.
[226] Laws *The Constitutional Balance* (n 2) 16.
[227] Gleeson (n 188) 26; Harris, 'Is Property a Human Right?' (n 58) 85; Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984) 74–5; HS Reiss (ed), *Kant's Political Writings* (Cambridge University Press, 1991) 42.
[228] *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* (2009) 237 CLR 603 [40]–[41] (French CJ); Paul Babie, 'Completing the Painting: Legislative Innovation and the "Australianness" of Australian Real Property Law' (2017) 6 (3) *Property Law Review* 160.
[229] *Human Rights Act* s 48.
[230] *Human Rights Act 2019* pt 3, div 3 (Interpretation of Laws); McDougall (n 39) 118.
[231] Human Rights Bill 2018 (Qld) Explanatory Notes (n 130) 10.

the constitutionality of legislation by amending it to address the concerns of a court'.[232] Matthew Groves suggests that, in Canada, the metaphor indicates that rulings of invalidity (possible under the *Canadian Charter of Rights and Freedoms*) are but one step in a wider process.[233] As such, the metaphor of 'dialogue' is intended to overcome perceptions of 'undemocratic' use of the Charter to invalidate legislation,[234] and to foster 'a two-way exchange between the judiciary and legislature on the topic of human rights and freedoms [that] rarely raises an absolute barrier to the wishes of the democratic institutions'.[235] That idea of dialogue offering 'a promising middle path' was adopted in the *Human Rights Act 1998* (UK), even though that Act does not provide for judicial rulings of invalidity.[236] Under the UK Act, a court can issue a 'statement of incompatibility' if legislation is deemed incompatible with human rights,[237] and the legislature then determines whether to amend the legislation via a fast-track procedure.[238]

The idea of dialogue as a middle path is adopted under the Australian human rights instruments,[239] and is the path taken for the Queensland interpretive sections.[240] Questions of law arising from the application of the Act or a question of interpretation of any statute in accordance with the *Human Rights Act* may be referred to the Supreme Court,[241] where the Attorney-General,[242] or the Human Rights Commission,[243] may intervene. In all Supreme Court proceedings, whether on referral or otherwise, the Court may make a 'declaration of incompatibility' when the Court is 'of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights'.[244] The declaration neither affects the validity of the provision nor creates legal rights.[245] It is not made in exercise of judicial

---

[232] Jeremy Webber, 'Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)' (2003) 9 *Australian Journal of Human Rights* 135; Peter Hogg and Allison Bushell, 'The *Charter* Dialogue Between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal* 75; Groves, 'Interpreting the Effect of Our Charters' (n 202) 15; Julie Debeljak, 'Parliamentary Sovereignty and Dialogue Under the Victorian Charter of Human Rights and Responsibilities' (2017) 33 *Monash University Law Review* 9; Peter W Hogg and Ravi Amarnath, 'Understanding Dialogue Theory' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 1053, 105–4.
[233] Groves 'Interpreting the Effect of Our Charters' (n 202) 15: that is, that a ruling of invalidity is followed commonly by amending legislation; Campbell (n 189) 332: if the override were used routinely, 'the *Charter* would be ineffective'.
[234] Groves 'Interpreting the Effect of Our Charters' (n 202) 15.
[235] Hogg and Amarnath (n 232) 1054.
[236] Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue, and Deference' [2009] 47 *Osgoode Hall Law Journal* 235, 236.
[237] *Human Rights Act 1998* (UK) s 4.
[238] Campbell (n 189) 332.
[239] Boughey (n 171) 9–10.
[240] *Human Rights Act* ss 48–57.
[241] Ibid s 49.
[242] Ibid s 50.
[243] Ibid s 51.
[244] Ibid ss 53(1) and (2), but may not do so if a parliamentary override declaration is in force in relation to the provision under pt 3 div 2.
[245] Ibid s 54; *Human Rights Act 2004* (ACT) s 32; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

power.[246] Janina Boughey suggests a declaration will not 'alter the substantive powers of either [parliament] or courts, nor the relationship between the two'.[247] That is because the

> plenary power of … legislatures to pass laws which impinge on fundamental rights remains unaffected by these formal process requirements. The legislatures may continue to pass laws which limit protected rights, provided that they are sufficiently clear in expressing their intention to do so within the legislation.[248]

A copy of a declaration of incompatibility, once made, is given to the Attorney-General,[249] and the responsible Minister tables a copy in the Parliament, along with a response to the Court's declaration of incompatibility.[250] That response is considered and reported on by a parliamentary committee.[251]

Under section 48, all legislation is to be interpreted consistently with the rights stated in the *Human Rights Act.*[252] And '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.[253] Groves explains that the interpretive section applies at large: it is 'not directed specifically nor solely at courts; and it is 'carefully drafted in the passive voice'.[254] Its operation is modelled on the principle of legality.[255] In *Momcilovic v The Queen*,[256] French CJ said the equivalent section in the Victorian Charter 'requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms'.[257] Extra-curially, French explains the interpretive section requires a construction consistent with small 'c' constitutionalism and 'favouring an interpretation of a statute, if one be available, that is compatible with common law rights and freedoms

---

[246] *Momcilovic v The Queen* (2011) 245 CLR 1, 60, 65 (French CJ) 94 (Gummow, Hayne JJ) 185 (Heydon J) 222 (Crennan, Kiefel JJ) 241 (Bell J): by majority, it appears state courts can make declarations of incompatibility; Groves, 'Interpreting the Effect of Our Charters' (n 202) 13–4.
[247] Boughey (n 171) 37.
[248] Ibid 37–8; Groves, 'Interpreting the Effect of Our Charters' (n 202) 2–21.
[249] *Human Rights Act* s 55.
[250] Ibid s 56.
[251] Ibid s 57.
[252] Groves, 'Interpreting the Effect of Our Charters' (n 202) 9–12; JJ Spigelman, *Statutory Interpretation and Human Rights: The McPherson Lecture Series* (University of Queensland Press, 2008) 70–80: 'as in *R v Momcilovic* … Australian courts have not followed the English case law in this respect'.
[253] James Henry '*Human Rights Act 2019* (Qld) What work will it bring us?' [2019] *Queensland Judicial Scholarship* 10; McDougall (n 39).
[254] Groves, 'Interpreting the Effect of Our Charters' (n 202) 9, quoting from *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 594 (Lord Rodger).
[255] Human Rights Bill 2018 (Qld) Explanatory Notes (n 130) 10–1; Department of Justice and Attorney-General, *Response to Legal Affairs and Community Safety Committee: Issues Raised in Written Submissions* (3 December 2018) 49–50, quoted in Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No 26, 56th Parliament, February 2019); Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic)' [2009] *University of Queensland Law Journal* 7.
[256] *Momcilovic v The Queen* (2011) 245 CLR 1.
[257] Ibid [51]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s32.

rather than an interpretation which would override them'.[258] In short, French indicates that the rights statutes are drafted to be interpreted consistently with common law constitutionalism and its constitutional balancing.[259]

In the *Human Rights Act*, one manifestation of this drafting is the absence of constitutional entrenchment:[260] the *Human Rights Act* may be amended by subsequent exercises of legislative authority.[261] This means that 'parliamentary sovereignty is retained, and unlike the United States and Canada, the higher courts do not have the final word on important issues'.[262] Instead, courts mediate when deciding, for example, whether a statute affects the negative right stated in section 24(2) of the *Human Rights Act* not to be deprived arbitrarily of property.[263]

Another manifestation is that the Court may develop a rights-compatible interpretation only if the meaning of legislation is not clear.[264] This middle path was the result of careful drafting 'in light of experience from other jurisdictions' and the interpretive sections in the *Human Rights Act* are 'intended to avoid a strong remedial approach that would facilitate a legislative role by the courts'.[265] Janina Boughey explains that 'Australian courts have held that the interpretive provisions in the Australian Charters do not permit remedial interpretations, but require courts to perform their ordinary common law interpretive role'.[266] According, courts will have an important role 'when there is an issue of arbitrariness, discrimination, or unjustifiable harm to autonomy or dignity'.[267] In *Momcilovic*, for example, the statute was held to be in tension with the Victorian Charter's presumption of innocence.[268] Nevertheless, the High Court judgment indicated clear limits to the legal controls available to courts under rights statutes, suggesting that provisions enabling courts to change the meaning of legislative provisions 'might run into constitutional hurdles'.[269]

Under common law constitutionalism working in tandem with statute then, Queensland courts interpret and review legislation. The court-legislature interaction – the constitutional balancing – controls

[258] French (n 3) 155.
[259] Ibid.
[260] McDougall (n 39) 118.
[261] *McCawley v The King* (1920) 28 CLR 106.
[262] McDougall (n 39) 118.
[263] Henry (n 253) [4].
[264] Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice); Henry (n 253); Benedict Coxon, 'Learning From Experience: Interpreting the Interpretive Provisions in Australian Human Rights Legislation' (2020) 39(2) *University of Queensland Law Journal* 253, 269–75.
[265] Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 377.
[266] Boughey (n 171) 37.
[267] Andre van der Walt, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation' in McLean (n 58) 109, 127; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (University of Chicago Press, 1994); Laura S Underkuffler, 'On Property: An Essay' (1990) 100 *Yale Law Journal* 127.
[268] *Momcilovic v The Queen* (n 256).
[269] French (n 3) 155.

legislative authority,[270] ensuring legislative authority's coherence 'with the nature of legislation and the respective constitutional roles of Parliament and the courts'.[271] The dynamic is the third piece of the rule of law set of considerations examined in this chapter. There will be a particular role for courts where issues of arbitrariness, discrimination, or unjustifiable harm to human dignity arise. Relevant to property rights, these concerns are given prominence in distinct Queensland variations to the Australian model for human rights statutes. The next section examines this fourth and final set of considerations regarding property rights systems and the rule of law.

IV PROPERTY AND THE HUMAN RIGHTS ACT

The *Human Rights Act* differs from earlier Australian human rights statutes in two significant ways.[272] Section 24 (Property rights) has two distinct drafting differences and follows closely Article 17 of the *Universal Declaration of Human Rights* (UDHR).[273] The two differences create a need for a bespoke Queensland understanding of the right to property under section 24, and of the legal limits the promotion and protection of that right marks out for exercises of legislative authority.[274] In this section, the considerations relevant to that understanding are developed from High Court jurisprudence, Harris' institution-focused approach to 'ownership'[275] and Simon Evans' evaluation of the legal limits of property.[276] Evans identifies two conditions: proportionality and an 'institutional' condition.[277] The conditions are found in sections 8 and 13 of the *Human Rights Act*. Consistent with the 'citizenship dignity' theory of Waldron and Habermas, section 11 adds a further condition of 'equality'.[278] From the terms of the *Human Rights Act*,[279] the three conditions emerge as legal controls on exercises of legislative authority for property questions. They are the fourth set of rule of law considerations regarding the property rights system.

When legislators enact a statute to address a property question, they debate, amend and enact proposed legislation that becomes law.[280] Law made by legislators significantly and directly affects human rights

---

[270] Laws, *The Constitutional Balance* (n 2) 16; *The Common Law Constitution* (n 184) 31; Beatson, *The Rule of Law* (n 1) 27–8; Feldman, 'Constitutionalism at Home and Abroad' (n 4).
[271] Crawford (n 3) 2.
[272] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[273] Blore and Nibbs (n 11) 2; the UDHR (GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948)) is available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.
[274] Blore and Nibbs (n 11) 2; Henry (n 253) 14.
[275] Harris, 'Is Property a Human Right?' (n 58) 67.
[276] Evans 'Constitutional Property Rights in Australia' (n 131); Simon Evans, 'Comment and Book Review: From Private Property to Public Law' (2000) 28 *Federal Law Review* 155, 158.
[277] Evans, 'From Private Property to Public Law' (n 276) 158.
[278] Jeremy Waldron, 'Citizenship Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 327; Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464.
[279] Blore and Nibbs (n 11) 3: when reading human rights legislation for meaning 'one must begin and end with the text'; *Maloney v The Queen* (2013) 252 CLR 168, 291–2 (Gageler J).
[280] Waldron, *Political Political Theory* (n 2) chs 6, 7.

– when the laws are enforced, citizens and others experience a human rights impact.[281] Conversely, legislators 'are able to be proactive in seeking to protect rights rather than having to wait for a violation of rights to take place'.[282] The comparison is with judges and those making decisions in other state institutions.[283] Legislators are well-positioned because '[t]he best rights-protection prevents abuses of rights rather than redresses, annuls or punishes violations'.[284] Moreover, legislators in pursuit of rights promotion and protection have a wider range of options open to them than judges do.[285]

One systemic rights option available to legislators is a 'just terms' provision, as in section 51(xxxi) of the Australian Constitution.[286] That provision limits the exercise of Commonwealth legislative authority to laws with the respect to 'the acquisition of property on just terms from any State or person'.[287] It is a written constitutional guarantee of just terms 'and is to be given the liberal construction appropriate to such a constitutional provision'.[288] In Queensland, on two occasions, unsuccessful attempts were made to introduce a 'just terms' protection: the Constitution (Declaration of Rights) Bill 1959 (Qld);[289] and the Private Property Protection Bill 2003 (Qld).[290] Neither bill was enacted, lapsing with the dissolution of the Parliament ahead of a State election.[291]

The *Human Rights Act* is an alternative systemic option – promotion and protection of 'property rights' in a rights statute.[292] In its statutory rights model, the *Human Rights Act* largely follows the Australian model in the earlier Australian Capital Territory (ACT) and Victorian statutes.[293] Importantly, however, the ACT statute does not protect property rights, and there are two important differences between the respective 'property rights' sections in the Victorian Charter and the Queensland statute.[294] Section 20 of the Victorian Charter states: 'A person must not be deprived of his or her property other than in

[281] Simon Evans and Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights' (Papers on Parliament No. 47, July 2007) available at <https://www.aph.gov.au/~/~/link.aspx?_id=8B6C280930C4453C92CA146B82B01CE6> [1.2]; Lorraine Finlay, 'The Erosion of Property Rights and its Effects on Individual Liberty' in Suri Ratnapala and Gabriël Moens (eds), *Jurisprudence of Liberty* (2nd ed, LexisNexis 2011) 465, 493.
[282] Evans and Evans (n 281) [1.2]; Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 278) 475; Henry (n 253).
[283] Evans and Evans (n 281) [1.2].
[284] Ibid; McDougall (n 39).
[285] Evans and Evans (n 281) [1.2].
[286] Commonwealth Constitution s 51(xxxi), and equivalent provisions are included in the legislation conferring government on the Australian Capital Territory, the Northern Territory and Norfolk Island; Evans, 'Constitutional Property Rights' (n 276) 197.
[287] *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 193.
[288] *JT International SA v Commonwealth of Australia* [2012] HCA 43 [41] (French CJ): A broad, linked construction of 'property' and of 'acquisition' was adopted by Dixon J in the *Bank Nationalisation case* (*Bank of NSW v Commonwealth* (1948) 76 CLR 1).
[289] Blore and Nibbs (n 11) 14.
[290] Available at <https://www.legislation.qld.gov.au/view/html/bill.first/bill-2003-1018>; Evans (n 131) 217–20.
[291] Blore and Nibbs (n 11) 14.
[292] *Human Rights Act 2019* s 24.
[293] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[294] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

accordance with the law';[295] section 20's accepted interpretation is that any deprivation of property authorised by law is held to be 'in accordance with that law'.[296] Section 24 of the *Human Rights Act*, however, states a positive right to 'ownership' of 'property' and associates deprivation with arbitrariness rather than unlawfulness. The different drafting in section 24, Kent Blore and Nikita Nibbs argue, means 'Queenslanders will need to develop their own theory about property as a human right'.[297]

Section 24 states:

> (1) All persons have the right to own property alone or in association with others.
>
> (2) A person must not be arbitrarily deprived of the person's property.

The paragraphs in section 24 largely restate the positive and negative right paragraphs in Article 17 of the *Universal Declaration of Human Rights* (UDHR).[298] Section 24(1) promotes and protects 'a systemic right to own property'.[299] The legislature must promote and protect each person's right to 'own property', and 'must fulfill that right through instituting property laws and procedures such as titling'.[300] Section 24(1) is characterised by 'alternativity',[301] meaning that the positive obligation imposed on the state can be met in more than one way, and that proportionality will be relevant as to sufficiency of protection and justification.[302] The positive duty demands, for example, 'geographical certainty' and effective communitarian ownership for Aboriginal peoples and Torres Strait Islanders.[303] In meeting the duty, the legislature has enacted the *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*, and enacts legislation consistent with the *Native Title Act 1993* (Cth).[304] Section 24(2) imposes a negative right but does not create a right to compensation.[305] The term 'deprivation' is interpreted to include formal and *de facto* expropriation and deprivation may occur even if the state does not gain a benefit (in this way separating 'deprivation' from 'acquisition').[306] The Explanatory Note and a decision of the Land Court in *Cement Australia [No 4]* indicate that the concept of 'arbitrary' in section 24 'extends to those interferences which may be lawful, but are unreasonable, unnecessary and

---

[295] Blore and Nibbs (n 11) 16: for the Victorian Charter, Simon Evans 'proposed a protection against arbitrary deprivation of property'; Williams (n 166) 29: 'there is no reference to such a right in the ICCPR'.
[296] *PJB v Melbourne Health* (2011) 39 VR 373, 396 (Bell J).
[297] Blore and Nibbs (n 11) 14.
[298] *Universal Declaration of Human Rights* (n 273) art 17: '1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.'
[299] Blore and Nibbs (n 11) 27.
[300] Rhoda E Howard-Hassmann, 'Reconsidering the Right to Own Property' (2013) 12 *Journal of Human Rights* 180, 192.
[301] Blore and Nibbs (n 11) 28; Robert Alexy, 'On Constitutional Rights to Protection' (2009) 3 *Legisprudence* 1, 5.
[302] Blore and Nibbs ' (n 11) 28.
[303] Ibid 27; *Indigenous Communities of the Lhaka Honhat (Our Land) Ass'n v Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No. 400 (Feb 6, 2020); Maria Antonia Tigre 'Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina' (2021) 115 *American Journal of International Law* 706–13.
[304] Ibid.
[305] Human Rights Bill 2018 (Qld) Explanatory Notes (n 130) 22.
[306] Blore and Nibbs (n 11) 29.

disproportionate'.[307] Blore and Nibbs state that section 24(2) is directed to 'the impact on the individual who bears human rights, not the State and not the public entity'.[308]

In pursuit of a theory of the right to property relevant to the *Human Rights Act*, Blore and Nibbs first note that Robert Alexy explains that positive and negative rights paragraphs have differing applications:[309]

> The structure of protective rights is in one point fundamentally different from that of defensive rights. Defensive rights are prohibitions on destroying, adversely affecting, and so on. Protective rights are commands to protect, support, and so on. When there is a prohibition on destroying or adversely affecting something, then every act that represents or brings about destruction or an adverse effect is prohibited. By contrast, if there is a command to protect or support something, then not every act that represents or brings about protection or support is required.[310]

Blore and Nibbs then examine the different applications of section 24(1) and section 24(2), with reference to Article 17 of the UDHR:

> As a matter of text, the first paragraph of art 17 appears to protect a positive or systemic right to property. It recognises the 'preexistent or antecedent right that everyone has as a human being to own and to acquire property'. The right of 'ownership' in the first paragraph 'must be seen as including the right to acquire property. It cannot simply be the right to use and enjoy one's property after it has been acquired'. Otherwise, the second paragraph would have sufficed. The second paragraph protects a negative right to property, requiring the state to refrain from taking away a person's property once they have acquired it. Beyond these obvious aspects of the right, art 17 is sphinx-faced as to what it means by 'ownership', 'arbitrary', 'deprivation' or even 'property'.[311]

There is High Court jurisprudence and a body of theory able to assist with the 'sphinx-faced' terms used in section 24. In *Maloney v The Queen* Hayne J observed that '[t]he ambiguity and looseness with which the word 'property' can be used is notorious'.[312] Indeed, as used in section 20 in the Victorian Charter, the term is interpreted 'liberally and beneficially to encompass economic interests and deprivation in a

