HUMAN DIGNITY AND CONSTITUTIONAL SPATIAL THEORY: TOWARDS AN AUSTRALIAN FRAMEWORK FOR THE RESOLUTION OF CONFLICTS IN EQUALITY RIGHTS AND RELIGIOUS LIBERTIES CLAIMS

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Declaration

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

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Abstract

This thesis seeks to resolve a particular problem in the Australian human rights regime—the conflict between the legal right to equal treatment and the conscientious claim to a right to refuse equal treatment. A right may be claimed to discriminate in respect of protected attributes in exception to the legal right to equality.

The problem arises when vendors of goods or services claim that as a manifestation of their religious liberty, they have the right to refuse to deal with customers who possess a protected attribute because to do so would offend their conscientiously-held objections in relation to that attribute. Whether and how such a right should be granted in diminution of the right to equal treatment thus creates a problem.

Despite legislation and litigation seeking some form of balance between liberty and equality, the problem remains unresolved and appears incapable of resolution. The only solution suggested to date has been the creation of further exceptions and *ad hoc* exemptions to equality laws permitting discrimination in cases where the conscience is impinged. An ideal solution to the problem should be guided by sufficiently clear principles that avoids the need to call upon the legislature for amendments to cater for new categories of conscientious objection or for the courts to resolve ongoing interpretational disputes. Solutions that require either ongoing legislative amendment or judicial intervention are unlikely to provide an efficient, durable, workable solution to the problem.

Can religious freedom be protected in Australia without the need for the continual creation of conscientious exceptions to equality laws? And, if so, under what theoretical framework? The answer to the first question is 'yes'. In answer to the second, a theoretical framework is to be found in 'constitutional spatial theory', the elements of which are outlined in the thesis. The principal element, human dignity, is all but completely absent in the Australian regime. This thesis argues that the need to provide for ongoing exceptions and exemptions can be overcome. Introducing a concept of 'constitutional space' would provide the missing principled rationale by limitation of rights and freedoms to their allocated spaces, avoiding encroachment upon other rights. It would also break the current mendicant cycle of advocacy, begging for a place for religious freedom in the current paradigm of exemptions.

The resolution is presented in four stages to produce a novel system for dealing with human rights in Australia and resolving the conflict identified in respect of religious freedom:

1. The first stage is the formulation of a hypothesis that there can be a theoretical framework, not previously applied to the problem in Australia, involving the constitutional spatial theory and the principle of human dignity, which can be tested in three ways.
2. The second stage is the first test of the hypothesis—namely, whether such a theory can be formulated.
3. The third stage is the second test of the hypothesis—namely, whether the theory can embrace human dignity as a part of its resolution of the problem.
4. The fourth stage is the third test of the hypothesis—namely, whether the theory, embracing human dignity, can provide, first, a constitutional space for religious freedom and, secondly, a durable solution to the problem without creating exceptions and *ad hoc* exemptions to equality laws for conscience.

The thesis presents a novel framework. That framework, first, enshrines human dignity as the dominant and guiding principle; secondly, it guarantees rights by a constitutionally entrenched bill of rights, creating a new constitutional space for religious freedom; and thirdly, it finally resolves the clash of discrimination and equality by the invocation of the Hohfeldian rights theory.

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Chapter 1. Towards a constitutional spatial theoretical resolution of conflicts in equality rights and religious liberties claims

Part A: Introduction

1. The problem of conflict in the case of the 'conscientious vendor'

A conflict arises when a vendor of goods and services who holds a religious belief act on those beliefs to deny that service to a consumer possessing a protected attribute and who, therefore, should enjoy a right to equal treatment under a relevant equality law. A dispute arises when the consumer's right to equal treatment[1] is challenged by the vendor who claims a right[2] to manifest

[1] Federal anti-discrimination laws granting rights of equal treatment in respect of protected attributes are in the following statutes: *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth). The federal regime is administered by Australian Human Right Commission, established under the *Australian Human Rights Commission Act 1986* (Cth). State and territory anti-discrimination laws are administered by cognate commissions. Statutes granting rights of equal treatment in respect of protected attributes found are the following: Australian Capital Territory—*Discrimination Act 1991* (ACT); New South Wales—*Anti-Discrimination Act 1977 (NSW)*; Northern Territory—*Anti-Discrimination Act* (NT); Queensland—*Anti-Discrimination Act 1991 (Qld)*; South Australia—*Equal Opportunity Act 1984* (SA); Tasmania—*Anti-Discrimination Act 1998* (Tas); Victoria—*Equal Opportunity Act 2010* (Vic) and *Racial and Religious Tolerance Act 2001 (Vic);* and Western Australia—*Equal Opportunity Act 1984* (WA). For a description of the regime under these statutes, see Expert Panel into Religious Freedom, *Religious Freedom Review: Report of the Expert Panel* (Commonwealth of Australia, 2018) 36–40 and 128 ('Ruddock Report'). At 128 there appears a tabular summary in Table C1 <*https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf*>.