---

[307] Human Rights Bill 2018 (Qld) Explanatory Notes (n 130) 22, 24; *Cement Australia (Exploration) Pty Ltd v East End Mine Action Group Inc (No 4)* [2021] QLC 22 [384] (McNamara) citing *PJB v Melbourne Health* (n 296) 395 (Bell J); Tom Allen, 'The Human Rights Act (UK) and Property Law' in McLean (n 58) 147: a right to full compensation, for example, does not prevent a compulsory acquisition from being arbitrary; *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* (2009) 237 CLR 603.
[308] Blore and Nibbs (n 11) 29.
[309] Ibid 7–8.
[310] Alexy (n 301) 5.
[311] Blore and Nibbs (n 11) 7–8.
[312] *Dorman v Rodgers* (1982) 148 CLR 365; *Yanner v Eaton* (1999) 201 CLR 351 [18]–[19] (Gleeson CJ, Gaudron, Kirby, Hayne JJ) [85]–[86] (Gummow J).

broad sense'.[313] In *Dorman v Rogers*,[314] Murphy J provides an often-cited analysis of 'property', including conceptualisations of 'property' when used in legislation:

> Property is an extremely wide concept with a long history … Throughout the history of the common law the concept of property has been used to recognise the legitimacy of claims and to secure them by bringing them within the scope of legal remedies. They might first be formulated as social claims with no legal recognition. As they become accepted by reason of social or political changes they are tentatively and then more surely recognized as property. The limits of property are the interfaces between accepted and unaccepted social claims …
>
> In modern legal systems, 'property' embraces every possible interest recognized by law which a person can have in anything and includes practically all valuable rights. When used in legislation it should be given its 'ordinary' or 'natural' comprehensive meaning unless the context or history of the legislation suggests otherwise.[315]

In property theory, citing Murphy J's analysis of 'property' in *Dorman v Rogers*, Kevin Gray and Susan Francis Gray observe that the ideology of property as 'raw, untrammelled, individually exercised exclusory power' is now untenable, as is 'the dichotomous distinction between the domains of public and private'.[316] This is because each conceptual structure 'threatens fundamental values of community and democracy', each imperils 'important freedoms of expression, association and movement', and each places in jeopardy 'those critical, but fragile social values which are summed up in irreducible notions of fairness and respect for human dignity'.[317] Further, the term 'property' is approached with ambivalence about 'ownership' of things and about materiality.[318] And, if 'property' is treated as meaning the same as 'ownership', scepticism arises about the idea of 'ownership' of a bundle of separable rights and the possibility of any single idea of property relevant to all exercises of legislative authority.[319]

Simon Evans' search for the limits of 'property' associates legislative use of 'property' with democratic values and democratic institutions.[320] In the written Australian Constitution, Evans finds limited

---

[313] *PJB v Melbourne Health* (n 296) [87] (Bell J) regarding the words used in the equivalent s20 of the *Victorian Charter of Rights and Responsibilities*; *Thompson v Minogue* [2021] VSCA 358 [46] (Kyrou, McLeish, Niall JJA).
[314] *Maloney v The Queen* [2013] HCA 28 [74] (Hayne J); *Yanner v Eaton* (n 312) [18]–[19] (Gleeson CJ, Gaudron, Kirby, Hayne JJ) [85]–[86] (Gummow J).
[315] *Dorman v Rodgers* (n 312) 372.
[316] Kevin Gray and Susan Francis Gray, 'Private Property and Public Propriety' in McLean (n 58) 11, 15; *Dorman v Rodgers* (n 312) 372; Evans, 'From Private Property to Public Law' (n 276) 156.
[317] Kevin Gray and Susan Francis Gray, 'Private Property and Public Propriety' in McLean (n 58) 11, 15.
[318] Harris, 'Is Property a Human Right?' (n 58) 65–6.
[319] Ibid 66; Queensland Law Review Commisson, *Review of Queensland's Laws Relating to Civil Surveillance and the Protection of Privacy in the Context of Current and Emerging Technologies* (Report No 77, February 2020)
[320] Evans, 'From Private Property to Public Law' (n 276) 156; 'Constitutional Property Rights in Australia' (n 131) 213–5; *Dorman v Rodgers* (n 335) 372–4.

answers about the limits of property.[321] However, from jurisprudence in *Lange v Australian Broadcasting Corporation*,[322] Evans identifies two conditions controlling legislative authority.[323] They are: compatibility of the object of the law with 'the maintenance of the constitutionally prescribed system of representative and responsible government' (an institutional condition); and a legislative measure reasonably appropriate or adapted to achieving the legitimate object of the law (a proportionality condition).[324] Evans cautions that legislators will be involved in 'deeply contested political questions' even if meeting the two conditions.[325] In this context, David Feldman observes that, disagreements will arise about the aims to which institutions should be directed, and the values that should inform them.[326] Therefore, legislators ought to recognise that 'constitutions are concerned with managing disagreement, not giving effect to consensus'.[327]

The *Human Rights Act* employs proportionality and institutional conditions to manage disagreement about the limits to a right to property,[328] and to manage disagreement about whether proposed legislation is 'compatible with' a right to property.[329] The management occurs under sections 8 and 13 of the *Human Rights Act.*[330] Proportionality is invoked by sections 8 and 13,[331] and legislators applying the sections can draw upon judicial and scholarly analysis about the proportionality condition.[332]

Section 8 is another distinct *Human Rights Act* departure from the ACT and Victorian rights statutes: the section defines compatibility with human rights, although the earlier Australian rights statutes do not.[333] Under section 8, 'compatible with human rights' means either that the proposed measure does not limit a human right, or that it limits a right in a way that is 'reasonable and demonstrably justifiable' under section 13. Section 8(a) says compatibility with human rights is a measure that does not limit a human right. Section 8(b) says legislation will be compatible if it 'limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13'.

---

[321] Evans, 'From Private Property to Public Law' (n 276) 156.
[322] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[323] Evans, 'From Private Property to Public Law' (n 276) 158.
[324] Ibid 158–9; Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 PLR 85: the term is based in reason: 'One meaning of the word "proportion" is the correct relation that one thing bears to another… In law, proportionality is employed as a concept and an ideal; as a test and as a conclusion.'
[325] Evans, 'From Private Property to Public Law' (n 276) 158.
[326] Feldman, 'Constitutionalism at Home and Abroad' (n 4) 123.
[327] *Australian Institute for Progress Ltd v Electoral Commission (Qld)* (2020) 4 QR 31 (Applegarth J).
[328] Blore and Nibbs (n 11) 32–4.
[329] Kent Blore, 'Proportionality under the Human Rights Act 2019 (Qld): When Are the Factors in s13(2) Necessary and Sufficient, And When Are They Not?' (2022) 45(2) *Melbourne University Law Review* (advance) 5–6.
[330] *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246 [3] (Applegarth J).
[331] Ibid.
[332] Blore and Nibbs (n 11) 32–4.
[333] Blore (n 329) 6: without an equivalent of s 8, 'the relationship between the interpretive clause (s 48) and the general limitations clause (s 13) has been a vexed issue in those jurisdictions. In particular, the role of proportionality in interpreting legislation compatibly with human rights remains unsettled.'

Section 13 provides 'a framework for deciding when and how a human right may be limited in a way which does not result in incompatibility'.[334] In *Owen-D'Arcy v Chief Executive, Queensland Corrective Services*, Martin J said section 13 is to be regarded as embodying a proportionality test.[335] The overall test in section 13(1) is whether the limit on a human right is 'demonstrably justified in a free and democratic society'. The drafting model is an equivalent provision in the Canadian Charter, long held to incorporate a structured proportionality analysis.[336] In *R v Morgentaler*, Wilson J refers to a 'basic theory' underlying the Canadian Charter; namely that 'the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life'.[337]

Legislators considering whether a limitation on human rights is justified must consider relevant factors identified in section 13(2).[338] The factors are:

(a) the nature of the human right;
(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
(d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
(e) the importance of the purpose of the limitation;
(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
(g) the balance between the matters mentioned in paragraphs (e) and (f):

Regarding property rights, proportionality is relevant to *limiting* the positive right (section 24(1)) and the arbitrariness of deprivation for the negative right (section 24(2)).[339] For the positive right, Blore and Nibbs suggest proportionality is relevant to *justification* also – justification of the specific legislative measure selected from among the alternatives.[340] This would mean, it is further suggested, that section 13(e) to (g) of the *Human Rights Act* would apply the proportionality question to the selection of one alternative over others.[341] For the negative right, '[w]hether a deprivation is 'arbitrary' really turns on whether the deprivation is disproportionate'.[342] The Explanatory Note to the Human Rights Bill and a

[334] Human Rights Bill 2018 (Qld) Explanatory Notes (n 130) 16.
[335] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [104, [244] (Martin J); Blore (n 329) 5–6.
[336] *Canada Act 1982* (UK) c 11, sch B, pt I s 1; Blore (n 329) 2.
[337] *R v Morgentaler* [1988] 1 SCR 30, 166 (Wilson J).
[338] *Owen-D'Arcy v Chief Executive* (n) [104], [244] (Martin J); Blore (n 329) 5–6.
[339] Human Rights Bill 2018 (Qld) Explanatory Notes (n 130); *Attorney-General v Sri* (n 330) [43] (Applegarth J); Blore and Nibbs (n 11) 28; Blore (n 329).
[340] Blore and Nibbs (n 11) 3, 28–30; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 433–4, 353.
[341] Blore and Nibbs (n 11) 32–4.
[342] Ibid 28.

decision in *Cement Australia (No 4)* also suggest proportionality is relevant to whether deprivation is 'arbitrary', and to a legislative decision under section 13.[343]

To date, there is uncertainty in the case law from Victoria,[344] and Queensland,[345] about the application of the proportionality condition due to the ambivalent meanings of terms used in sections 8, 13 and 24; namely, 'ownership', 'proportionate', 'arbitrary', and 'property'.[346] Problems also arise, Simon Evans argues, because proportionality 'depends on a highly artificial approach to characterisation of the law in question'.[347] An artificial characterisation is consistent with Taylor's concerns about 'fetishisation', and promotes undue focus on one 'essential' value, obscuring 'the real dilemmas that we encounter'.[348] Waldron similarly notes that the term 'arbitrariness' has at least three connotations in modern jurisprudence, 'all of them bad'.[349] The connotations are 'unpredictable',[350] 'unreasoned',[351] and lacking 'political legitimacy'.[352]

In these circumstances, the institutional condition, as stated in section 13 factors, assists legislators considering proposed legislation.[353] Section 13(1) and section 13(2)(b) each state legislators are to consider 'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. The institutional factors identified in section 13 are consistent with Simon Evans' institutional condition on legislative authority and the limits of property,[354] and which Jedediah Purdy refers to as a 'social-obligation norm'.[355] They are consistent also with Harris's answer to the ambivalent meanings of 'property rights' terms used in sections 8, 13 and 24:

> There is no univocal, singular concept of ownership, applicable to all resources at all stages of social and legal development. Instead, property institutions include a spectrum of ownership interests. We need to display the interactions between this spectrum and the different types of

[343] Human Rights Bill 2018 (Qld) Explanatory Notes (n 130) 22, 24; *Cement Australia (No 4)* [2021] QLC 22 [384] (McNamara) citing *PJB v Melbourne Health* (n 296) 395 (Bell J); Blore and Nibbs (n 11) 29–30.
[344] *PJB v Melbourne Health* (n 296) 395 (Bell J); *Thompson v Minogue* (n 313).
[345] *Attorney-General v Sri* (n 330); *Cement Australia (No 4)* (n 330).
[346] Blore and Nibbs (n 11) 1–3; *HJ (a pseudonym) v IBAC* [2021] VSCA 200 [193] (Beach, Kyrou, Kaye JJA).
[347] Evans, 'Property and the Constitution' (n 131) 162–3.
[348] Taylor, 'The Meaning of Secularism' (n 64) 29; 'The Nature and Scope of Distributive Justice' (n 63) 233: Taylor refers to a 'belief that there is a single consistent domain of the "moral"'; Orit Kamir, 'Basic Law: Israel as Nation State – National Honor Defies Human Dignity and Universal Human Rights' (2020) *Israel Studies* 2137, 219.
[349] Waldron, *Law and Disagreement* (n 21) 167–9.
[350] Gerald Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1986) 328–36.
[351] Waldron, *Law and Disagreement* (n 21) 168.
[352] Ibid: in a democratic sense '"arbitrary" means something like "without authority or legitimacy"'.
[353] *Attorney-General v Sri* (n 330) [3] (Applegarth J); Kent Blore and Brenna Booth-Marxson 'Breathing Life into the Human Rights Act 2019 (Qld): The Ethical Duties of Public Servants and Lawyers Acting for Government' (2022) 41(1) *University of Queensland Law Journal* 1.
[354] Evans, 'From Private Property to Public Law' (n 276) 156.
[355] Purdy (n 185) 948; Margaret Jane Radin, *Contested Commodities* (Harvard University Press, 2001).

> rules to be found in property institutions, as well as indicating the space left for non-ownership items. The overall analysis has to be institution focussed.[356]

An institutional condition is necessary, Habermas argues, because it underlines the '*legal* character of human rights'; that is, that rights 'protect a human dignity that derives its connotations of self-respect and social recognition from a status in space and time – that of democratic citizenship'.[357] Here, Habermas agrees with Waldron's institutional approach of citizens insisting their democratic representatives treat private people with dignity, and citizens demanding legal controls are in place to ensure legislators do so.[358] And each approach accords with Beatson's theory of the rule of law and the separation of powers, according to which Beatson states that an institutional condition allows the legislature efficacy but forbids legislative oppression. [359]

Sections 8 and 13, and the institutional condition, must be understood to be complemented by section 11 of the *Human Rights Act* requiring what Habermas describes as 'egalitarian universalism',[360] and what Jeremy Waldron describes as 'citizenship dignity'.[361] Section 11 states that '[a]ll individuals in Queensland have human rights',[362] and '[o]nly individuals have human rights'.[363] Henry J observes that section 11 makes it abundantly clear that 'BHP, Telstra, Google, Microsoft et cetera do not have human rights', comparing the *Bill of Rights Act 1990* (NZ) which 'does not contain a provision expressly confining its application to individuals as distinct from other legal persons in the form of companies'.[364] A drafting note to section 11 states that a corporation 'does not have human rights.' However, section 11 also complements section 13's preferencing of 'human dignity, equality, freedom and the rule of law'.[365] Together, the sections invoke Article 1 of the UDHR which states '[a]ll human beings are born free and equal in dignity and rights'.[366] Section 11 works with section 13 to ensure legislative compatibility with human rights, promoting and protecting 'the equal right of each person to freedom'.[367] And, relevant to section 24, Purdy explains 'everyone has the legal capacity to be an owner'

---

[356] Harris, 'Is Property a Human Right?' (n 58) 67.
[357] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 278) 475.
[358] Jeremy Waldron 'Human Dignity: A Pervasive Value' (Public Law Research Paper No 20-46, NYU School of Law, 1 July 2019) 19, available at <https://ssrn.com/abstract=3463973>; Brenda Hale, 'Preface' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) xv, xv–xvi.
[359] Beatson, *The Rule of Law* (n 1) 28–9.
[360] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 278) 464.
[361] Waldron, 'Citizenship Dignity' (n 278).
[362] *Human Rights Act* s 11(1).
[363] Ibid s 11(2).
[364] Henry (n 253) 12.
[365] *Human Rights Act* ss 13(1) and (2).
[366] UDHR (n 273); Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 278) 464.
[367] *Human Rights Act* s 13.

and, '[t]o participate in [American] property law is, therefore, to embrace an obligation to honor a version of human equality, an obligation so basic to property law that it easily becomes invisible'.[368]

The equal right of each person to freedom is the definition of human dignity adopted by Weinrib in his theory of dignity in modern constitutional states.[369] The direct relevance of the definition to sections 11 and 13 illustrates the benefits to legislators of the rich resources of theory about human dignity and legislation. Two examples are Habermas' idea that legislators implement 'the core moral values of an egalitarian universalism',[370] and Justice Kennedy's jurisprudential legacy – a commitment to 'equal dignity as a central promise of the Fourteenth Amendment'.[371] An equal right of each person to freedom is consistent with the concept of human dignity stated in High Court jurisprudence,[372] and the concept understood by Waldron, Habermas, Baroness Hale and Conor Gearty.[373]

Section 11's inclusion in the *Human Rights Act,* along with the proportionality and institutional conditions in sections 8 and 13, clarifies and strengthens the Act's preferencing of 'human dignity, equality, freedom and the rule of law'.[374] In *Clubb v Edwards; Preston v Avery*,[375], Kiefel CJ, Bell and Keane JJ cite Barak's statement that '[m]ost central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole'.[376] This means, Gearty argues that dignity is not 'something which people have conditionally, the way they have free speech or privacy, which are however capable of being set aside in the interests of the community'.[377] Instead, Gearty's review of select United Kingdom case law finds human dignity underpins human rights: dignity 'floats' and then moves forward to give law 'right energy' when needed, adding impact to the right, as a 'source of/explanation for a right rather than a right itself'.[378] Scott Stephenson says there is broad agreement in Australia the principal objective of the concept of dignity 'is to assist in the recognition and protection of fundamental rights and freedoms'.[379] That may be variously, 'as a justification for their existence, as a freestanding right, or as an aid in the

[368] Purdy (n 185) 948; Rawls (n 47) 78–81; Amartya Sen *Development as Freedom* (Oxford University Press, 1999).
[369] Weinrib (n 58) 7.
[370] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 278) 464.
[371] 'Equal Dignity – Heeding its Call' (2019) 132 *Harvard Law Review* 1323; United State v Windsor 570 US 744 (2013); Planned Parenthood of Southeastern Pennsylvania v Casey 505 US 833 (1992).
[372] *Clubb v Edwards; Preston v Avery* [2019] HCA 11; Scott Stephenson 'Dignity and the Australian Constitution' (2020) 42 *Sydney Law Review* 369, 393.
[373] Waldron, 'Citizenship Dignity' (n 278); Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 278); Hale (n 358); Conor Gearty, 'Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 155.
[374] *Human Rights Act* s 13.
[375] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171.
[376] Ibid [50] (Kiefel CJ, Bell, Keane JJ).
[377] Gearty (n 373) 163.
[378] Ibid 168, 171; Waldron, 'Human Dignity: A Pervasive Value' (n 358) 18; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 7.
[379] Stephenson (n 372) 393.

interpretation of rights and freedoms'.[380] Thus, the judgment of the plurality in *Clubb v Edwards* models reliance upon human dignity jurisprudence when examining statutory limitations on rights; as explained by Gearty, a conceptualisation of dignity is examined as a source of/explanation for limiting a property right (access to a public place).[381] The mediating role of dignity is analysed further in the next chapter.

On the evidence then, each of the three conditions limiting legislative authority – proportionality, institutional considerations, and equal freedom for all people – is found in case law jurisprudence, legal theory and in the terms of the *Human Rights Act*. Waldron's explanation is similar to Beatson's description of legal controls on legislators facilitating legislation but preventing legislative oppression:[382]

> We have democratic institutions because we want to maintain equal respect for one another in the midst of our disagreements. We have human rights on account of our vulnerability to the worst excesses of human power. We demand economic freedom, free markets, and private property because our life-plans are different from one another and because we know that there is no other way to reconcile our varying preferences in a coherent way of life. And we subject ourselves to the discipline of the Rule of Law so that we can be governed in a way that respects our dignity in the forms and procedures that are used.[383]

Examining 'the rule of law', Waldron's explanation unites the set of considerations regarding property rights systems and the rule of law. Analysis of the Queensland set of considerations in this chapter consequently indicates a Queensland property system adhering to the rule of law. [384] The four pieces are: rule of law objectives (predictability of property rules, commitment to established procedures, and a society bound by law); statutory legislative scrutiny provisions; a court-legislature dynamic controlling legislative authority; and promotion and protection of property rights for legislative effectiveness but preventing oppression. In Cass's words, they are the legal controls in place to limit 'the avenues for change and the ambit of discretion in ways that make property more secure and impositions on it more predictable without reference to the identity of the individual official enforcing the law or the individual property owners subject to it'.[385]

The analysis of the set of considerations regarding property rights systems and the rule of law, and Waldron's explanation of the limits of legislative authority, show the way human dignity 'floats' in law. Gearty says dignity floats '(especially perhaps) in politics as well',[386] because 'it is in the political realm

---

[380] Ibid.
[381] *Clubb v Edwards; Preston v Avery* (n 372) [50] (Kiefel CJ, Bell, Keane JJ); Gearty (n 373) 171; Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015) 104–5, 112–3; Waldron, 'Human Dignity: A Pervasive Value' (n 358) 18; Singer, *Entitlement* (n 378) 7.
[382] Beatson, *The Rule of Law* (n 1) 28–9.
[383] Waldron, *The Rule of Law* (n 8) 109–10.
[384] Cass (n 6) 222.
[385] Ibid 256.
[386] Gearty (n 373) 168.

that issues about the content of an agreed commitment to dignity should be played out'.[387] Chapter 6 analyses human dignity and legislative mediation – law made in the circumstances of politics.

[387] Ibid 165.

CHAPTER SIX: LEGISLATIVE DEMOCRACY

I COLLECTIVE ACTION IN CIRCUMSTANCES OF POLITICS

The dignity of legislation, Waldron explains, is a 'tribute we should pay to the achievement of concerted, co-operative, co-ordinated, or collective action in the circumstances of modern life'.[1] Despite a diversity of people and interests, many initiatives are achieved when those within a political community play their parts, 'in large numbers, in a common framework of action'.[2] Examples include legislation for environmental sustainability, a functioning health care system, an efficient market economy, and a system of justice.[3] This chapter analyses the legal and political theory of Jeremy Waldron, Jürgen Habermas and Jacob Weinrib about the concept of human dignity – a concept concerning 'the equal right of each person to freedom'[4] – and the work of legislators.[5] From the theory, it will emerge that Queensland legislators ought to aspire to use of 'real-world normative tools' to get to deeper dignitarian values,[6] as the values are capable of integrating a diversity of people and their interests in a political community, and are a shared but floating standard of the human values shared by those in a political community. In this section, achievement of making law in the circumstances of politics is analysed with reference to theory of Waldron, Habermas and Kant.

In *The Dignity of Legislation* and *Law and Disagreement*,[7] and in many publications since,[8] Waldron emphasises legislation's character. Legislation is law made in 'the circumstances of politics',[9] and the 'elementary' condition of modern politics is that 'nothing we can say about politics makes much sense if we proceed without taking … into account' the prospect of persisting disagreement.[10] In political communities, legislation is the common, shared response to a necessity for joint action.[11] On the one hand, legislation responds to 'the felt need . . . for a common framework or decision or course of

---

[1] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 101; *The Dignity of Legislation* (Cambridge University Press, 1999) 2, 158; John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 126–30.
[2] Waldron, *Law and Disagreement* (n 1) 101–2.
[3] Ibid.
[4] Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016).
[5] David Runciman, 'Review: Jeremy Waldron's *Political Political Theory*' (2019) 18(3) *European Journal of Political Theory* 437, 445.
[6] Ibid.
[7] Waldron, *Law and Disagreement* (n 1) Pt II 147–208; *The Dignity of Legislation* (n 1) 154.
[8] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016); *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012).
[9] Waldron, *Law and Disagreement* (n 1) (n 8) 101–3; Alexander Latham-Gambi, 'Jeremy Waldron and the Circumstances of Politics' (2021) 83 *The Review of Politics* 242.
[10] Waldron, *The Dignity of Legislation* (n 1) 154; *Law and Disagreement* (n 1) Pt II 147.
[11] Hannah Arendt, *On Revolution* (Penguin Classics, 2006) 208; John Stuart Mill, *Considerations on Representative Government* (Prometheus Books, 1991) 283: we expect there to be a place 'where every interest and shade of opinion in the country can have its cause even passionately pleaded, in the face of the government and of all other interests and opinions, can compel them to listen, and either comply, or state clearly why they do not'.

action'.[12] On the other, the legislative process accommodates '[d]isagreement on matters of principle' as disagreement is 'not the exception but the rule in politics'.[13]

Waldron has formulated seven principles of legislation identifying the 'distinctive features' of lawmaking by legislators.[14] The principles address 'the general norm of fair and responsible conduct in the discharge of this most important civic function'.[15] Their aim is to meet the demand for enacted rules to do their work 'in a community of people who do not necessarily agree with them and who will therefore demand that something other than the merits of their content – something about the way they were enacted – be cited in order to give them an entitlement to respect'.[16] In Waldron's principles, that 'something' is respect for human dignity.[17] It is argued below that respect for dignity is implicit in each of the seven principles:

1. The principle of explicit lawmaking (i.e., the principle that holds that when law is changed, it should be made or changed explicitly).
2. The duty to take care when legislating, in view of both the inherent importance of law and the interests and liberties that are at stake.
3. The principle of representation, which requires that law should be made in a forum that gives voice to and gathers information about all important opinions and interests in the society.
4. The principle of respect for disagreement, and concomitant requirements like the principle of loyal opposition.
5. The principle of deliberation and the duty of responsiveness to deliberation.
6. The principle of legislative formality, including structured debate and a focus on the texts of the legislative proposals under consideration.
7. The principle of political equality and the decision procedure it supports in an elective legislature (i.e., the rule of majority decision).[18]

Waldron's principles (and Waldron's theory of legislation more generally[19]) have received little scholarly attention.[20] Alexander Latham-Gambi observes that 'lively debates' with Waldron about legislation being made in the circumstances of politics 'have not been accompanied by close analysis

[12] Richard Posner, *Frontiers of Legal Theory* (Harvard University Press, 2001) 19: legislation is adopted as 'the democratic solution to the problem posed by the fact that in a complex, heterogeneous society people do not agree on ends'.
[13] Waldron, *Law and Disagreement* (n 1) 15.
[14] Waldron, *Political Political Theory* (n 8) 145–9.
[15] Ibid 166.
[16] Ibid 145: Waldron distinguishes the principles from 'the principles of a utilitarian such as Jeremy Bentham' and from 'the principles of a theorist of justice such as John Rawls'.
[17] Jeremy Waldron, 'Human Dignity: A Pervasive Value' (Public Law Research Paper No 20-46, NYU School of Law, 1 July 2019) 19, available at <https://ssrn.com/abstract=3463973>.
[18] Waldron, *Political Political Theory* (n 8) 153, 145–9.
[19] Posner (n 12); Waldron *The Rule of Law* (n 8).
[20] Alexander Latham-Gambi, 'Jeremy Waldron and the Circumstances of Politics' (2021) 83 *The Review of Politics* 242; Michael Pal, 'Comparative Constitutional Law and Waldron's Political Political Theory' (2017) 15 *International Journal of Constitutional Law* 855.

of his arguments'.[21] Scott Stephenson suggests the principles of legislation contribute to debates 'where the terrain is already well mapped',[22] but Stephenson assumes Waldron's principles of legislation are merely procedural.[23] The principles cannot be understood merely as a safeguard against misrule though,[24] if viewed in the context of Waldron's long history of thought about the dignity of legislation, and law and disagreement.[25] Waldron emphasises that the principles are constructed from his decades of thought and concern for 'the dignity of legislation', embedding respect for human dignity within the principles.[26] The seven principles are, therefore, able to be put to work by Queensland's legislators to foster a Rule of Law state,[27] empower citizens,[28] and ensure equal respect for each person's human dignity.[29] Legislators ought to do so, Waldron argues, because in modern political communities people demand legislators treat them with respect for their human dignity:

> Indeed we insist as a matter of dignity that the government is ours and for us to control; its accountability to us, through established political mechanisms, is a matter of the tribute that agents must pay to the dignity of those who employ them. By insisting on the rule of law, we maintain that we are to be treated with dignity even when it is a question of coercing us. Our well-being is to be regarded as that of individuals with dignity not the well-being of cattle who graze for their masters' benefit.[30]

Habermas supports Waldron's approach to human dignity and legislation, pointing out that it is 'paradoxical': an 'egalitarian concept of human dignity is the result of a generalization of particularistic dignities' and yet 'all human persons belong to the same rank and that rank is a very high one indeed'.[31] There is support too from David Runciman who suggests legislators employ the seven principles as 'real-world normative tools' to uncover 'deeper layers of dignitarian value'.[32] And there is a body of dignitarian legal and political theory available to hone tool selection and use, assisting legislators to the deeper layers.[33]

---

[21] Latham-Gambi (n 20) 243: Latham-Gambi suggests the felt need for a common course of action is fundamental to politics, as in Waldron's theory.
[22] Scott Stephenson, 'A Study of Institutions in Constitutional Theory' (2017) 15 *International Journal of Constitutional Law* 850, 854.
[23] Ibid.
[24] Runciman (n 5) 445; Jon Elster, *Securities Against Misrule: Juries, Assemblies, Elections* (Cambridge University Press, 2013).
[25] Waldron, *Law and Disagreement* (n 1); *The Dignity of Legislation* (n 1).
[26] Waldron, *Political Political Theory* (n 8) 9–12.
[27] Jeremy Waldron *The Rule of Law* (n 8) 88
[28] Jeremy Waldron, 'Citizenship Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 327.
[29] Waldron, 'Human Dignity: A Pervasive Value' (n 17).
[30] Ibid 16; Waldron and Dan-Cohen, *Dignity, Rank, & Rights* (Oxford University Press, 2015); *One Another's Equals: The Basis of Human Equality* (Belknap Press, 2017).
[31] Jürgen Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464, 474; Waldron and Dan-Cohen, *Dignity, Rank and Rights* (n 30).
[32] Runciman (n 5) 445.
[33] Habermas (n 31) 470.

The concept of human dignity in the 'political' (or public law) context is equated by Weinrib to the entitlement of each person to equal freedom.[34] So far as possible each person, as free, has 'the right to determine the purposes that he or she will pursue' and, as equal, upholds the 'duty to pursue his or her purposes in a manner that respects the right of others to freedom'.[35] Dignity is a universal concept, as indicated by its invocation in the *Universal Declaration of Human Rights*.[36] It accords with Kant's definition of 'independence from being constrained by another's choice', a conception that is deeply egalitarian.[37] Kant explains that '[d]ignity is something that all human beings have in common'.[38]

In the modern political context, the term is used widely: states employ dignity in constitutions and in legislation 'to refer to the most abstract concept that justifies their practices'.[39] As a result, 'the idea of human dignity is everywhere invoked and everywhere contested',[40] as the idea is 'the conceptual hinge that connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights'.[41] Ronald Dworkin says therefore that the idea can be used 'almost thoughtlessly either to provide a pseudo-argument or just to provide an emotional charge'.[42]

Consequently, for some legal and political theorists, dignity constitutes little more than 'an empty formula that summarizes a catalogue of individual, unrelated human rights'.[43] Indeed, Mirko Bargaric and James Allen have stated dignity is a 'vacuous concept' without boundaries,[44] Michael Rosen describes dignity as an indistinct concept that 'masks a great deal of disagreement and sheer

---

[34] Weinrib, *Dimensions of Dignity* (n 4).
[35] Ibid; Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012) 67; Patrick Riordan, 'Which Dignity? Which Religious Freedom?' in McCrudden, *Understanding Human Dignity* (n 28) 421; Jacob Weinrib 'Kant on Citizenship and Universal Independence' (2008) 33 *Australian Journal of Legal Philosophy* 1, 19: 'Kant defines the state as 'a union of a multitude of human beings under laws of right''; Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2003) chs 12–13; JW Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 64, 84: Harris refers to 'natural equality – if treatment is due to one person, X, nothing less is due to another person, Y, merely on the ground that Y is an inferior type of human being to X'.
[36] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); *Charter of the United Nations Act 1945* (Cth) approved under the Charter of the United Nations.
[37] Weinrib, 'Kant on Citizenship' (n 35) 6.
[38] Rosen (n 35) xx; Jonathan Sacks, *Morality: Restoring the Common Good in Divided Times* (Hodder & Stoughton 2020) 240.
[39] Weinrib, *Dimensions of Dignity* (n 4) 23–4; Matthias Mahlmann, 'The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law' in McCrudden, *Understanding Human Dignity* (n 28) 593, 595; Rosen (n 35).
[40] Weinrib, *Dimensions of Dignity* (n 4) 1.
[41] Habermas (n 31).
[42] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 204; Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) 9–10: the basis and conditions of human dignity are comprised of two principles – 'that every human life is of intrinsic potential value and that everyone has a responsibility for realizing that value in his own life'; the principles invoke the ideals of equality and liberty.
[43] Habermas (n 31).
[44] Mirko Bargaric and James Allen, 'The Vacuous Concept of Dignity' (2006) *5 Journal of Human Rights* 269; Nicholas Aroney, 'The Rise and Fall of Human Dignity' (2021) 46 *Brigham Young University Law Review* 1211.

confusion'.[45] Steven Pinker says it is an 'impossibly vague' idea that does not 'provide a universalistic, principled basis' for exercises of public authority.[46] And Nicholas Aroney concludes dignity is a subjective idea varying 'radically with the time, place, and beholder'.[47] As relevant to human rights, Christopher McCrudden says 'dignity' functions mostly as 'a place holder for the absence of agreement' in human rights discourse, used when people 'want to sound serious but are not sure what to say'.[48]

Habermas contends though that an 'intimate' conceptual connection between dignity and rights has always existed in political communities because 'human rights have always been the product of resistance to despotism, oppression and humiliation'.[49] Waldron similarly argues that law has always protected dignity,[50] pointing to evidence of 'an implicit commitment to dignity in the tissues and sinews of law – in the character of its normativity and its procedures'.[51] The complete answer to dignity as an empty formula, Waldron suggests, is that it is widely invoked in constitutions, in constitutional jurisprudence, and in law made by legislators.[52]

Habermas and Waldron identify a major transition in legal and political thought and legislative and judicial practice occurring since the end of World War II.[53] Baroness Hale explains the transition has been politically-driven as it was generated by the people: '[f]reedom-fighters, levellers, feminists even, who knew that they were not being accorded their proper respect as human beings and sometimes called this dignity'.[54] So, in the *Human Rights Act 2019* (Qld) andin the *Canadian Charter of Rights and Freedoms*, for example, the concept 'finds expression in almost every right and freedom guaranteed'.[55] Constitutional invocation simultaneously reflects and declares that, from the time modern constitutional states were established, human dignity has formed 'the "portal" through which the egalitarian and universalistic substance of morality is imported into law'.[56] Waldron argues that, even where it is not invoked explicitly in a written constitution (human dignity is not explicitly referred to in the *Constitution of Queensland 2001*), dignity is 'indispensable' to constitutional protections and to the 'underlying status and authority' of the people for whom a constitution is drafted and upheld.[57]

---

[45] Rosen (n 35) 67; Riordan (n 35) 421.
[46] Aroney (n 44).
[47] Stephen Pinker, 'The Stupidity of Dignity' (2008) *The New Republic* 28.
[48] Christopher McCrudden, 'Human Dignity in Human Rights Interpretation' (2008) 19 *European Journal of International Law* (2008) 655.
[49] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 31) 466, 471.
[50] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 1; Habermas (n 31) 464.
[51] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 1; Habermas (n 31) 464.
[52] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 6.
[53] Ibid; Catherine Dupré, 'Constructing the Meaning of Human Dignity' in McCrudden, *Understanding Human Dignity* (n 28) 113, 119–20.
[54] Brenda Hale, 'Preface' in McCrudden, *Understanding Human Dignity* (n 28) xv–xvi, xvi.
[55] *R v Morgentaler* [1988] 1 SCR 30, 166.
[56] Habermas (n 31) 469.
[57] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 2; Aharon Barak *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015) 50.

And Queensland legislators seeking to get to deeper layers of dignitarian value for property questions have an array of real-world normative tools to hand.[58] The normative tools in Part A of this thesis (staged, normative argument to elaborate institutional, property and doctrinal norms) are complemented by the Part B normative tools (rule of law objectives, statutory provisions for legislative scrutiny, judicial mediation, and the bespoke provisions of the *Human Rights Act*). These real-world normative tools equip legislators to achieve, as Dworkin urges, more than pseudo-argument or an emotional charge.[59] Waldron's seven principles of legislation provide a framework developed from long study of the legal and political theory. To reach the deeper layers though, and for the concept to be an effective mediating concept in any shift from moral duties to collective political action in the form of enacted law, legislators ought themselves to hone their tool selection and use by drawing upon relevant theory.[60] As in this section, the theories advanced by Waldron, Habermas and Kant serve to deepen legislators' understandings of human dignity's connection with collective action in a political community.[61] The following two sections set out theory relevant to dignity's work as an integrating value in a political community, and its work in the explicit and implicit legislative administration of distributive justice.

II HUMAN DIGNITY'S INTEGRATING VALUE

The capacity of human dignity to operate as an integrating value is manifest in the constitutions and constitutional jurisprudence of more than 150 nations.[62] In these states, dignity makes possible the collective action required for democratic representation and law-making:[63] each invocation declares, Waldron argues, that, human dignity works in the state 'as an integrating idea across the whole range of constitutional considerations – structures as well as rights, empowerment as well as constraint'.[64] This section examines the evolving understanding of legislative respect for human dignity – in legal and political theory and in High Court jurisprudence – available to assist Queensland legislators.[65]

As an integrating value within a legal and political community, dignity proves to be a concept around which all citizens can meet and discuss,[66] including when it is necessary to deeply transform broadly-

[58] Runciman (n 5) 445.
[59] Dworkin, *Justice for Hedgehogs* (n 42) 204; *Is Democracy Possible Here?* (n 42) 9–10.
[60] Habermas (n 31) 471.
[61] Waldron, *Law and Disagreement* (n 1); *The Dignity of Legislation* (n 1); Rawls (n 1) 126–30.
[62] Waldron, 'Human Dignity: A Pervasive Value' (n 17); Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in McCrudden, *Understanding Human Dignity* (n 28) 1, 1: 'The concept of human dignity has probably never been so omnipresent in everyday speech, or so deeply embedded in political and legal discourse.'
[63] Waldron, 'Citizenship Dignity' (n 28) 331.
[64] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 1.
[65] Weinrib, *Dimensions of Dignity* (n 4) 2; Waldron, *Law and Disagreement* (n 1) 115.
[66] Ibid 12–3; Bernhard Schlink, 'The Concept of Human Dignity: Current Usages, Future Discourses' in McCrudden, *Understanding Human Dignity* (n 28) 631; Paolo G Carozza, 'Human Rights, Human Dignity, and Human Experience' in McCrudden, *Understanding Human Dignity* (n 28) 615; Elizabeth Anderson, *The Imperative of Integration* (Princeton University Press, 2010).

held social and cultural expectations and perceptions.[67] The equal entitlement of each person to freedom can sound in rational discourse about reforming legislation for (using examples from earlier in the chapter) environmental sustainability,[68] a functioning health care system,[69] an efficient market economy,[70] and a system of justice.[71] For each example, deeper layers of dignitarian value identified in the theoretical literature exemplify Bernhard Schlink's equating of dignity's value to *Sehnsuchtsbegriff*, a 'concept that encapsulates our yearning for a recognition and protection of humans that is not up for grabs (political grabs, balancing grabs) '.[72]

The yearning and recognition is implied by historical meanings or words found in other languages for human dignity, including in Latin (*dignitas*) and in German (*Würde*).[73] However, Habermas points to the relatively recent currency of the concept of dignity in constitutions, constitutional jurisprudence, and in the administration of justice.[74] Prior to the middle decades of the twentieth century, dignity did not perform the overt normative role it does now.[75] Habermas's explanation is that the bundle of classical civil rights *and* democratic rights of participation in a political community constitute liberal rights.[76] Twentieth-century experiences of 'exclusion, suffering, and discrimination' taught that citizens are valued equally only when civil rights are supplemented by social and cultural rights.[77] As it is human dignity 'which is one and the same everywhere and for everyone', dignity is the integrating constitutional value that 'grounds the indivisibility of all categories of rights'.[78] Recall that in *Clubb v Edwards, Preston v Avery*, the High Court's plurality judgment, citing Aharon Barak, says '[m]ost central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole.'[79]

Consistent with dignity's centrality to human rights and therefore to legal and political communities, many constitutions drafted during the past century (within which Weinrib would include 'constitutional'