[2] Examples of cases in which religious liberty has been invoked as a defence to a claim of discriminatory treatment and are typical of the conscientious vendor case include *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, upheld on appeal at [2013] UKSC 73; *Elane Photography v Willock* 309, P3d 53 (Sup Ct NM, 2013); *State of Washington v Arlene's Flowers Inc and Ingersoll* and *Freed v Arlene's Flowers Inc*; *In the Matter of Klein dba Sweetcakes by Melissa* (Sup Ct Wash, Docket no. 19-333, 2 July 2015, 2015) slip op; *Christian Youth Camps Limited v Cobaw Community Health Service Limited* (2014) 308 ALR 615 (Victorian Court of Appeal) ('*Christian Youth Camps*'). For a discussion the so-called 'balancing clauses' which are a feature of the Australian and other equality law regimes, see Neil Foster, 'Freedom of Religion and Balancing

religious belief by a refusal to deal with that consumer.[3] This thesis will refer to this type of dispute as the 'conscientious vendor' case. The conscientious vendor case exemplifies the wider issue of conflict between equality and freedom to manifest religious belief. Of course, a vendor's conscience not need to be religiously informed for an objection to arise. There is a much wider issue as to the circumstances in which 'conscience' should be protected by exemptions from obedience to the law. For current purposes, the conscience that gives rise to the problem to be solved is one that is informed by a particular religious belief. The particular belief is that the vendor ought not to facilitate enjoyment of the equality right. To do so would offend a religious precept. Reference to 'conscience' throughout the thesis has this type of religiously informed conscience in mind as the one that gives rise to the problem to be solved.

The refusal to deal in the conscientious vendor case is discrimination in breach of the relevant equality right. That is so unless the vendor can demonstrate that the manifestation of belief falls within an exception to or exemption from that law.[4] Typically, the vendor will seek to justify the refusal to supply goods or services by claiming that supply would thus offend the vendor's conscience. Supply, it is claimed, would support or promote an activity that celebrates the protected characteristic.[5] There is, therefore, an apparently insoluble dilemma. The right of refusal to deal and the right to equal treatment in commerce cannot coexist. One claim must yield and the other prevail. All such cases raise the question: in which circumstances, if any, should the conscience justify discrimination? That question has, to date, received no satisfactory answer.

2. A proposed solution.

This thesis proposes a novel solution to the conscientious vendor case. The proposal here circumvents the need for further exceptions and *ad hoc* exemptions to equality laws. Permitting conscientious discrimination in a wider range of cases[6] only perpetuates the likelihood of disputes

Clauses in Discrimination Legislation', (2016) 5 *Oxford Journal of Law and Religion* 385–430. See also Russell Sandberg and Norman Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 *Cambridge Law Journal* 302–12 and Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) 117. For a critical examination of the equality law Australian regime, see Michael Quinlan, 'An Unholy Patchwork Quilt: The Inadequacy of Protections of Freedom of Religion in Australia' in Iain T Benson, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius?* (Shepherd Street Press, 2019) 40–71. For an argument for the extension of balancing clause protection to conscientious vendors generally, see Alex Deagon, 'Religious Schools, Religious Vendors and refusing services after Ruddock: Diversity or Discrimination' (2019) 93 ALJ 766.

[3] See Deagon, 'Religious Schools, Religious Vendors' (n 2) 766–77 and Foster, 'Freedom of Religion and Balancing Clauses' (n 2) 5 *Oxford Journal of Law and Religion* 385–430.

[4] Ibid.

[5] See cases cited at n 2; Deagon, 'Religious Schools, Religious Vendors' (n 2).

[6] See Deagon, 'Religious Schools, Religious Vendors' (n 2) 766–777 and Foster, 'Freedom of Religion and Balancing Clauses' (n 2).

and the diminution of equality. It requires either ongoing legislative amendment or continued judicial oversight. It is not an efficient, durable, or workable solution to the problem. An ideal solution to the problem would be guided by clear principle that avoids the need to call for amendments to cater for new categories of conscientious objection or for the courts to resolve ongoing interpretational disputes. Additionally, if the proposed principled regime were to be implemented, it would provide the benefits of consistency and clarity. As consistency and clarity of principle become commonplace, fewer disputes should arise.

The question is, then, whether religious freedom can be protected in Australia without the need for the continual creation of conscientious exceptions to equality laws? And, if so, under what alternative theoretical framework? The answer this thesis gives to the first question is 'yes'. As to the second question regarding an alternative, the thesis proposes a new theoretical framework. That framework is found in 'constitutional spatial theory'. Human dignity is the principal element of the theory. Dignity is all but absent from the current Australian regime. It will be argued in relation to religious freedom that the current human rights regime, without any unifying organising principle, such as human dignity, relies upon a piecemeal and unprincipled model of exception.