---

[67] Catherine Dupré, 'Constructing the Meaning of Human Dignity' in McCrudden, *Understanding Human Dignity* (n 28) 113, 119–20.
[68] Eloise Scotford, 'Legislation and the Stress of Environmental Problems' (2021) 74 *Current Legal Problems* 299, 326.
[69] Daniel Markovits, 'Quarantines and Distributive Justice' (2005) *The Journal of Law, Medicine & Ethics* 323; Jeremy Waldron, 'Mill on Liberty and on the Contagious Diseases Acts' in N Urbinati and A Zakaras (eds), *JS Mill's Political Thought: A Bicentennial Reassessment* (Cambridge University Press, 2007) 11.
[70] Dworkin, *Is Democracy Possible Here?* (n 42).
[71] Weinrib, *Dimensions of Dignity* (n 4) 108–34.
[72] McCrudden, 'An Introduction to Current Debates' (n 62) 13–14; Schlink (n 66); Conor Gearty, 'Socio-Economic Rights: A Perspective from Law's Front Line' in McCrudden, *Understanding Human Dignity* (n 28) 155, 163.
[73] McCrudden, 'An Introduction to Current Debates' (n 62) 24.
[74] Habermas (n 31) 466; Dupré (n 67) 118–9.
[75] Rosen (n 35); Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, & Rights* (Oxford University Press, 2015); 'Human Dignity: A Pervasive Value' (n 17) 1: Waldron notes that the *Constitution of Finland 1919* art 1(1) 'undertook to guarantee the inviolability of human dignity'.
[76] Habermas (n 31) 468.
[77] Ibid; Rawls (n 1) 126–30; Gregory Alexander, 'Two Experiences, Two Dilemmas' in McLean (n 35) 88, 97.
[78] Ibid 468–9; Gearty (n 72).
[79] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 [50] (Kiefel CJ, Bell, Keane JJ).

instruments such as human rights statutes[80]) explicitly empower and recognise citizens and their equal dignity.[81] Waldron emphasises Kant's metaphor of 'each person as (like) a legislator in the … 'republic of ends'' to equate citizens to law-makers, not mere subjects in a state's moral enterprise.[82] In constitutional jurisprudence, therefore, the value of dignity is 'indispensable not only to our sense of the constitutional protections we need but also to our whole sense of the underlying status and authority of the ordinary human persons for whose sakes constitutions are framed and their provisions upheld'.[83] Gregory Alexander describes human dignity as the ultimate constitutional value – a value that is 'pre-political, objective, indeed, transcendent'.[84] Waldron's like description is 'pervasive'.[85] As such, dignity enables 'the realization of a legal order in which the exercise of power is accountable to the inherent dignity and fundamental rights of each person subject to its authority'.[86] So, in German and South African constitutions, for example, 'all humans have inherent dignity as an attribute independent of and antecedent to any constitutional protection thereof'.[87]

An invocation of dignity in a country's constitution seeks therefore to revive the 'ancient' sense of the constitution – the constitution as a 'political project' binding the people together 'into a common political life'.[88] That common political life is formed, Hannah Arendt states, because 'not man but men inhabit the earth and form a world between them'.[89] Legislation's authority has a lot to with its enactment via the common political life and its integration of political diversity via: 'concerted, cooperative, coordinated or collective action in the circumstances of modern life'.[90]

The law made by contemporary legislators – by majoritarian decision-procedure – is respectful in two different ways.[91] First, it is respectful in its integration of each person's beliefs when no one belief is self-certifying;[92] that is, each person equally authorises political action.[93] Second, legislation ensures

[80] Weinrib, *Dimensions of Dignity* (n 4) 17.
[81] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 13; David Feldman, '"Which in Your Case You Have Not Got": Constitutionalism at Home and Abroad' (2011) 64 *Current Legal Issues* 117, 124.
[82] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 13.
[83] Ibid 2; Barak (n 57) 50.
[84] Alexander (n 77) 97.
[85] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 6.
[86] Weinrib, *Dimensions of Dignity* (n 4) 19; Waldron, 'Human Dignity – A Pervasive Value' (n 17) 6.
[87] Weinrib, *Dimensions of Dignity* (n 4) 27–8 quoting Justice Akerman; Waldron, 'Human Dignity: A Pervasive Value' (n 17) 6; Alexander (n 77) 97–9.
[88] Benjamin L Berger, 'Freedom of Religion' in Nathalie Des Rosiers, Patrick Macklem and Peter Oliver (eds), *Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 755, 767; Charles Taylor, 'Modernity and the Rise of the Public Sphere' (The Tanner Lectures on Human Values, Stanford University, 25 February 1992) available at <https://tannerlectures.utah.edu/_resources/documents/a-to-z/t/Taylor93.pdf>; Weinrib, *Dimensions of Dignity* (n 4) 19.
[89] Arendt, *On Revolution* (n 11) 175; Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 234; Waldron, *The Dignity of Legislation* (n 1) 160; Waldron, *Law and Disagreement* (n 1) 144.
[90] Waldron, *The Dignity of Legislation* (n 1) 156.
[91] Ibid 158.
[92] Ibid 159.
[93] Ibid 160.

the common political life works together with the 'modern universal logic of rights protection'.[94] It is only via collective, collaborative action that human rights 'fulfill the moral promise to respect the human dignity of each person equally'.[95] Relevant to both forms of respect, Waldron observes Charles Beitz 'is surely right that the concept of equal respect for persons is normally used in a way that conveys not just the speaker's view about how political decisions are reached but also their view about the substantive impact on individuals of the outcome itself'.[96]

Waldron says legislators ought understand dignity therefore 'as a non-fungible value' affecting 'how policy calculations are to be made'.[97] It picks up 'a whole array of ideas – an array of protections, benefits, structures, empowerments, entitlements, institutions, forms of respect, and equalizations going well beyond a list of individual rights'.[98] Moreover, each deliberate inclusion of human dignity in constitutional jurisprudence signals that the constitutional community is willing to learn from others in the elaboration of dignity.[99] In the United States' Supreme Court in a dissenting decision in *Roper v Simmons*, for example, Justice O'Connor said an 'evolving understanding' was 'neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries'.[100] In Australia, similarly, in *Clubb v Edwards; Preston v Avery*,[101] the judgment of the plurality cited and applied the dignitarian jurisprudence of Barak in its statutory interpretation.[102]

Thus, Waldron observes, dignity is not just an abstract philosophical thesis about Kantian imperatives.[103] John Stuart Mill indicates legislation requires 'something like 'that to which no one can reasonably object''.[104] Waldron himself stresses Mill's insistence that

> [t]he respect and dignity that are embodied in some political systems, and the indignity, humiliation and dismissiveness that are embodied in others, are among the most important values that there are – not least because they entangle themselves with and intensify what people fear from, or hope for, so far as their political institutions are concerned.[105]

In promoting these understandings about the integrating value of human dignity, the legal and political theory about dignity further equips Queensland legislators to overcome the problem identified in Chapter 1: uncertainty about which policies are adequate and hesitancy to take reforming measures that

---

[94] Ibid.
[95] Habermas (n 31) 468–9; Gearty (n 72) 155.
[96] Gearty (n 72) 162, referring to Charles Beitz, *Political Equality* (Princeton University Press, 1989) 64 and Rawls (n 1) 232–4; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 59–69.
[97] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 6.
[98] Ibid 15.
[99] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 2–3; McCrudden, 'An Introduction to Current Debates' (n 62).
[100] *Roper v Simmons* 543 US 551 at 605 (2005).
[101] *Clubb v Edwards; Preston v Avery* (n 79).
[102] Ibid [50] (Kiefel CJ, Bell, Keane JJ).
[103] Waldron, *Political Political Theory* (n 8) 10.
[104] Waldron, *Law and Disagreement* (n 1) 115; Mill (n 11) ch III, 329.
[105] Waldron, *Political Political Theory* (n 8) 10; Mill (n 11) 329, 335.

might not be supported by the political community.[106] As Waldron argues, the concept of dignity makes possible the collective action required for democratic representation and law-making.[107] It works in the state 'as an integrating idea across the whole range of constitutional considerations – structures as well as rights, empowerment as well as constraint'.[108] The following section provides the final, related 'law and legislation' tool: it examines the evolving theoretical understanding of respect for human dignity when legislation is enacted for the administration of justice.

III HUMAN DIGNITY AND JUSTICE

As legislation is for a common political life, to administer justice, Queensland legislators must mediate individual and community interests.[109] As explained by Rawls, in a legal and political community, in circumstances of justice, separate people collaborate in conditions of moderate scarcity.[110] Charles Taylor adds that disagreement about 'distributive justice' involves 'giving clear formulations to strong and originally inchoate intuitions; and attempting to establish some coherent order among these formulations'.[111] Taylor says that to think through disagreement about distributive justice, including disagreement about property questions, it is necessary to think through conceptualisations of human dignity at a given time in a given legal and social (including political) community.[112] In this section, analysis is of the role of dignity in the achievement of legislation standing on behalf of all, and in equal justice being done according to law.[113] The section begins with a contemporary example of deep disagreement about distributive justice.

The example is from Kevin Gray and Susan Francis Gray who contend that the 'exclusion question' epitomises 'one of the more profound problems of social philosophy'.[114] It is a question lying 'at the heart of an intensely significant contemporary debate which reaches to the root of our social arrangements for co-operative living'.[115] Enormous outcomes, Gray and Gray argue, will turn on legislative choice whether to 'attribute continued vitality to the unqualified exclusionary function of 'property'' or instead to 'fashion our property thinking to accord with more inclusive, more integrative

[106] Charles Taylor, Patrizia Nanz and Madeleine Beaubien Taylor, *Reconstructing Democracy: How Citizens Are Building from the Ground Up* (Harvard University Press, 2020).
[107] Waldron, 'Citizenship Dignity' (n 28) 331.
[108] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 1.
[109] Waldron, *The Dignity of Legislation* (n 1) 160.
[110] Rawls (n 1); Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1983) ch 1; Charles Taylor, 'The Nature and Scope of Distributive Justice' in *Philosophical Papers, Vol 2: Philosophy and the Human Sciences* (Cambridge University Press, 1985) 289, 289.
[111] Taylor, 'The Nature and Scope of Distributive Justice' (n 110) 290, 291: 'distributive justice can only be clarified if we formulate and confront the underlying notions of man and society'.
[112] Ibid 290–1.
[113] Waldron, *Political Political Theory* (n 8) 291; Arendt, *On Revolution* (n 11) 231–2; Aristotle, *The Politics* (Cambridge University Press, 1988) 3.
[114] Kevin Gray and Susan Francis Gray, 'Private Property and Public Property' in McLean (n 28) 11, 15.
[115] Ibid; Jeremy Waldron *One Another's Equals: The Basis of Human Equality* (Belknap Press, 2017).

visions of social relationship'.[116] Moreover, the profound problem arises at a time when 'the growth of technology and the modern industrial economy has given us (the sense of) unprecedented power to alter our natural and social condition at will'.[117] At stake is the 'critical, but fragile' value of respect for human dignity.[118]

Waldron's frequent points of reference regarding the critical but fragile value are Kant and John Stuart Mill.[119] When there are 'several conceptions of justice and rights let loose in the community', each upheld by its own 'self-righteous militia',[120] Kant would argue the state must find an accommodation.[121] As legislation must 'stand fast in society, in the midst of disagreement',[122] in legislative practice what matters 'are interests and purposes that are shared by all as members of a community'.[123] From Mill, Waldron restates the principle that freedom is 'a good whose distribution matters crucially and if it is maldistributed then a simple quantitative assessment of the amount of liberty at stake in society will not be a good guide to the decisions we make about legislation'.[124] So, if proposed legislative accommodation does not effect equal freedom for all people equally, it must receive the closest possible scrutiny.[125]

When legislative evaluation is undertaken, if diminishing the freedom of members of a particular class of persons 'is not necessary for the best or most effective pursuit of the legitimate legislative goal', Waldron argues that legislators ought to 'assume it is motivated by some other purpose [and so] … scrutinize that closely and critically'.[126] Daniel Markovits, for example, stresses that the public health concerns in the eighteenth century that led to the *Contagious Diseases Acts*,[127] and in the twentieth that led to statutes directed to overcoming AIDS, 'commonly trigger retributive and discriminatory instincts'.[128] The outcome is that actual quarantines often impose 'inhumane, stigmatizing, or even

---

[116] Ibid.
[117] Taylor, 'The Nature and Scope of Distributive Justice' (n 110) 304.
[118] Gray and Gray (n 114) 16 refer to human dignity as an 'irreducible' notion.
[119] Jeremy Waldron, 'Kant's Legal Positivism' (1996) 109(7) *Harvard Law Review* 1535; 'The Normative Resilience of Property' in McLean (n 28) 170; *Law and Disagreement* (n 1) 115; *Political Political Theory* (n 8) 9–10.
[120] Waldron, 'Mill on Liberty' (n 69) 56–7; 'Human Dignity: A Pervasive Value' (n 17) 6: Waldron notes that Stephen Darwall has drawn attention to Kant's later work presenting dignity as 'a sort of commanding value'.
[121] Waldron, *Political Political Theory* (n 8) 280–1.
[122] Waldron, *The Dignity of Legislation* (n 1) 47–50; 'Kant's Legal Positivism' (n 119); 'The Normative Resilience of Property' (n 119) 171.
[123] Waldron, *Political Political Theory* (n 8) 291; Arendt, *On Revolution* (n 11) 231–2; Aristotle (n 114) 3.
[124] Waldron, 'Mill on Liberty' (n 69) 32.
[125] Ibid.
[126] Ibid 38–9.
[127] *Contagious Diseases Acts*: 1864 (27 & 28 Vict. c. 85), 1866 (29 & 30 Vict. c. 35) and 1869 (32 & 33 Vict. c. 96); FB Smith, 'Ethics and Disease in the Late Nineteenth Century: The Contagious Diseases Acts' (1971) 15 *Historical Studies* 118: in evidence given in 1871 to a United Kingdom Royal Commission examining three statutes known as the *Contagious Diseases Acts*, Mill submitted that the laws were not justifiable on principle because they were 'opposed to one of the greatest principles of legislation, the security of personal liberty'.
[128] Markovits (n 69).

penal treatment upon persons who are confined based on caprice or even prejudice'.[129] Waldron concurs with Markovits that legislative responses to pressing common concerns are rarely isolated entirely from 'forms of anger and antipathy people feel toward each other or toward particular classes of persons in their society'.[130]

However, respect for human dignity, Waldron explains, is 'respect for the persons on whom and in whose name our laws and policies are administered – respect for them as persons, as centers of intelligence, and for their dignity as individuals'.[131] Baroness Hale states the concept of dignity can be conceptualised by private people knowing when they are being accorded 'their proper respect as human beings'.[132] As Joseph Raz indicates, '[r]especting human dignity entails treating humans as persons capable of planning and plotting their future' and therefore 'respecting people's dignity includes respecting their autonomy, their right to control their future'.[133] Similar statements of principle may be drawn from Lon Fuller's account of the inner morality of law and the 'self-application' of HLA Hart and Albert Sacks.[134] That is, that 'the law strains as far as possible to look for ways of enabling voluntary application of its general norms and many of its particular decrees'.[135] Waldron says that

> [t]he pervasive emphasis on self-application is, in my view, definitive of law, differentiating it sharply from systems of rule that work primarily by manipulating, terrorising or galvanising behaviour. And as Fuller recognises, it represents a decisive commitment by law to the dignity of the human individual.[136]

Nevertheless, any one legislative version of dignity – any one property rule, for example – is 'provisional' only, as it is 'Parliament's best guess *at that moment* as to what dignity entails'.[137] This contingency of legislation 'is part and parcel of all parliamentary truth', characterised by Waldron as 'the dignity of legislation'.[138] Legislators seeking compromise can put the contingency of legislation to work to secure a legislative outcome.[139] Compromise in circumstances of continency may be essential

---

[129] Ibid.
[130] Waldron, 'Mill on Liberty' (n 70) 40.
[131] Waldron, *Political Political Theory* (n 8) 9–10.
[132] Hale (n 54) xv–xvi.
[133] Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 210, 221.
[134] Lon R Fuller, *The Morality of Law* (2nd ed, Yale University Press, 1969) 162; Henry M Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994).
[135] Gregory S Alexander 'Property, Dignity, and Human Flourishing' (2019) 104 *Cornell Law Review* 991.
[136] Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200, 206, where Waldron says 'self-application' is: 'people applying officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state. Self-application is an extraordinarily important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people's capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behaviour in relation to norms that they can grasp and understand.'
[137] Gearty (n 73) 168–9.
[138] Ibid; Waldron, *The Dignity of Legislation* (n 1).
[139] Waldron, *Political Political Theory* (n 8) 12–3; Ittai Bar-Siman-Tov, 'Temporary Legislation, Better Regulation, and Experimentalist Governance: An Empirical Study' (2018) 12(2) *Regulation & Governance* 192; Schlink (n 66); Carozza (n 66).

where deep transformations of broadly-held social and cultural expectations and perceptions are sought.[140] Relevant to human rights, Habermas describes a role for human dignity as a shared value when legislators are facilitating 'compromises when specifying and extending human rights by neutralizing unbridgeable differences'.[141] Waldron notes a long and important history of legislative success via contingency and compromise:

> In the United States, in Western Europe, and in all other democracies, every single step that has been taken by legislatures towards making society safer, more civilized, and more just has been taken against a background of disagreement, but taken nonetheless in a way that managed somehow to retain the loyalty and compliance (albeit often grudging loyalty and compliance) of those who in good faith opposed the measures in question.[142]

It follows that legislating cannot be 'predicated on the assumption of a cool consensus that exists only as an ideal'.[143] It must be the product of a common basis for action in matters of justice.[144] Thus, Waldron proposes 'reasoned argument as the best way to get people to think critically about the things that they have previously taken for granted'.[145] If reasoned argument involves, for example, 'several concrete versions of what dignity is found to entail, specific to particular moments and situations', the 'beauty of the democratic approach to dignity is that it manages the differences [between people] and resolves them'.[146]

Dignity can manage and resolve difference because it is a shared but floating standard concerning the equal right of each person to freedom.[147] As explained by Schlink, dignity is a 'concept that encapsulates our yearning for a recognition and protection of humans'.[148] As defined by Weinrib, the concept is a floating standard because it looks to 'the underlying human values that property serves and the social relationships it shapes and reflects' in a given political community at a relevant point in time.[149] In *Clubb v Edwards; Preston v Avery*,[150] a statute examined by the High Court prescribes dignity as a legislative standard for safe access to premises providing medical termination services.[151] The prescription includes that 'the public, employees and other persons who need to access premises at

---

[140] Dupré (n 67) 119–20.
[141] Habermas (n 31) 467.
[142] Waldron, *The Dignity of Legislation* (n 1) 155; *Political Political Theory* (n 8) 14.
[143] Waldron, *The Dignity of Legislation* (n 1) 155; *Political Political Theory* (n 8) 14; Cheryl Saunders, *Australian Democracy and Executive Law-making: Practice and Principle (Part II)* (Papers on Parliament No 66) available at <www.aph.gov.au>; Mill (n 11) 283.
[144] Ibid.
[145] Waldron, *Political Political Theory* (n 8) 9–10; Jan Pieter Beetz, 'Political Political Theory: Essays on Institutions' (2017) 16 *Contemporary Political Theory* 553–6.
[146] Gearty (n 72) 168.
[147] Habermas (n 31) 474: Habermas uses the term 'synthesis'; Weinrib, *Dimensions of Dignity* (n 4) 7.
[148] Schlink (n 67) 634.
[149] Gregory S Alexander et al 'A Statement of Progressive Property' (2009) *Cornell Law Faculty Publications* 11 743 [1].
[150] *Clubb v Edwards; Preston v Avery* (n 79).
[151] *Public Health and Wellbeing Act 2008* (Vic), *Reproductive Health (Access to Terminations) Act 2013* (Tas).

which abortions are provided … should be able to enter and leave such premises without interference and in a manner which … respects the person's privacy and dignity'.[152] The High Court found a legitimate burden on the implied freedom of communication about governmental and political matters, justified by reference to stated, legitimate legislative purposes in the Act.[153] The Court said those purposes include protection of the dignity of persons accessing the premises, and '[g]enerally speaking, to force upon another person a political message is inconsistent with the human dignity of that person'.[154]

The legislative prescription examined in *Clubb v Edwards; Preston v Avery*, illustrates the remaining matter for examination in this section: dignity as a substantive normative concept, including a concept from which human rights can be deduced by specifying 'the conditions under which human dignity is violated'.[155] Analysing *Clubb v Edwards* for Australian applications of the concept of human dignity, Stephenson says there is broad agreement 'that its principal objective is to assist in the recognition and protection of fundamental rights and freedoms'.[156] That may be variously, 'as a justification for their existence, as a freestanding right, or as an aid in the interpretation of rights and freedoms'.[157]

In Queensland, legislative provisions relying on the applications have been in place for more than two decades.[158] The term 'dignity' assists in specifying conditions under which human dignity is violated in, for example, the *Child Protection Act 1999* (Qld),[159] *Coroners Act 2003* (Qld),[160] and *Police Powers and Responsibilities Act 2000* (Qld).[161] The *Guardianship and Administration Act 2000* (Qld) requires a financial administrator exercising power under the Act to apply general principles stated in Schedule 1.[162] The third general principle, 'Individual value', is '[a]n adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account'.[163] In circumstances 'riven with potential conflict',[164] courts rely upon the dignity standard in Schedule 1 to

[152] Section 185C of the *Public Health and Wellbeing Act*.
[153] *Clubb v Edwards; Preston v Avery* (n 79) [116] (Kiefel CJ, Bell, Keane JJ): 'It is apparent that the [Tasmanian] Act differs from its Victorian counterpart in a number of respects. First, the *Reproductive Health Act* does not expressly state its objects. Secondly, the impugned prohibition is directed at "a protest" about terminations. Thirdly, the scope of the operation of the prohibition is not limited by a requirement that the protest be reasonably likely to cause distress or anxiety.'
[154] Ibid.
[155] Habermas (n 31) 466; Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010).
[156] Scott Stephenson, 'Dignity and the Australian Constitution' (2020) 42(4) *Sydney Law Review* 369, 393.
[157] Ibid.
[158] And have been enacted recently: *Residential Services (Accreditation) Regulation 2018* (Qld).
[159] *Child Protection Act 1999* (Qld) s 122 (Statement of Standards).
[160] *Coroners Act 2003* (Qld) s 18 (Transferring body to mortuary).
[161] *Police Powers and Responsibilities Act 2000* (Qld) ss 519 (Protecting the dignity of person in performing a non-intimate forensic procedure), 624 (General provision about searches of persons), 625 (Taking a person to another place for search) and 630 (Protecting the dignity of persons during search).
[162] *Guardianship and Administration Act 2000* (Qld) s 6.
[163] Ibid sch 1.
[164] Paul de Jersey, 'Court Intrusion into Testamentary Disposition: A Beneficial Jurisdiction?' (2010) 10(2) *QUT Law Journal* 233, 237; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-making Disability* (Report No 49, 1996.)

the *Guardianship and Administration Act* when interpreting property and financial rights and freedoms of people under legal incapacity.[165]

Legal and political theory and the High Court jurisprudence suggest, however, that the concept 'is too vague and uncertain to be able to be effective on its own'.[166] And, although increasingly invoked in constitutions and in other statutes, dignity does not operate as a substantive right, unless that right is provided by statute.[167] This means that when legislation relies – explicitly or implicitly – upon dignity as a normative concept, respect for human dignity is best realised by way of 'a combination of a legislative emphasis on particulars combined with a careful judicial deployment of the language of human rights'.[168] Waldron agrees that there is 'an implicit commitment to dignity in the tissues and sinews of law – in the character of its normativity and its procedures'.[169] Law implicitly protects dignity in the way law is applied by courts; that is, for consistency with principles such as equal treatment of all people under law.[170]

Importantly, though, the normative concept of human dignity is also a 'juridical concept', with a legal character to its functioning.[171] Thus, a review by Gearty of select United Kingdom judgments finds dignity underpins rights and jumps forward to give law 'right energy' when needed in support of a right litigated before a court.[172] The normative concept adds impact to the right, as a 'source of/explanation for a right rather than a right itself'.[173] Waldron points to the way dignity 'hooks up in obvious ways with juridical ideas about hearings and due process and status to sue'.[174] Waldron says human dignity is a 'sort of value, or principle, or policy deeply … within the law … established like a legal principle or deep policy of the law'.[175] Even if 'not laid down in any text', it is 'something to which the legal system has committed itself to in the way it commits itself also to other elements of public morality in the way that we reason'.[176] The normative concept has 'particular work to do' when legislators and judges are figuring out the content of a specific right.[177]

---

[165] *Re Tracey* [2016] QCA 194 [25]–[26] (Fraser JA); *Regine Bergmann v DAW* [2010] QCA 143 [5], [10] (McMurdo P).
[166] Gearty (n 72) 155; McCrudden, 'Human Dignity in Human Rights Interpretation' (n 48) 655; *Clubb v Edwards* (n 79) [50] (Kiefel CJ, Bell, Keane JJ).
[167] Hale (n 54).
[168] Gearty (n 72) 155.
[169] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 1; Habermas (n 31) 464.
[170] Ibid; Waldron, *One Another's Equals* (n 115).
[171] Hale (n 54).
[172] Gearty (n 72) 171.
[173] Ibid.
[174] Waldron, 'How Law Protects Dignity' (n 136) 202–3.
[175] Ibid.
[176] Gearty (n 72) 166; Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' (Public Law & Legal Theory Working Paper No 12-73, New York University School of Law, January 2013) 6–8; Waldron, 'How Law Protects Dignity' (n 136) 201–2.
[177] Waldron, 'Human Dignity: A Pervasive Value' (n 17) 18; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 7.

Under the *Human Rights Act*, the normative concept of human dignity works in concert with other rights, such as rights to access government-held information.[178] The Explanatory Notes state that the Act is intended to complement and strengthen other justiciable constraints on the exercise of all public authority, such as under the *Judicial Review Act 1991*.[179] In *Owen-D'Arcy v Chief Executive, Queensland Corrective Services*,[180] for an application under the *Judicial Review Act*, Martin J examined legal theory,[181] and Australian and Canadian jurisprudence about dignity and prisoners' rights,[182] when figuring out the content of various rights in the *Human Rights Act*.

In this section of Chapter 6 then, the theory and the case law support respect for human dignity as a normative concept – when legislation is evaluated, when legislative compromise or contingency are important, when differences are to be managed and resolved, and when human rights and legal rights are interpreted or in need of 'right energy'. They do not support human dignity as a freestanding right (unless provided in statute).

The wider chapter, about the conceptual connection, in the form of human dignity, between legislation and democracy, again provides legislators with real-world normative tools. Within the framework, Waldron's seven principles of legislation equip legislators to unearth deeper layers of dignitarian value. Those deeper layers are essential to dignity's function as an integrating value, and for justice to be done according to law.

[178] *Human Rights Act* s 59.
[179] *Judicial Review Act 1991* (Qld).
[180] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 (Martin J).
[181] Liora Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69(5) *Modern Law Review* 738; Chuks Okpaluba, 'The Right to the Residual Liberty of a Person in Incarceration: Constitutional and Common Law Perspectives' (2012) 28(3) *South African Journal on Human Rights* 458.
[182] *R v Oakes* [1986] 1 SCR 103, 136 (Dickson CJ); *Re Application under the Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381; (2009) 24 VR 415, 448–9 (Warren CJ).

CHAPTER SEVEN: CONCLUSION

While the institution of property is of profound importance to the social, economic and political prosperity of the Queensland political community and its people,[1] the making of legislative property rules is complex and difficult.[2] And this importance increases in the light of the fact that property, as identified by the Australian Human Rights Commission, is one of 'the key rights and freedoms that have traditionally underpinned our liberal democracy'.[3] New imperatives arise for legislators from the terms of the *Human Rights Act 2019* (Qld): imperatives to understand what property is, and what is at stake in property questions about distribution and institutional design. Thus, the work of legislators when making property rules in the circumstances of politics ought, now especially, to be taken seriously.[4]

This thesis elaborates, for Queensland legislators, principles of legal and social (including political) theory. Theory equips legislators with 'ways of giving meaning to practice'.[5] Legislators enacting property rules for a political community ought to understand, first, 'the underlying human values that property serves and the social relationships it shapes and reflects'.[6] Second, legislators ought to appreciate that, although enacted property rules are made in the circumstances of politics, legislative authority is controlled by common law and by statute.[7] In Part A, relevant to property discourse, and in Part B, relevant to human dignity's integrating value and its functioning as a normative concept, the legislative task is assisted by 'real-world normative tools'. The tools are identified from analysis of legal and political theory, High Court jurisprudence, and scholarly commentary about Australian property institutions. Each tool equips legislators working within the framework (evaluating proposed legislation to address a property question). Recourse to High Court jurisprudence, legal and political theory, and scholarly commentary also hones legislators' selection and use of real-world normative tools.

---

[1] Laura S Underkuffler, 'A Theoretical Approach' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave 2016) 11.
[2] JW Harris, *Property and Justice* (Oxford University Press, 1996) 367–9.
[3] Australian Human Rights Commission, *Rights and Responsibilities: Consultation Report* (2015) 8, available at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/rights-responsibilities-consultation-report>.
[4] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 19.
[5] Janet McLean, 'The Crown in the Courts: Can Political Theory Help?' in Linda Pearson et al (eds), Administrative Law in a Changing State: Essays in Honour of Mark Aronson (Bloomsbury, 2008) 161, 172.
[6] Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) *Cornell Law Faculty Publications* 11 [1]–[2].
[7] Jack Beatson, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (Hart Publishing, 2021) 27–8; John Laws, *The Constitutional Balance* (Hart Publishing, 2021) 8–10; Robert French, 'Common Law Constitutionalism' (2016) 14 *New Zealand Journal of Public & International Law* 153; Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45 *Melbourne University Law Review* (Advance).

From a rule of law perspective, the normative tools considered in Part A and Part B of this thesis represent two conceptions of the rule of law.[8] The first rule of law conception, in Part A, is the substantive content of property law – whether enacted property rules conform to the institution's fundamental values or 'larger purposes'.[9] Chapter 2 tools analyse the Queensland property institution, its historical situation, its social and ideological goals, and its legal features. The findings, from the application of the Chapter 2 normative tools, are that the larger purposes strongly support individual property rights and private property, but that all four ideal-typic categories of property are found in the Queensland system of real property. The overall picture is of a bespoke, malleable institution.

Chapter 3 tools equip legislators to analyse the internal morality of the property institution and, consequently, to shift morality into generalised law. Selecting of tools from theory and High Court jurisprudence ought to commence with Harris's theory of property and justice,[10] and then move towards an idea of property that is 'more inherently and fundamentally complex', supplementing with 'thicker', more moral approaches to property.[11] Rational discourse about property and about the demands of respect for human dignity is an essential tool. Proposed inquiries are into what legislative justice requires: the values implicated by a property question; and the correct response of the state to diversity.

Chapter 4 tools address the coherence and consistency of legal doctrine. The tools and are directed to careful exercise of legislative authority. Doctrinal tools overtly available to legislators – case law, theory and scholarly commentary – are rarely used.[12] Additional tools proposed in Part A (Chapter 4) complement the readily available ones: the uncovering of property-specific justice reasons, ensuring a stable property institution; rational discourse of the legal and social culture within which property rules operate, ensuring doctrinal coherence; and careful matching of proposed property rules with law as it is practised in Queensland. The final stage in Chapter 4, and in Part A, is to collect together the outcomes from the use of each normative tool selected; that is, the norms identifying what property is, and what is at stake in a property question about distribution and institutional design.

The second rule of law conception, examined in Part B, is a formal one. It is concerned with how property rules are made and applied.[13] The tools recounted in Chapter 5 relate to legal controls of legislative authority: three rule of law objectives (predictability of property rules, commitment to

---

[8] Ibid 17.
[9] Ibid; Ronald Dworkin *A Matter of Principle* (Harvard University Press, 1985) 11–12; David Lametti, 'Property and (Perhaps) Justice: A Review Article of James W Harris, Property and Justice and James E Penner, The Idea of Property in Law' (1998) 43 *McGill Law Journal* 663, 670.
[10] Harris, *Property and Justice* (n 2).
[11] David Lametti, 'The Morality of James Harris's Theory of Property' in T Endicott, J Getzler and E Peel (eds), *The Properties of Law: Essays in Honour of James Harris* (Oxford University Press, 2006) 147, 149.
[12] Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 61, 94–5.
[13] Beatson (n 7) 17; Joseph Raz, *The Authority of Law* (Oxford University Press, 1971).

established procedures, and a society bound by law); Queensland's statutory scrutiny provisions; a court-legislature dynamic controlling legislative authority; and promotion and protection of property rights for legislative effectiveness but preventing oppression. Chapter 6 assesses the legislative reality of law made in the circumstances of politics. Seven principles of legislation from Waldron provide legislators with normative tools to reach deeper layers of dignitarian value.[14] The deeper layers facilitate legislative integration of competing norms implicated by proposed property rules. Normative conceptions standing on behalf of all in a political community, identified in Part A and synthesised via the mediating concept of human dignity, ensure legislation effects substantive and procedural justice. Thus, for Queensland legislators working within the framework, Parts A and B produce two groups of complementary real-world normative tools from theory, court jurisprudence and scholarly works.

The tools are important because, for contemporary legislators, substantial law-making pitfalls are identified in the literature. The first is legislators not knowing which proposed property rule would be adequate to Queensland's legal and political arrangements, its property institution, and to existing legal doctrine and legal practice.[15] A second pitfall is legislators being afraid to take measures that might not be supported by the political community.[16] And a third is legislators not wanting to suffer a backlash if a legislative property rule proves unpopular.[17] The pitfalls are widening in modern states, Habermas argues, because of a legitimation gap 'on the circuit between instrumentally conceived power and instrumentalized law'.[18] Waldron contends 'important controversies' about private property 'are best aired and debated directly'.[19] Regrettably, though, a preponderance of legal and political theory about legislative authority criticises but does not assist legislators enacting property rules for contemporary communities.[20] To bridge the gap, Habermas, Waldron and Jacob Weinrib propose lawyers, judges and scholars provide the thinking to ensure each legislative property rule conceptualises respect for human dignity according to the expectations of the diversity of people in the political community.[21]

---

[14] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) 149; David Runciman, 'Review: Jeremy Waldron's Political Political Theory' (2019) 18(3) *European Journal of Political Theory* 437, 445.
[15] Harris, *Property and Justice* (n 2) 367–9.
[16] Charles Taylor, Patrizia Nanz and Madeleine Beaubien Taylor, *Reconstructing Democracy: How Citizens Are Building from the Ground Up* (Harvard University Press, 2020) 3–4.
[17] Ibid.
[18] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, Polity Press, 1997) 146.
[19] Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) 111.
[20] Ibid 106–7; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016) 270–1; Ittai Bar-Siman-Tov, 'The Global Revival of Legisprudence: A Comparative View on Legislation in Legal Education and Research' in Ittai Bar-Siman-Tov (ed), *Conceptions and Misconceptions of Legislation* (Springer, 2019) 233, 235–7.
[21] Jürgen Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 (4) *Metaphilosophy* 464; Jeremy Waldron, 'Human Dignity: A Pervasive Value' (Public Law Research Paper No. 20-46, NYU School of Law, 1 July 2019) available at <http://dx.doi.org/10.2139/ssrn.3463973>; Weinrib (n 20); Conor Gearty, 'Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 155.

This thesis argues that when legislators evaluate property questions, they work in the space where human dignity and a right to property connect. It is contended that human dignity is a universal concept, able to convert the individual/collective and moral/legal tension of property questions into a constructive dynamic.[22] Indeed, the High Court has affirmed the normative functioning of the concept of dignity in legislation enacted for Australian States.[23] The plurality in *Clubb v Edwards; Preston v Avery* cited a landmark statement from Barak that '[m]ost central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole.'[24] In the scholarly literature, dignity is a pervasive value that underpins, and adds impact to, common law and statutory rights.[25] And human dignity has come to feature prominently in Australia 'in human rights discourse and in judicial decision-making'.[26] Waldron says this is evidence that the people 'attribute human dignity to one another',[27] and expect to be governed in a manner demonstrating equal respect for each person's dignity.[28]

In the modelling and testing of normative argument in Part A, dignity forms a ''portal' through which the egalitarian and universalistic substance of morality' is imported into law,[29] when property norms compete, and when more is at stake than just one 'good' valued by the community.[30] The thesis proposes, then, that legislators begin with JW Harris's analysis of the internal morality of a property institution.[31] Further, it proposes that legislators supplement the Harris analysis with additional moral approaches, as implicated by rational discourse about a proposed property rule.[32] In this way, legislators attending to human dignity will be better equipped to particularise 'just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons'.[33] In Part B, dignity is shown to provide legislators with democratic 'energy' or efficacy when formulating the legislative prescriptions necessary to ensure, so far as possible, all people hold equal freedoms equally.[34] Queensland's legal and political history

[22] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 21).
[23] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171.
[24] Ibid [50] (Kiefel CJ, Bell, Keane JJ).
[25] Waldron, 'Human Dignity: A Pervasive Value' (n 21); Gearty (n 21) 168–9; Bernhard Schlink, 'The Concept of Human Dignity: Current Usages, Future Discourses' in McCrudden, *Understanding Human Dignity* (n 21) 631–6.
[26] Samuel Moyn, 'The Secret History of Constitutional Dignity' in McCrudden, *Understanding Human Dignity* (n 21) 95; Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 21) 464; Weinrib (n 20) 2–3.
[27] Waldron, 'Human Dignity: A Pervasive Value' (n 21) 18.
[28] Waldron, *The Rule of Law* (n 19) 109–10.
[29] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 21) 469.
[30] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 392: 'comprehensive views of the good' shared by people of very different outlooks.
[31] Harris, *Property and Justice* (n 2).
[32] Lametti, 'The Morality of James Harris's Theory' (n 11) 149.
[33] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 21) 467.
[34] Gearty (n 21) 166–7.

instigated considerable statutory controls of legislative authority.[35] The statutory measures complement small 'c' constitutionalism, so that common law and statute together facilitate legislative efficacy but prevent legislative oppression.[36] As a pervasive value, and functioning as a normative concept, dignity mediates the legal and political, facilitating the accommodations constitutive of a democratic legal order and its property institution.[37]

In Australia presently, the principal objective recognised for the concept of dignity 'is to assist in the recognition and protection of fundamental rights and freedoms', including property rights.[38] As Harris argues, in modern states such as Queensland, a human right to property might be protected by common law.[39] In Queensland, the *Human Rights Act* also requires exercises of legislative authority to promote and protect both positive and negative rights to property.[40]

The *Human Rights Act* relies upon a normative concept of human dignity.[41] Similarly, dignity's normativity is relied upon explicitly and implicitly in the terms of other Queensland legislation,[42] and in judicial decisions.[43] In the *Human Rights Act*, moreover, the normativity is given particular work to do because sections 24 (property rights) and 13 (limitations) are drafted in different terms than the earlier Australian rights statutes.[44] The Queensland sections follow more closely the provisions of the *Universal Declaration of Human Rights*.[45] Thus, the early case law about the *Human Rights Act* demonstrates that close reading of the Act and its provisions is required.[46] So too is an understanding of human dignity as a pervasive institutional value, promoting and protecting property rights; that is, a normative concept capable of realising the 'utopia' of universal and equal human rights.[47] This thesis has shown that Queensland legislators seeking to avoid legislative pitfalls when working within the framework (evaluating proposed legislation to address a property question) have available to them an

[35] Peter Coaldrake, 'Overview – Reforming the System of Government' in Scott Prasser, Rae Wear and John Nethercote (eds), *Corruption and Reform: The Fitzgerald Vision* (University of Queensland Press, 1990) 158; Scott Prasser and Nicholas Aroney, 'Real Constitutional Reform After Fitzgerald: Still Waiting for Godot' (2009) 18 *Griffith Law Review* 596.
[36] Laws (n 13) 27–9.
[37] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 21) 467.
[38] Scott Stephenson, 'Dignity and the Australian Constitution' (2020) 42(4) *Sydney Law Review* 369, 393.
[39] JW Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 64, 85.
[40] *Human Rights Act 2019* s 24.
[41] *Human Rights Act 2019* s 13.
[42] *Child Protection Act 1999* (Qld); *Coroners Act 2003* (Qld); *Police Powers and Responsibilities Act 2000* (Qld); *Residential Services (Accreditation) Regulation 2018* (Qld).
[43] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560; *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing* [2012] 1 Qd R 1; *Morton v Queensland Police Service* [2010] QCA 160; *Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218.
[44] Kent Blore and Nikita Nibbs, 'A Theory of the Right to Property under the Human Rights Act 2019 (Qld)' (2022) 30 *Australian Property Law Journal* 1.
[45] Ibid; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); *Charter of the United Nations Act 1945* (Cth) approved under the Charter of the United Nations.
[46] Ibid 3.
[47] Habermas, 'Human Dignity and the Realistic Utopia of Human Rights' (n 21); Waldron 'Human Dignity: A Pervasive Value' (n 21) 18.

array of real-world normative tools. The tools equip legislators to act with greater confidence when enacting property rules: the many tensions inherent in property questions are converted into a constructive dynamic via the universal concept of human dignity.

BIBLIOGRAPHY

A ARTICLES/BOOKS/REPORTS

Acts, Laws and Documents Relating to the Constitution of the State of Queensland (Queensland Government Printer 1991)

Aitkin, D, M Kahan and D Stokes, *Australian National Political Attitudes Survey, 1969* [computer file], September 2005, available at: https://australianelectionstudy.org/

Alexander, Gregory S, *Property and Human Flourishing* (Oxford University Press, 2018)

Alexander, Gregory S, 'Property, Dignity, and Human Flourishing' (2019) 104 *Cornell Law Review* 991

Alexander, Gregory, 'Two Experiences, Two Dilemmas' in Janet McLean (ed). *Property and the Constitution* (Hart Publishing 1999) 88

Alexander, Gregory S and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012)

Alexander, Gregory S and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2009)

Alexander, Gregory S, Eduardo Peñalver, Joseph W Singer and Laura S Underkuffler, 'A Statement of Progressive Property' (2009) *Cornell Law Faculty Publications* 11

Allan, TRS, 'Book Review: Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law' (2018) 68 *University of Toronto Law Journal* 312

Allan, TRS, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003)

Allan, TRS, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' (2009) 22 *Canadian Journal of Law and Jurisprudence* 187

Allan, TRS, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013)

Allen, Tom, 'The Human Rights Act (UK) and Property Law' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 147

Allen, Tom, *The Right to Property in Commonwealth Constitutions* (University of Cambridge Press, 2000)

Alexy, Robert, 'On Constitutional Rights to Protection' (2009) 3 *Legisprudence* 1

Anderson, Elizabeth, *The Imperative of Integration* (Princeton University Press, 2010)

Arendt, Hannah, *The Human Condition* (University of Chicago Press, 1958)

Arendt, Hannah, *On Revolution* (Penguin Classics, 2006)

Aristotle, *The Politics* (Cambridge University Press, 1988)

Aroney, Nicholas, 'Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability' (2008) 29 *Adelaide Law Review* 205

Aroney, Nicholas, 'The Rise and Fall of Human Dignity' (2021) 46 *Brigham Young University Law Review* 1211

Aronson, Mark, 'Subordinate Legislation: Lively Scrutiny or Politics in Seclusion' (2011) 26 *Australasian Parliamentary Review* 4

Atherton, Rosalind, 'New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 203

Austin, Lisa M, 'Property and the Rule of Law' (2014) 20 *Legal Theory* 79

Austin, Lisa M, 'The Public Nature of Private Property' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 1

Austrade, *About Land Tenure – Pastoral Leases*, available at <https://www.austrade.gov.au/land-tenure/Land-tenure/pastoral-leases>

Australian Human Rights Commission, *Rights and Responsibilities: Consultation Report* (2015), available at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/rights-responsibilities-consultation-report>

Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (ALRC Report 129, 2016), available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>

Babie, Paul, 'Climate Change: Government, Private Property, and Individual Action' (2011) 11(2) *Sustainable Development Law & Policy* 11

Babie, Paul, 'Completing the Painting: Legislative Innovation and the "Australianness" of Australian Real Property Law' (2017) 6 *Property Law Review* 157

Babie, Paul, 'Private Property in Post-Secular Law: An Introductory Foray' [2013] *University of Queensland Law Journal* 239

Babie, Paul, 'Private Property: The Solution or the Source of the Problem?' (2010) 2 *Amsterdam Law Forum* 17

Babie, Paul, 'Property in the Empirical World' (2019) 7 *University of New South Wales Law Journal Forum* 1

Babie, Paul, 'Sovereignty as Governance: An Organising Theme for Australian Property Law' (2013) 36 *University of New South Wales Law Journal* 1075

Babie, Paul, 'The Spatial: A Forgotten Dimension of Property' (2013) 50 *San Diego Law Review* 323

Babie, Paul, 'Three Tales of Property, or One?' (2016) 25(4) *Griffith Law Review* 600

Babie, Paul T, 'The "Monkey Selfies": Reflections on Copyright in Photographs of Animals Naruto v Slater 888 F3d 418 (9th Cir 2018)' (2018) 52 *UC Davis Law Review* 103

Babie, Paul T, Peter D Burdon and Francesca da Rimini, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 40 *Houston Journal of International Law* 797

Babie, Paul T, John V Orth and Charlie Xiao-chuan Weng, 'The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese, and Australian Land Law' (2016) 91 *Tulane Law Review* 739

Baker, C Edwin, 'Property and Its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741

Balkin, JM, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105

Banner, Stuart, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, 2007)

Bant, Elise, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367

Barak, Aharon, Proportionality: *Constitutional Rights and Their Limitations* (Cambridge University Press, 2012)

Barak, Aharon, *The Judge in a Democracy* (Princeton University Press, 2006)

Bargaric, Mirko, James Allen, 'The Vacuous Concept of Dignity' (2006) 5 *Journal of Human Rights* 269

Barnes, Stephen (ed), *The Coherence of Statutory Interpretation* (The Federation Press, 2019)

Bar-Siman-Tov, Ittai, 'Beyond Neglect and Disrespect: Legislatures in Legal Scholarship' in Cyril Benoît, Olivier Rozenberg (eds), *Handbook Of Parliamentary Studies: Interdisciplinary Approaches To Legislatures* (Edward Elgar, 2020) ch 9

Bar-Siman-Tov, Ittai, 'COVID-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures' (2020) 8 *The Theory and Practice of Legislation* 11

Bar-Siman-Tov, Ittai, 'The Global Revival of Legisprudence: A Comparative View on Legislation in Legal Education and Research' in Ittai Bar-Siman-Tov (ed), *Conceptions and Misconceptions of Legislation* (Springer 2019) 233

Bar-Siman-Tov, Ittai, 'Temporary Legislation, Better Regulation, and Experimentalist Governance: An Empirical Study' (2018) 12(2) *Regulation & Governance* 192

Basten, John, 'Statute and the Common Law' (2019) 93 *Australian Law Journal* 985

Baynes, Kenneth, 'Discourse Ethics and the Political Conception of Human Rights' (2009) 2 *Ethics and Global Policy* 1

Baynes, Kenneth, 'Toward a Political Conception of Human Rights' (2009) 35 *Philosophy and Social Criticism* 371

Bean, Clive, 'Changing Citizen Confidence: Orientations towards Political and Social Institutions in Australia, 1983-2010' (2015) 8 *The Open Political Science Journal* 1

Beatson, Jack, 'Common Law, Statute Law, and Constitutional Law' (2006) 27 *Statute Law Review* 1

Beatson, Jack, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (Hart, 2021)

Beetz, Jan Pieter, 'Political Political Theory: Essays on Institutions' (2017) 16 *Contemporary Political Theory* 553

Beitz, Charles R, *Political Equality* (Princeton University Press, 1989)

Bell, John, George Engel, Cross on Statutory Interpretation (3rd ed, Lexis Nexis, 1976)

Bennett, John, Alex Castles (eds), *A Source Book of Australian Legal History* (Law Book Co, 1979)

Bennett Moses, Lyria and Brendan Edgeworth, 'Statutes in a Web of Law' in P Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (The Federation Press, 2019)

Bentham, Jeremy, *A Plea for the Constitution: shewing the enormities committed ... in and by the design ... of the penal colony of New South Wales: including an inquiry into the right of the Crown to legislate without parliament in Trinidad, etc*. available at <https://www.bl.uk/collection-items/a-plea-for-the-constitution>

Bentham, Jeremy, *Principles of the Civil Code* (W Tait, 1843)

Bentham, Jeremy, *The Theory of Legislation* (K Paul, Trench, Trubner & Co, 1931)

Berger, Benjamin L, 'Freedom of Religion' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 755

Bingham, Tom, *The Rule of Law* (Penguin Books, 2010)

Blackstone, William, *Commentaries on the Laws of England, 1765, Bk 1* (Beacon Press, 1962)

Blandy, Sarah, 'Socio-legal Approaches to Property Law Research' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 24

Blore, Kent, 'Proportionality Under the Human Rights Act 2019 (Qld): When Are the Factors in s13(2) Necessary and Sufficient, And When Are They Not?' (2022) 45(2) *Melbourne University Law Review* (advance)

Blore, Kent, Brenna Booth-Marxson, 'Breathing Life into the Human Rights Act 2019 (Qld): The Ethical Duties of Public Servants and Lawyers Acting for Government' (2022) 41(1) *University of Queensland Law Journal* 1

Blore, Kent, Nikita Nibbs, 'A Theory of the Right to Property under the Human Rights Act 2019 (Qld)' (2022) 30 *Australian Property Law Journal* 1

Boughey, Janina, 'The Scope and Application of the Charters' in Matthew Groves and Tom Campbell (eds), *Australian Charters of Rights a Decade On* (The Federation Press, 2017) 36

Bradbrook et al, *Australian Real Property Law* (5th ed, Lawbook Co, 2011)

Buck, AR, Nancy E Wright, 'The Law of Dower in New South Wales and the United States' in Hamar Foster, AR Buck and Benjamin L Berger (eds), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (UBC Press, 2008) 208

Burrows, Andrew, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018)

Burrows, John, 'The Interrelation Between Common Law and Statute' (1976) 3 *Otago Law Review* 583

Burton Crawford, Lisa, 'An Institutional Justification for the Principle of Legality' (2022) 45 *Melbourne University Law Review* (Advance)

Byrnes, PJ, 'The Constitution of Queensland' (1992) 1 *Public Law Review* 58

Calabresi, Guido, *A Common Law for the Age of Statutes* (Harvard University Press, 1982)

Campbell, Enid, 'Crown Land Grants: Form and Validity' (1966) 40 *Australian Law Journal* 35

Campbell, Enid, 'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia' (1994) 13 *University of Tasmania Law Review* 1

Campbell, Tom, 'Human Rights Strategies: An Australian Alternative' in Tom Cambell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 319

Campbell, WB, 'A Note on Jeremy Bentham's "A Plea for the Constitution of New South Wales"' (1951) 25 *Australian Law Journal* 59

Carey, George W, James McLellan (ed), *Alexander Hamilton, John Jay and James Madison The Federalist Papers* (Liberty Fund, 2012)

Carney, Gerard, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006)

Carney, Gerard, 'A Legal and Historical Overview of the Land Borders of the Australian States' (2016) 90 *Australian Law Journal* 579

Carney, Gerard, *Members of Parliament: Law and Ethics* (Prospect Media, 2000)

Carozza, Paolo G, 'Human Rights, Human Dignity, and Human Experience' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 615

Cass, Ronald A, 'Property Rights Systems and the Rule of Law' in Enrico Colombatto (ed), *The Economics of Property Rights* (Edward Elgar, 2004) 222

Castles, Alex, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1

Castles, Alex C, *An Australian Legal History* (Law Book Co, 1982)

Coaldrake, Peter, 'Overview – Reforming the System of Government' in Scott Prasser, Rae Wear and John Nethercote (eds), *Corruption and Reform: The Fitzgerald Vision* (University of Queensland Press, 1990) 158

Cohen, Morris R, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8

Cole, Daniel H, 'The Law and Economics Approach to Property' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 106

Cooke, Robin, 'Foreword' in BD Gray and RB McClintock (eds), *Courts and Policy: Checking the Balance* (Brookers, 1995)

Copley, Julie, 'Public Deliberation on Legislation: From Fitzgerald to Facebook and Beyond' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Scrutiny and Accountability in the 21st Century, July 2009, Parliament House, Canberra)

Cormacain, Ronan , Ittai Bar-Siman-Tov, 'Global legislative responses to coronavirus' (2020) 8 *The Theory and Practice of Legislation* 239

Coxon, Benedict, 'Learning From Experience: Interpreting the Interpretive Provisions in Australian Human Rights Legislation' (2020) 39(2) *University of Queensland Law Journal* 253

Croucher, Rosalind, 'How Free is Free? Testamentary Freedom and the Battle Between "Family" and "Property"' (2012) 37 *Australian Journal of Legal Philosophy* 9

Crown Law (Queensland), *Review of Property Law in Queensland* available at <www.crownlaw.qld.gov.au/resources/publications/review-of-property-law-in-qld>

Dagan, Hanoch, 'The Craft of Property' (2003) 91 *California Law Review* 1517

Dagan, Hanoch, 'Lawmaking for Legal Realists' (2013) 1 *Theory and Practice of Legislation* 187

Dan-Cohen, Meir, 'Introduction: Dignity and its (Dis)content' in Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, & Rights* (Oxford University Press, 2015) 5

Debeljak, Julie, 'Parliamentary Sovereignty and Dialogue Under the Victorian Charter of Human Rights and Responsibilities' (2017) 33 *Monash University Law Review* 9

de Jersey, Paul, 'Court Intrusion into Testamentary Disposition: A Beneficial Jurisdiction?' (2010) 10(2) *QUT Law Journal* 233

Demsetz, Harold, 'Toward a Theory of Property Rights' (1967) *American Economic Review* 347

Department of Justice and Attorney-General, *Response to Legal Affairs and Community Safety Committee: Issues Raised in Written Submissions* (3 December 2018)

Department of Natural Resources and Mines, *A Guide to Land Tenure Under the Land Act 1994* (State of Queensland 2013)

Dewey, John, *The Public and Its Problems: An Essay in Political Inquiry* (Ohio University Press, 2016)

Dewey, John, *The Quest for Certainty* (Minton, Balch and Company 1929)

Dicey, AV, *Introduction to the Law of the Constitution* (10th ed, Macmillan, 1964)

Dixon, Martin, 'A Doctrinal Approach to Property Law Scholarship' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 1

Dixon, Rosalind, 'The Supreme Court of Canada, Charter Dialogue, and Deference' [2009] 47 *Osgoode Hall Law Journal* 235

Duncan, Bill, et al, *Property Law Review: Lot Entitlements Under the Body Corporate and Community Management Act 1997 – Final Recommendations (Department of Justice and Attorney-General, Queensland Government, 2016)*

Duncan, WD and RJ Vann, *Property Law and Practice in Queensland* (Law Book Co, 1982)

Dupré, Catherine, 'Constructing the Meaning of Human Dignity: Four Questions' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 113

Durand-Gasselin, Jean-Marc, 'Introduction – The Work of Jürgen Habermas: Roots, Trunk and Branches' in Jürgen Habermas, *Philosophical Introductions: Five Approaches to Communicative Reason* (trans Ciaran Cronin) (Polity Press, 2018) 1

Dworkin, Ronald, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press, 2008)

Dworkin, Ronald, *Justice for Hedgehogs* (Harvard University Press, 2011)

Dworkin, Ronald, *A Matter of Principle* (Harvard University Press, 1985)

Dworkin, Ronald, *Taking Rights Seriously* (Harvard University Press, 1977)

Edelman, J, 'Foreword' in Janine Boughey and Lisa Burton Crawford, *Interpreting Executive Power* (The Federation Press, 2020) 1

Edgeworth, Brendan, *Butt's Land Law* (7th ed, Lawbook Co, 2017)

Edgeworth, Brendan, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387

Edgeworth, Brendan, 'Post-Property?: A Post-Modern Conception of Private Property' (1988) 11 *UNSW Law Journal* 87

Electoral and Administrative Review Commission, *Report on Consolidation and Review of the Queensland Constitution* (Queensland Government Printer, 1993)

Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees* (Queensland Government Printer, 1992)

Elster, Jon, *Securities Against Misrule: Juries, Assemblies, Elections* (Cambridge University Press, 2013)

Epstein, Richard, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard University Press, 2011)

'Equal Dignity – Heeding its Call' (2019) 132 *Harvard Law Review* 1323

Esmaeili, Hossein, Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge University Press, 2016)

Evans, Raymond, *A History of Queensland* (Cambridge University Press, 2007)

Evans, Simon, Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights' (Papers on Parliament No 47, July 2007), available at <https://www.aph.gov.au/~/~/link.aspx?_id=8B6C280930C4453C92CA146B82B01CE6>

Evans, Simon, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006) 197

Evans, Simon, 'From Private Property to Public Law' (2000) 28(1) *Federal Law Review* 155

Evatt, HV, 'The Legal Foundations of New South Wales' (1938) 11 *Australian Law Journal* 409

Feldman, David, '"Which in Your Case You Have Not Got": Constitutionalism at Home and Abroad' (2011) 64 *Current Legal Problems* 117

Fella, Andrew, 'The Concept of Coherence in Australian Private Law' (2018) 41 *Melbourne University Law Review* 1160

Finlay, Lorraine, 'The Erosion of Property Rights and its Effects on Individual Liberty' in Suri Ratnapala, Gabriël Moens (eds), *Jurisprudence of Liberty* (2nd ed, LexisNexis, 2011) 465

Finn, Paul, *Law and Government in Colonial Australia* (Oxford University Press, 1987)

Finn, Paul, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52

Finnis, John, *Natural Law and Natural Rights* (Clarendon Law Series, 1980)

Fitzgerald, GE, *Report of a Commission of Inquiry Pursuant to Orders in Council* (Queensland Government Printer, 3 July 1989), available at <www.ccc.qld.gov.au/>

Fitzgerald, Ross, Lyndon Megarrity and David Symons, *Made in Queensland: A New History* (University of Queensland Press, 2009)

Fitzmaurice, Andrew, 'The Genealogy of Terra Nullius' (2007) 38 *Australian Historical Studies* 1

Ford, Lisa, 'Locating Indigenous Self-determination" in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2013)

Ford, Lisa, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010)

Ford, Lisa, 'Thinking Big About New South Wales History: Colonial Law in Global Perspective' (2011) 34 *Australian Bar Review* 204

Freeman, S, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 327

French, Robert, 'Common Law Constitutionalism' (2016) 14 *New Zealand Journal of Public & International Law* 153

Freund, Ernst, *Jurisprudence and Legislation* (Houghton Mifflin and Company, 1904)

Fry, TP, *Freehold and Leasehold Tenancies of Queensland Land* (University of Queensland, 1946)

Fry, TP, 'Land Tenures in Australian Law' (1946) 3 *Res Judicatae* 158

Fukuyama, Francis, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile, 2018)

Fuller, Lon L, *The Morality of Law* (Yale University Press, 1964)

Gageler, Stephen, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash Law Review* 1

Gallie, WB, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167

Galligan, Brian and Emma Larking, 'Rights Protection: The Bill of Rights Debate and Protection in Australia's States and Territories' (2007) 28(1) *Adelaide Law Review* 177

Galligan, DJ (ed), *Constitution in Crisis: The New Putney Debates* (Bloomsbury Publishing, 2017)

Galligan, DJ, *Law in Modern Society* (Clarendon Law Series, 2006)

Gardbaum, Stephen, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8(2) *International Journal of Constitutional Law* 167

Gearty, Conor, 'Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 155

Geary, Ian and Adrian Pabst (ed), *Blue Labour: Forging a New Politics* (IB Taurus, 2015)

Gillooly, M, 'Legal Coherence in the High Court: String Theory for Lawyers' (2013) 87 *Australian Law Journal* 33

Ginsburg, Tom, 'Foreword for Special Issue on Legislatures in the Time of COVID-19' (2020) 8 *The Theory and Practice of Legislation* 1

Gleeson, Jacqueline, 'Human Dignity in the Time of John Hubert Plunkett' (10th Annual JH Plunkett Lecture, Francis Forbes Society for Australian Legal History), available at <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/gleesonj/Human%20Dignity%20In%20The%20Time%20of%20John%20Hubert%20Plunkett.pdf>

Gleeson, Hon Murray, 'The Meaning of Legislation' (2009) *Public Law Review* 26

Goldsworthy, Jeffrey, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010)

Goodheart, David, *Head Hand Heart: The Struggle for Dignity and Status in the 21st Century* (Penguin, 2020)

Graham, Nicole, 'Dephysicalised Property and Shadow Lands' in Robyn Bartel and Jennifer Carter (eds), *Handbook on Space, Place and Law* (Edward Elgar, 2021) 281

Grainger, Virginia, 'Is Family Protection a Question of Moral Duty' [1994] *Victoria University of Wellington Law Review* 8

Grantham, Ross and Darryn Jensen 'Coherence in the Age of Statutes' (2016) 42 *Monash University Law Review* 360

Gray, Kevin and, Susan Francis Gray, *Elements of Land Law* (5th ed, Oxford University Press, 2009)

Gray, Kevin and Susan Francis Gray, 'Private Property and Public Propriety' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 11

Green, Thomas Hill, *Lectures on the Principles of Political Obligation* (Cambridge University Press, 2012)

Greenberg, Daniel, *Laying Down the Law* (Sweet & Maxwell, 2011)

Groves, Matthew, 'Interpreting the Effect of Our Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (The Federation Press, 2017) 2

Gummow, William, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999)

Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Polity Press, 1997)

Habermas, Jürgen, 'Human Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) *Metaphilosophy* 464

Habermas, Jürgen, *Legitimation Crisis*, tr Thomas McCarthy (Beacon Press, 1975)

Habermas, Jürgen, *Moral Consciousness and Communicative Action*, tr Christian Lenhardt and Shierry Weber Nicholsen (MIT Press, 1990)

Habermas, Jürgen, *Philosophical Introductions: Five Approaches to Communicative Reason*, tr Ciaran Cronin (Polity Press, 2018)

Habermas, Jürgen, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Polity Press, 1989)

Haidt, Jonathan, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (Penguin, 2013)

Hale, Brenda, 'Preface' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Society 2013) xv

Harris, Jim, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 64

Harris, JW, *Property and Justice* (Oxford University Press, 1996)

Hart, Henry M and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994)

Hayek, FA, *The Constitution of Liberty* (University of Chicago Press, 1960)

Hayek, FA, *Law Legislation and Liberty, Volume 1: Rules and Order* (University of Chicago Press, 1983)

Hegel, GWF, *Elements of the Philosophy of Right*, tr HB Nisbet (Cambridge University Press, 1991)

Henry, James, 'Human Rights Act 2019 (Qld) What Work Will It Bring Us?' [2019] *Queensland Judicial Scholarship* 10

Hobbes, Thomas, *Leviathan* (1651) ed CB McPherson (Penguin Books, 1976)

Hogg, Peter and Allison Bushell 'The Charter Dialogue Between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal* 75-6

Hogg, Peter W and Ravi Amarnath, 'Understanding Dialogue Theory' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 1053

Hohfeld, Wesley Newcomb, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710

Hohfeld, Wesley Newcomb, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16

Hollenbach, David, 'Human Dignity: Experience and History, Practical Reason, and Faith' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 123

Honoré, AM, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987)

Honoré, AM, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 109

Horrigan, Bryan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without A Bill of Rights* (Ashgate, 2006) 61

Howard-Hassmann, Rhoda E, 'Reconsidering the Right to Own Property' (2013) 12 *Journal of Human Rights* 180

Hughes, Colin A, *The Government of Queensland* (University of Queensland Press, 1980)

Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better: Here Are 101 Cases Showing How* (June 2022), available at <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/62952d419ab542440dc23f65/1653943661284/Charter_of_rights_101_cases.pdf>

Hume, David, *A Treatise of Human Nature*, ed LA Selby-Bigge and PH Nidditch (Clarendon Press, 1978)

Hume, David, 'Of the Independency of Parliament' in Eugene F Miller (ed), *David Hume, Essays: Moral, Political, Literary* (Liberty Classics, 1985)

Hume, David, 'That Politics May be Reduced to a Science' in Eugene F Miller (ed), *David Hume, Essays: Moral, Political, Literary* (Liberty Classics, 1985)

Jenks, Edward, *A History of the Australasian Colonies A History of the Australasian Colonies: (From Their Foundation to the Year 1911)* (Cambridge University Press, 1912)

Johnson, Murray, 'The Historical Significance of Queensland Day', *Queensland State Archives: Stories from the Archives* (2016) available at: https://blogs.archives.qld.gov.au/2016/06/06/the-historical-significance-of-queensland-day/

Johnston, Vanessa and Ben France-Hudson, 'Implications of Climate Change for Western Concepts of Ownership: Australian Case Study' (2019) 42(3) *UNSW Law Journal* 869

Jones, Kate and Scott Prasser, 'Resisting Executive Control in Queensland's Unicameral Legislature: Recent Developments and the Changing Role of the Speaker in Queensland' (2012) 27 *Australasian Parliamentary Review* 67

Jones, Stanley, 'A Judicial Hero' in Aladin Rahemtula (ed), *Justice According to Law* (Supreme Court of Queensland Library, 2006) 14

Kamir, Orit, 'Basic Law: Israel as Nation State: National Honor Defies Human Dignity and Universal Human Rights' (2020) *Israel Studies* 213

Keane, PA, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 10 *Queensland University of Technology Law and Justice Journal* 106

Keane, Patrick, 'The Termination of Contracts for the Sale of Land upon the Failure of a Condition Subsequent' in Aladin Rahemtula (ed), *Justice According to Law* (Supreme Court of Queensland Library, 2006) 106

Kennedy, Duncan, 'Form and Substance in Private Law Adjudication' (1976) *Harvard Law Review* 1685

Kenny, S, 'Colonies to Dominion, Dominion to Nation' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013) 245

Kiefel AC, Hon Justice Susan, 'Proportionality: A Rule of Reason' (2012) 23 PLR 85

Kirby, Justice M, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444

Kirby, Justice Michael, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights' (Speech, New Zealand Research Foundation Conference, Auckland, 4 April 1997)

Knox, BA, 'Care Is More Important than Haste: Imperial Policy and the Creation of Queensland, 1856–9' (1976) 17 *Historical Studies* 64

Kociumbas, Jan, *The Oxford History of Australia* (Oxford University Press, 1992)

Laitinen, Arto, 'MacIntyre and Taylor: Traditions, Rationality, and the Modern Predicament' in Jeff Malpas and Hans-Helmuth Gander (eds), *Routledge Companion of Hermeneutics* (Routledge 2014) 204

Lametti, David, 'The Morality of James Harris's Theory of Property' in T Endicott, J Getzler and E Peel (eds), T*he Properties of Law: Essays in Honour of James Harris* (Oxford University Press, 2006) 147

Lametti, David, 'Property and (Perhaps) Justice: A Review Article of James W Harris, Property and Justice and James E Penner, The Idea of Property in Law' (1998) 43 *McGill Law Journal* 663

Lametti, Hon David, 'Destination' (2020) 66 *McGill Law Journal* 47

Lane, PM, 'Australian Land Law' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013) 212

Latham, John, 'Australia' (1960) 76 *Law Quarterly Review* 54

Latham-Gambi, Alexander, 'Jeremy Waldron and the Circumstances of Politics' (2021) 83 *The Review of Politics* 242

Laws, John, *The Common Law Constitution* (Cambridge University Press, 2014)

Laws, John, *The Constitutional Balance* (Hart Publishing 2021)

Laws, Sir Stephen, 'Legislation and Politics' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) 87

Lazarus, Liora, 'Conceptions of Liberty Deprivation' (2006) 69(5) *Modern Law Review* 738

Lee, WA, *Manual of Queensland Succession Law* (8th ed, Lawbook Co, 2019)

Leeming, Mark, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 *UNSW Law Journal* 1002

Leeming, Mark, 'What is a Trust?' (2009) 7 *Trusts Quarterly Review* 5

Legal Affairs and Community Safety Committee, Parliament of Queensland, Human Rights Bill 2018 (Report No 26, 56th Parliament, February 2019)

Legal Constitutional and Administrative Review Committee, *Consolidation of the Queensland Constitution: Final Report* (Report No 13, Queensland Government Printer, 1999)

Legal Constitutional and Administrative Review Committee, *Review of the Queensland Constitutional Review Commission's Recommendations Relating to a Consolidation of the Queensland Constitution* (Report No 24, Queensland Government Printer, 2000)

Locke, John, *Two Treatises of Government*, ed P Laslett (Cambridge University Press, 1960)

Lumb, RD, *The Constitutions of the Australian States* (5th ed, University of Queensland Press, 1991)

Lumb, RD, 'The Torres Strait Islands: Some Questions Relating to Their Annexation and Status' (1990) 19 *Federal Law Review* 154

McAllister, I, et al, *Australian Election Study 2019* [computer file], December 2019, 15-6, available at: <https://australianelectionstudy.org/>

McCrudden, Christopher, 'Human Dignity in Human Rights Interpretation' (2008) 19 *European Journal of International Law* (2008) 655

McCrudden, Christopher, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 1

McDermott, Peter M, 'Mr Justice BH McPherson – His Contribution to Law Reform in Queensland' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 433

McDonald, Leighton, 'Rights, "Dialogue" and Democratic Objections to Judicial Review' (2004) *Federal Law Review* 1

McDougall, Scott, 'Making Rights Real: The Promise and Potential Pitfalls of the Human Rights Act 2019 (Qld)' [2020] *Bond Law Review* 115

McHarg, Aileen, et al, *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010)

McHugh, Paul, Lisa Ford, 'Settler Sovereignty and the Shapeshifting Crown' in Lisa Ford and Time Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2013) 23

MacIntyre, Alasdair, 'Charles Taylor and Dramatic Narrative: Argument and Genre' (2018) 44 *Philosophy and Social Criticism* 761

McLean, Janet, 'The Crown in the Courts: Can Political Theory Help?' in Linda Pearson et al (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Bloomsbury, 2008) 161

McMinn, WG, *A Constitutional History of Australia* (Oxford University Press, 1979)

McNeil, Kent, *Common Law Aboriginal Title* (Clarendon Press, 1989)

McPherson, BH, *The Reception of English Law Abroad* (The Supreme Court of Queensland Library, 2007)

Macpherson, CB, 'Liberal Democracy and Property' in CB Mapherson (ed), *Property, Mainstream and Critical Positions* (University of Toronto Press, 1978) 201

Mahlmann, Matthias, 'The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 593

Markovits, Daniel, *The Meritocracy Trap* (Penguin, 2020)

Markovits, Daniel, 'Quarantines and Distributive Justice' (2005) *The Journal of Law, Medicine & Ethics* 323

Meagher, Dan, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449

Milbank, John, 'Dignity Rather than Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 189

Milbank, John and Adrian Pabst, *The Politics of Virtue: Post-liberalism and the Human Future* (Rowman & Littlefield 2016)

Mill, John Stuart, *Considerations on Representative Government* (Prometheus Books, 1991)

Mill, John Stuart, 'Principles of Political Economy: With Some of Their Applications to Social Philosophy' in JM Robson (ed), *Collected Works of John Stuart Mill* (University of Toronto, Press, 1965)

Mills, Stephen, 'Parliament in a Time of Virus: Representative Democracy As "A Non-Essential Service"' (2019-20) 34 *Australasian Parliamentary Review* 7

Monaghan, Osca, 'Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141: Essay' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge 2021) 25

Moyn, Samuel, 'The Secret History of Constitutional Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 95

Munzer, Stephen R, *A Theory of Property* (Cambridge University Press, 1990)

Nedelsky, Jennifer, *Private Property and the Limits of American Constitutionalism* (University of Chicago Press, 1994)

Neudorf, Lorne, 'Reassessing the Constitutional Foundation of Delegated Legislation in Canada' (2018) 41 *Dalhousie Law Journal* 519

Neudorf, Lorne, 'Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia' (2021) 43(8) *Law Society Bulletin* 10

New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision* (Report 110, 2005)

Norton, Philip, 'Global Legislative Responses to Coronavirus' (2020) 8 *The Theory and Practice of Legislation* 237

Okpaluba, Chuks, 'The Right to the Residual Liberty of a Person in Incarceration: Constitutional and Common Law Perspectives' (2012) 28(3) So*uth African Journal on Human Rights* 458

Olsthoorn, Johan, 'Two Ways of Theorising "Collective Ownership of the Earth"' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 187

O'Neill, Onora, *A Question of Trust* (Cambridge University Press, 2002)

Pal, Michael, 'Comparative Constitutional Law and Waldron's Political Political Theory' (2017) 15 *International Journal of Constitutional Law* 855

Pearce, Dennis and Andrew Geddes, *Statutory Interpretation in Australia* (9th ed, LexisNexis, 2019)

Penner, James, 'Rights, Distributed and Undistributed: On the Distributive Justice Implications of Lockean Property Rights, Especially in Land' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 138

Penner, JE, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711

Penner, JE, *The Idea of Property in Law* (Clarendon Press, 1997)

Perram, Nye, 'Comment on Paper of Peter Quiggin' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) 97

Picketty, Thomas, *Capital in the Twenty-first Century* (Belknap Press, 2017)

Pinker, Stephen, 'The Stupidity of Dignity' (2008) *The New Republic* 28

Pistor, Katharina, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019)

Pocock, Melissa, 'Discovering Common Ground – Appropriation of Common Property For Exclusive Use and Scheme Terminations: Reconsidering Albrecht v Ainsworth & Ors [2015] QCA 220' (2016) 35 *University of Queensland Law Journal* 393

Pollock, Sir Frederick, *The Expansion of the Common Law* (Stevens and Sons, 1904)

Polsby, Nelson W, 'Legislatures' in Fred I Greenstein and Nelson W Polsby (eds), *Handbook of Political Science* (Addison-Wesley, 1975)

Poole, Thomas, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 *The Modern Law Review* 463

Posner, Eric A and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010)

Posner, Eric A and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018)

Posner, Richard A, *Frontiers of Legal Theory* (Harvard University Press, 2001)

Posner, Richard A, 'Review: Review of Jeremy Waldron, "Law and Disagreement"' (2000) 100(2) *Columbia Law Review* 582

Postema, Gerald, *Bentham and the Common Law Tradition* (Clarendon Press, 1986)

Postema, Gerald J, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011)

Pound, Roscoe, *An Introduction to the Philosophy of Law: Revised Edition* (Yale University Press, 1954)

Prasser, Scott, 'The State of Democracy in Queensland', *Online Opinion* (24 December 2007) <www.on-line opinion.com.au>

Prasser, Scott and Nicholas Aroney 'Real Constitutional Reform After Fitzgerald: Still Waiting for Godot' (2009) 18 *Griffith Law Review* 596

Preece, AA, 'Late 20th Century Property Law Reform in Queensland' (Paper delivered to 2001 Real Property Law Teachers Conference, Melbourne, 2001)

Preece, AA, 'Reform of the Real Property Acts in Queensland' (1986) *QUT Law Review* 41

Pretty, Lynda, 'Queensland's Scrutiny of Proposed Legislation by Parliamentary Committees' (2019-20) 35 *Australasian Parliamentary Review* 54

Purdy, Jedediah, *This Land is Our Land: The Struggle for a New Commonwealth* (Princeton University Press, 2019)

Purdy, Jedediah, 'Response – A Few Questions about the Social-Obligation Norm' (2009) 94 *Cornell Law Review* 948

Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to the Acts and Laws that relate to the Queensland Constitution* (Queensland Government Printer, 2000)

Queensland Department of Infrastructure and Planning, *Findings from the Gold Coast City Broadhectare Study* (2008)

Queensland Government Department of Premier and Cabinet, *Queensland Legislation Handbook*, available at <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook.aspx>

Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974–1986: Report No 37* (Queensland Government Printer, 1987)

Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes: Report No 16* (Queensland Government Printer, 1973)

Queensland Law Reform Commission, 'A Bill to Consolidate and Amend the Law Relating to Trusts, Trustees and Settled Land: Working Paper No 5' (Queensland Government Printer, 1970)

Queensland Law Reform Commission, 'A Working Paper of the Law Reform Commission on a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland' (Working Paper No 32, 1989)

Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-making Disability. Report No 49* (Queensland Government Printer, 1996)

Queensland Law Reform Commission, *Report to the Standing Committee of Attorneys-General on Family Provision* (Report No 28, 1997)

Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015)

Queensland Law Reform Commission, *Review of Queensland's Laws Relating to Civil Surveillance and the Protection of Privacy in the Context of Current and Emerging Technologies* (Report No 77, February 2020)

Quick, Sir John and Sir Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (The Australian Book Company, 1901)

Quiggin, Peter PSM, 'Statutory Construction: How to Construct, and Construe, a Statute' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) 78

Radin, Margaret Jane, *Contested Commodities* (Harvard University Press, 1996)

Radin, Margaret Jane, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia Law Review* 1667

Radin, Margaret J, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957

Radin, Margaret Jane, *Reinterpreting Property* (University of Chicago Press, 1993)

Rawls, John, *A Theory of Justice* (Harvard University Press, 1971)

Rawls, John, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 31

Raz, Joseph, 'The Rule of Law and its Virtue' in *The Authority of Law* (Clarendon Press, 1979) 214

Reich, Charles A, 'The Liberty Impact of the New Property' (1990) 31(2) *William and Mary Law Review* 295

Reich, Charles A, 'The New Property' (1964) 73 *Yale Law Journal* 733

Reiss, HS (ed), *Kant's Political Writings* (Cambridge University Press, 1991)

Riordan, Patrick, 'Which Dignity? Which Religious Freedom?' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 421

Ripstein, Arthur, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009)

Roberts, Stephen H, *History of Australian Land Settlement, 1788–1920* (MacMillan/Melbourne University Press, 1924)

Robertson, Michael, 'Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 239

Robin, David, 'McPherson on Property' in Aladin Rahemtula (ed), *Justice According to Law* (Supreme Court of Queensland Library, 2006) 520

Rodger, Alan, 'The Form and Language of Legislation' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) 65

Rose, Carol, 'Possession as the Origin of Property' (1985) 52 *The University of Chicago Law Review* 73

Rose, Carol, *Property and Persuasion* (Westview, 1996)

Rosen, Michael, *Dignity: Its History and Meaning* (Harvard University Press, 2012)

Rubin, Edward, 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369

Rubin, Edward L, 'Statutory Design as Policy Analysis' [2018] *Harvard Journal of Legislation* 143

Runciman, David, 'Review: Jeremy Waldron's Political Political Theory' (2019) 18(3) *European Journal of Political Theory* 437

Ryan, Alan, *Property and Political Theory* (Blackwell, 1984)

Sacks, Jonathan, *Morality: Restoring the Common Good in Divided Times* (Hodder & Stoughton, 2020)

Sandel, Michael J, *Justice: What's the Right Thing to Do?* (Penguin, 2011)

Sandel, Michael J, *The Tyranny of Merit: What's Become of the Common Good?* (Penguin, 2020)

Saunders, Cheryl, *Australian Democracy and Executive Law-making: Practice and Principle (Part II)* (Papers on Parliament No 66), available at <www.aph.gov.au>

Sax, Joseph L, 'Liberating the Public Trust Doctrine from Its Historical Shackles' (1980) 14 *UC Davis Law Review* 185

Schlink, Bernhard, 'The Concept of Human Dignity: Current Usages, Future Discourses' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 631

Scotford, Eloise, 'Legislation and the Stress of Environmental Problems' (2021) 74 *Current Legal Problems* 299

Scott, Joanne, et al, *The Engine Room of Government: The Queensland Premier's Department 1959–2001* (University of Queensland Press, 2001)

Sedley, Stephen, 'Does the Separation of Powers Still Work?' in DJ Galligan (ed), *Constitution in Crisis: The New Putney Debates* (IB Tauris, 2017) 93

Seeley, John, *Introduction to Political Science: Two Series of Lectures* (Macmillan, 1986)

Sen, Amartya, *Development as Freedom* (Oxford University Press, 1999)

Sherry, Cathy, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property' (2013) 36 *University of New South Wales Law Journal* 280

Shiffrin, Seana Valentine, 'Lockean Argument for Private Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 138

Shiller, Robert J, *The New Financial Order: Risk in the 21st Century* (Princeton University Press, 2003)

Shiner, Roger A, 'Law and Its Normativity' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd ed, John Wiley and Sons, 2010) 435

Singer, Joseph William, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 *Cornell Law Review* 1009

Singer, Joseph William, *The Edges of the Field* (Beacon, 2000)

Singer, Joseph William, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000)

Singer, Joseph William, 'How Property Norms Construct the Externalities of Ownership' in Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2010) 57

Singer, Joseph William, *Introduction to Property* (Aspen Law and Business, 2001)

Singer, Joseph William, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* (Yale University Press, 2015)

Singer, Joseph William, *Property* (4th ed, Wolters Kluwer, 2014)

Singer, Joseph William, 'Property' in David Kairys (ed), *The Politics of Law* (3rd ed, Basic Books, 1998) 240

Singer, Joseph William, 'Property Law as the Infrastructure of Democracy' (Harvard Public Law Working Paper No 11-16, 2011), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832829>

Singer, Joseph William, 'Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations' (2017) 18 *Theoretical Inquiries in Law* 519

Smith, FB, 'Ethics and Disease in the Late Nineteenth Century: The Contagious Diseases Acts' (1971) 15 *Historical Studies* 118

South, Jim, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic)' [2009] *University of Queensland Law Journal* 7

Spigelman, James, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769

Spigelman, JJ, *Statutory Interpretation and Human Rights: The McPherson Lecture Series* (University of Queensland Press, 2008)

Stephenson, Scott, 'Dignity and the Australian Constitution' (2020) 42 *Sydney Law Review* 369

Stephenson, Scott, 'A Study of Institutions in Constitutional Theory' (2017) 15 *International Journal of Constitutional Law* 850

Stern, James Y, 'What is the Right to Exclude and Why Does it Matter?' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 38

Steyn, Johan, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5

Synot, Eddie and Roshan de Silva-Wijeyeratne 'Constitutional Foundations: The Persistent Myth of Cooper v Stuart' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 36

Tamanaha, Brian Z, *A Realistic Theory of Law* (Cambridge University Press, 2017)

Tamanaha, Brian Z, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375

Tarcov, Nathan, Harvey Mansefield (eds), *Niccolò Machiavelli: Discourses on Livy* (University of Chicago Press, 1996)

Taylor, Charles, 'The Diversity of Goods' in *Philosophical Papers, Volume 2: Philosophy and the Human Sciences* (Cambridge University Press, 2012) 230

Taylor, Charles, 'The Meaning of Secularism' (2010) *The Hedgehog Review* 23

Taylor, Charles, 'Modernity and the Rise of the Public Sphere' (The Tanner Lectures On Human Values, Stanford University, 25 February 1992), available at <https://tannerlectures.utah.edu/_resources/documents/a-to-z/t/Taylor93.pdf>

Taylor, Charles, 'Modern Social Imaginaries' (2002) 14 *Public Culture* 91

Taylor, Charles, *Modern Social Imaginaries* (Duke University Press, 2003)

Taylor, Charles, 'Social Theory as Practice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985) 91

Taylor, Charles, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989)

Taylor, Charles, Patrizia Nanz and Madeleine Beaubien Taylor, *Reconstructing Democracy: How Citizens Are Building from the Ground Up* (Harvard University Press, 2020)

Tigre, Maria Antonia, 'Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina' (2021) 115 *American Journal of International Law* 706

Tilbury, Michael, 'Book Review: Justice According to Law, a Festschrift for the Honourable Mr Justice B. H. McPherson CBE' (2008) *University of Queensland Law Journal* 11

Tushnet, Mark, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245

Tushnet, Mark, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000)

Twomey, Anne, *The Chameleon Crown: The Queen and Her Australian Governors* (The Federation Press, 2006)

Twomey, Anne, *The Constitution of New South Wales* (The Federation Press, 2004)

Twomey, Anne, 'Keeping the Queen in Queensland: How Effective is the Entrenchment of the Queen and Governor in the Queensland Constitution?' (2009) 28 *University of Queensland Law Journal* 81

Underkuffler, Laura S, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003)

Underkuffler, Laura S, 'On Property: An Essay' (1990) 100 *Yale Law Journal* 127

Underkuffler, Laura S, 'Property: A Special Right' (1996) 71 *Notre Dame Law Review* 1033

Underkuffler, Laura S, 'A Theoretical Approach' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 11

Unger, Roberto Mangbeira, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015) 120

Unger, Roberto Managabeira, *What Should Legal Analysis Become?* (Verso, 1996)

van der Walt, Andre, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 109

Villios, Sylvia, Natalie Williams, 'Family Provision Law, Adult Children and the Age of Entitlement' [2018] *Adelaide Law Review* 11

Waldron, Jeremy, 'Can There Be a Democratic Jurisprudence?' (Public Law Research Paper No 08-35, NYU School of Law, 2008), available at <https://ssrn.com/abstract=1280923>

Waldron, Jeremy, 'Citizenship Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (The British Academy, 2013) 327

Waldron, Jeremy, 'The Core of the Case Against Judicial Review' (2006) 115 *The Yale Law Journal* 1346

Waldron, Jeremy, *The Dignity of Legislation* (Cambridge University Press, 1999)

Waldron, Jeremy, *God, Locke and Equality* (Cambridge University Press, 2003)

Waldron, Jeremy, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200

Waldron, Jeremy, 'Human Dignity: A Pervasive Value' (Public Law Research Paper No. 20-46, NYU School of Law, 1 July 2019), available at <http://dx.doi.org/10.2139/ssrn.3463973>

Waldron, Jeremy, 'Kant's Legal Positivism' (1996) 109(7) *Harvard Law Review* 1535

Waldron, Jeremy, 'Law, Dignity and Self-Control' in Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, & Rights* (Oxford University Press, 2015) 135

Waldron, Jeremy, *Law and Disagreement* (Oxford University Press, 1999)

Waldron, Jeremy, 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373

Waldron, Jeremy, *Liberal Rights: Collected Papers, 1981–1991* (Cambridge University Press, 1993)

Waldron, Jeremy and Meir Dan-Cohen (eds), *Dignity, Rank, & Rights* (Oxford University Press, 2015)

Waldron, Jeremy, 'Mill on Liberty and on the Contagious Diseases Acts' in N Urbinati and A Zakaras (eds), *JS Mill's Political Thought: A Bicentennial Reassessment* (Cambridge University Press, 2007) 11

Waldron, Jeremy, 'The Normative Resilience of Property' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 170

Waldron, Jeremy, *One Another's Equals: The Basis of Human Equality* (Belknap Press, 2017)

Waldron, Jeremy, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016)

Waldron, Jeremy, 'The Primacy of Justice' (2003) 9(4) *Legal Theory* 269

Waldron, Jeremy, 'Property Law' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd ed, Wiley-Blackwell, 2010) 9

Waldron, Jeremy, *The Right to Private Property* (Clarendon Press, 1988)

Waldron, Jeremy, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3

Waldron, Jeremy, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012)

Waldron, Jeremy, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010)

Waldron, Jeremy, 'What is Private Property?' (1985) *Oxford Journal of Legal Studies* 313

Wallace, Anne, Les McCrimmon, Michael Weir (eds), Real Property Law in Queensland (5th ed, Thomson Reuters, 2020)

Walsh, James D, 'Reaching Mrs Murphy: A Call for Repeal of the Mrs Murphy Exemption to the Fair Housing Act' (1999) 34 *Harvard Civil Rights–Civil Liberties Law Review* 605

Walsh, Rachael, 'Property, Human Flourishing and St Thomas Aquinas: Assessing a Contemporary Revival' (2018) 31(1) *Canadian Journal of Law & Jurisprudence* 197

Wanna, John and Tracey Arklay, *The Ayes Have It: The History of the Queensland Parliament, 1957–1989* (ANU Press, 2010)

Watson, Irene, 'First Nations Stories, Grandmother's Law' in Heather Douglas et al (eds), Australian Feminist Judgments: Righting and Re-writing Law (Hart Publishing 2014) 46

Waugh, John, 'Australia's State Constitutions, Reform and the Republic' (1996) 3 *Agenda* 59

Webb, Eileen and Margaret Stephenson, *Focus: Land Law* (5th ed, LexisNexis, 2020)

Webb, Raelene, 'The Birthplace of Native Title – From Mabo to Akiba' (2017) 23 *James Cook University Law Review* 31

Webber, Jeremy, 'Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)' (2003) 9 *Australian Journal of Human Rights* 135

Weinrib, Jacob, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016)

Weinrib, Jacob, 'Human Dignity and Its Critics' in G Jacobsohn and M Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018), 167

Weinrib, Jacob, 'Kant on Citizenship and Universal Independence' (2008) 33 *Australian Journal of Legal Philosophy* 1

Weir, Michael, 'An Australian View: The Queensland Land Title Act 1994' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (Lexis Nexis, 2003) 295

Weir, Michael, 'Land Title Act 1994 (Qld) – Statute for a New Millennium?' (2000) 4 *Flinders Journal of Law Reform* 185

Weir, Michael, 'Strata Title, Dispute Resolution and Law Reform in Queensland' (2018) 26 *Australian Property Law Journal* 361

West, R, 'Toward the Study of the Legislated Constitution' (2011) 72 *Ohio State Law Journal* 1343

Whalan, DS, *The Torrens System in Australia* (Law Book Co, 1982)

Whip, Rosemary and Colin A Hughes (eds), *Political Crossroads: The 1989 Queensland Election* (University of Queensland Press, 1991)

Williams, George, 'The Distinctive Features of Australia's Human Rights Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (The Federation Press, 2017) 22

B CASES

Ainsworth v Albrecht [2016] HCA 40

Airservices Australia v Canadian Airlines International Ltd (2000) 202 CLR 133

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) 250 CLR 209

Application under the Major Crimes (Investigative Powers) Act 2004, Re (2009) 24 VR 415

Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508

Attorney-General (Cth) ex rel McKinlay v Commonwealth (1975) 135 CLR 1

Attorney-General for the State of Queensland v Sri & Ors [2020] QSC 246

Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing [2012] 1 Qd R 1

Australian Institute for Progress Ltd v Electoral Commission (Qld) (2020) 4 QR 31

Bank of NSW v Commonwealth (1948) 76 CLR 1

Beaudesert Shire Council v Smith (1966) 120 CLR 145

Bell v Beattie [2003] QSC 333

Black v Garnock (2007) 230 CLR 438

Blackwood v London Chartered Bank of Australia (1874) LR 5 PC 92

Bloom v Lepre [2008] NSWSC 79

Bolton, Re (1987) 162 CLR 514

Breskvar v Wall (1971) 126 CLR 376

Brodie v Singleton Shire Council (2001) 206 CLR 512

Cassegrain v Gerard Cassegrain & Co Pty Ltd (2015) 254 CLR 425

Cement Australia (Exploration) Pty Ltd v East End Mine Action Group Inc (No 4) [2021] QLC 22

CFMMEU v Personnel Contracting Pty Ltd (2022) 398 ALR 404

Clubb v Edwards; Preston v Avery (2019) 267 CLR 171

Coco v The Queen (1994) 179 CLR 427

Coleman v Power (2004) 220 CLR 1

Commonwealth v Registrar of Titles (Vic) (1918) 24 CLR 348

Commonwealth v Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1

Cooper v Stuart (1889) 14 App Case 286

Cudgen Rutile (No 2) Ltd v Chalk (1975) AC 520

Deguisa v Lynn (2020) 384 ALR 209

Department of Health & Community Services v JWB & SMB (1992) 175 CLR 218

Dorman v Rodgers (1982) 148 CLR 365

Duncan v State of Queensland (1916) 22 CLR 556

Eatts v Gundy [2014] QCA 309

Eksiry v Cantwells Real Estate Pty Ltd [1996] HREOCA 5

Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309

Evans v State of New South Wales [2008] FCAFC 130

Frazer v Walker [1967] 1 AC 569

Ghaidan v Godin-Mendoza [2004] 2 AC 557

Grace Brothers v Commonwealth (1946) 72 CLR 269

Gundy v Joslin Eatts (As Administratrix of the Estate of the late Doreen ('Dolly') Mary-Ann Eatts, Deceased, Late of Winton, Queensland [2015] HCATrans 275

Hamilton v Mendes (1761) 2 Burr 1198

HJ (a pseudonym) v IBAC [2021] VSCA 200

Hutchinson v Lemon [1983] Qd R 369

Indigenous Communities of the Lhaka Honhat (Our Land) Ass'n v Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 400 (Feb 6, 2020)

JT International SA v Commonwealth of Australia [2012] HCA 43

Kennon v Spry (2008) 238 CLR 366

Koowarta v Bjelke-Petersen (1982) 153 CLR 168

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Love v Commonwealth, Thoms v Commonwealth (2020) 270 CLR 152

Mabo v Queensland (1986) 64 ALR 1

Mabo v Queensland (No 2) (1992) 175 CLR 1

McCawley v The King (1920) 28 CLR 106

McEldowney v Ford [1969] 2 All ER 1039

McGlade v Native Title Registrar (2017) 340 ALR 419

Maloney v The Queen (2013) 252 CLR 168

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Miller v Miller (2011) 242 CLR 446

Momcilovic v The Queen (2011) 245 CLR 1

Monis v The Queen [2013] HCA 4

Moreton Bay Regional Council v Mekpine Pty Ltd (2016) 256 CLR 437

Morris v Cizek 503 F2d 1303 (7th Cir 1974)

Morton v Queensland Police Service [2010] QCA 160

MZAPC v Minister for Immigration and Border Protection (2021) 390 ALR 590

Natural Resources (Saskatchewan), In re [1932] AC 28

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (2016) 260 CLR 232

Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014

Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313

Northern Territory v Mengel (1995) 185 CLR 307

Official Receiver in Bankruptcy v Schultz (1990) 170 CLR 306

Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273

Palmer v Western Australia [2021] HCA 31

PJB v Melbourne Health (2011) 39 VR 373

Planned Parenthood of Southeastern Pennsylvania v Casey 505 US 833 (1992)

R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council (2009) 237 CLR 603

R v Cuskelly [2009] QCA 375

R v Home Secretary; Ex parte Pierson [1998] AC 539

R v Morgentaler [1988] 1 SCR 30

R v Oakes [1986] 1 SCR 103

Randwick Corporation v Rutledge (1959) 102 CLR 54

Regine Bergmann v DAW [2010] QCA 143

Rock v Todeschino [1983] Qd R 356

Roper v Simmons 543 US 551 (2005)

Schwennesen v Minister for Environment and Resource Management [2010] QCA 340

South Australia v Totani (2010) 242 CLR 1

Stephens v WA Newspapers (1994) 182 CLR 211

Sullivan v Moody (2001) 207 CLR 562

Swan Hill v Bradbury (1937) 56 CLR 746

Thomas v Mowbray (2007) 233 CLR 307

Thompson v Minogue [2021] VSCA 358

Re Tracey [2016] QCA 194

TRG v The Board of Trustees of the Brisbane Grammar School [2020] QCA 190

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1998) 165 CLR 107

Union Steamship Company of Australia Pty Ltd v King (1988) 166 CLR 1

United Mizrahi Bank et al v Migdal Cooperative Village et al [1995] 49 PD 221

United States v Hunter 459 F2d 205 (4th Cir 1972) cert denied 409 US 934 (1972)

United States v Windsor 570 US 744 (2013)

Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan (1931) 46 CLR 73

Waller v Suncorp Metway Insurance Ltd [2010] 2 Qd R 560

Western Australia v Commonwealth (1995) 183 CLR 373

Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528

Wik Peoples v Queensland (Pastoral Leases case) (1996) 187 CLR 1

Williams v Attorney-General for New South Wales (1913) 16 CLR 404

Wilson v Anderson (2002) 213 CLR 401

Yanner v Eaton (1999) 201 CLR 351

C LEGISLATION

Acts Interpretation Act 1954 (Qld)

Anti-Discrimination Act 1991 (Qld)

Australian Constitution

Australian Constitutions Act 1842 (Imp)

Australian Constitutions Act (No 2) 1850 (Imp)

Australian Courts Act 1828 (Imp)

Body Corporate and Community Management Act 1997 (Qld)

Canada Act 1982 (UK)

Charter of the United Nations Act 1945 (Cth)

Child Protection Act 1999 (Qld)

Constitution Act 1867 (Qld)

Constitution Amendment Act 1922 (Qld)

Constitution of Finland 1919

Constitution of Queensland 2001

Contagious Diseases Act 1864 (27 & 28 Vict c 85)

Contagious Diseases Act 1866 (29 & 30 Vict c 35)

Contagious Diseases Act 1869 (32 & 33 Vict c 96)

Coroners Act 2003 (Qld)

Criminal Code 1899 (Qld)

Fair Housing Act 42 USC § 3601 (1994)

Human Rights Act 2004 (ACT)

Human Rights Act 2019 (Qld)

Judicial Review Act 1991 (Qld)

Land Act 1994 (Qld)

Land and Other Legislation Amendment Act 2017 (Qld)

Land Title Act 1994 (Qld)

Law Reform Commission Act 1968 (Qld)

Legislative Standards Act 1992 (Qld)

Native Title Act 1993 (Cth)

Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth)

Native Title Legislation Amendment Act 2021 (Cth)

New South Wales Constitution Act 1855 (Imp) 18 & 19 Vict c 54

Parliament of Queensland Act 2001 (Qld)

Police Powers and Responsibilities Act 2000 (Qld)

Property Law Act 1974 (Qld)

Public Health and Wellbeing Act 2008 (Vic)

Queensland Coast Islands Act 1879 (Qld)

The Queensland Debt Act of 1862 (NSW)

Racial Discrimination Act 1975 (Cth)

Real Property Act 1858 (SA)

Real Property Act 1861 (Qld)

Real Property Act 1988 (Qld)

Real Property Act Amendment Act 1985 (Qld)

Real Property (Priority Notices and Other Measures) Amendment Act 2015 (SA)

Religious Discrimination Bill 2022 (Cth)

Reproductive Health (Access to Terminations) Act 2013 (Tas)

Residential Services (Accreditation) Regulation 2018 (Qld)

Squatting Act 1839 (NSW)

Statutory Instruments Act 1992 (Qld)

Testator's Family Maintenance Act of 1900 (NZ)

Testator's Family Maintenance Act 1914 (Qld)

Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic)

Water Act 2000 (Qld)

D Treaties

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948)

E Other

Building Units and Group Titles Bill 1980 (Qld), Second Reading Speech, available at: www.qldparliament.gov.au

Dick, The Honourable Cameron, MP (Treasurer, Minister for Investment), Appropriation Bill 2021, First Reading Speech, 15 June 2021, available at: www.parliament.qld.gov.au

Human Rights Bill 2018, Explanatory Note, available at: www.parliament.qld.gov.au

Legislative Standards Bill 1992 (Qld) Explanatory Notes 2, available at: https://documents.parliament.qld.gov.au/tableoffice/tabledpapers/1992/4692T1706.pdf

'Letters Patent Altering the Western Boundary of Queensland 1862 (UK)' Museum of Australian Democracy: Documenting a Democracy, 2011, accessed 26 July 2021, https://www.foundingdocs.gov.au

'Letters Patent Erecting Colony of Queensland 6 June 1859', Museum of Australian Democracy: Documenting a Democracy, 2011, accessed 26 July 2021, https://www.foundingdocs.gov.au

New South Wales Legislative Council Votes and Proceedings of the Legislative Council 1 May 1851 31-2, available at: https://www.parliament.nsw.gov.au/hansard/pages/first-council.aspx#

'Order-in-Council establishing Representative Government in Queensland 6 June 1859 (UK)', Museum of Australian Democracy: Documenting a Democracy, 2011, accessed 26 July 2021, https://www.foundingdocs.gov.au/

Queensland Constitution Bill 2001, Explanatory Notes 34 available at: https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2001-755

Queensland Parliamentary Debates [Hansard], available at: www.parliament.qld.gov.au

Queensland Parliamentary Debates [Hansard] 20 August 1968, available at: www.parliament.qld.gov.au

Queensland Parliamentary Debates Legislative Assembly, 26 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice) , available at: www.parliament.qld.gov.au

Record of the Proceedings of the Queensland Parliament, Legislative Assembly, extracted from the third-party account as published in the Moreton Bay Courier, 4 July 1860, accessed 26 July 2021, https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates/dates/1860

Record of the Proceedings of the Queensland Parliament, Legislative Assembly, 28 August 1860, …Extracted from the third party account as published in the Moreton Bay Courier 29 August

1860, available at: https://www.parliament.qld.gov.au/documents/hansard/1860/1860_08_28_A.pdf

Record of the Proceedings of the Queensland Parliament, Legislative Assembly 29 May 1860, available at: www.parliament.qld.gov.au

Record of the Proceedings of the Queensland Parliament, Legislative Council, 29 May 1860, extracted from the third-party account as published in the Moreton Bay Courier, 31 May 1860, available at: https://www.parliament.qld.gov.au/work-of-assembly/hansard

Secret Instructions to Lieutenant Cook 30 July 1768 (UK)' Museum of Australian Democracy: Documenting a Democracy, 2011, accessed 26 July 2021, https://www.foundingdocs.gov.au/

Supplement to the Moreton Bay Courier "Moreton Bay Public Debt" The Moreton Bay Courier, 1 December 1857