Instead, I will argue, the need to provide for ongoing exceptions and exemptions can be met by providing a defined constitutional space within which religious freedom can reside under Australian constitutional arrangements. Thus, the solution proffered is, first, to provide a framework under which rights can be enjoyed with a minimum of ongoing legislative or judicial maintenance, enshrining human dignity as its organising principle; and, secondly, under that framework, to provide a dedicated constitutional space for religious freedom.

3. Presentation of the proposed solution in this thesis.

The new theoretical framework under constitutional spatial theory allocates 'space' to rights and freedoms within the Australian constitutional structure. 'Space', as explained in greater detail below, is a geometric metaphor to describe the places where political, legal and constitutional events occur. The new framework would provide 'spaces' both ensure the preservation and protection of fundamental rights and freedoms and limit the circumstances in which rights claims collide. This resolution of the problem is presented in four stages in this thesis.

1. The first stage is to formulate a hypothesis: there can be a novel theoretical framework – constitutional spatial theory—with human dignity as its guiding principle, which can be tested in three ways.

2. The second stage is the first test of the hypothesis: namely, whether such a theory could resolve the problem of the case of the conscientious vendor.

3. The third stage is the second test of the hypothesis: namely, whether the theory could embrace human dignity as its guiding principle and resolve the problem.

4. The fourth stage is the third test of the hypothesis: whether the novel theoretical framework, guided by human dignity, can provide, first, a constitutional space for religious freedom and, secondly, a durable solution to the problem raised by the case of the conscientious vendor, without creating exceptions and *ad hoc* exemptions for conscience to equality laws.

Before consideration of these four stages, this chapter provides explanation of 'constitutional space' and the associated theory; and why religious freedom, as opposed to any other fundamental right, has been chosen to test the theory. The chapter then considers the respective stages mentioned above. Providing this overview will allow the reader to appreciate the argument that the problem of conflict in the conscientious vendor case, under this framework, could find its solution.

Part B: Constitutional space and spatial theory

Constitutional spatial theory has been devised by relating together the concepts of 'constitutional space'[7] and 'human dignity',[8] with specific consideration being given to the issue of the religious conscience.[9] By the process of staged hypothetical testing outlined in the introduction to this

[7] For earlier examples of 'constitutional space' as a metaphor, see: Allan Erbsen, 'Constitutional Spaces' (2011) 95 *Minnesota Law Review* 1168; Laurence H Tribe, 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics' (1989) 103(1) *Harvard Law Review* 1; Kent McNeil, 'Envisioning Constitutional Space for Aboriginal Governments' (1993) 19(1) *Queen's Law Journal* 95. For an understanding of its current use in the context of constitutional spatial theory, see Neville Rochow QC 'Towards a Constitutional Spatial Theory for the Resolution of Conflicts in Rights and Liberties Claims' (2021) 29 *Michigan State International Law Review* 469. See also: Paul T Babie, Neville G Rochow QC, and Brett G Scharffs, 'Creating and Conserving Constitutional Space', in Paul T Babie, Neville G Rochow QC and Brett G Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020) 1–18; Carolyn Evans & Cate Read, 'Religious Freedom as an Element of the Human Rights Framework' in Paul T Babie, Neville G Rochow QC and Brett G Scharffs, loc. cit. 20–39; Brett G Scharffs, 'Conceptualising Reasonable Accommodation', in Paul T Babie, Neville G Rochow QC and Brett G Scharffs, loc. cit. 164–83, 167–8; Brett G Scharffs and Brock Mason, 'Constitutional Cultures Creating Constitutional Space' *Talk About: Law & Religion* (Blog Post, 21 July 2020) <*https://talkabout.iclrs.org/2020/07/21/constitutional-cultures-creating-constitutional-space/*>.

[8] Examples of the expanding modern literature on dignity include: Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015); Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012); Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (Profile Books, 2018); Donna Hicks, *Dignity: Its Essential Role in Resolving Conflict* (Yale University Press, 2011); Jeremy Waldron *Dignity, Rank, & Rights* (Oxford University Press 2012); George Kateb, *Human Dignity* (Oxford University Press, 2011); and Nicholas Aroney, 'The Rise and Fall of Human Dignity' (27 July 2020) forthcoming *Brigham Young University Law Review* <*https://ssrn.com/abstract=3661016*> or <*http://dx.doi.org/10.2139/ssrn.3661016*>.

[9] The most relevant consideration of the religiously informed conscience for the case of the conscientious vendor is Deagon, 'Religious Schools, Religious Vendors' (n 2).

chapter, it will be argued that the theoretical framework could and, indeed, should be adopted as a substitute human rights regime under Australian constitutional arrangements. If adopted, Australian human rights would, for the first time, be based entirely in human dignity, with all rights and freedoms deriving their legitimacy from it as the organising principle.

The theory, referred to throughout as 'constitutional spatial theory' or simply as 'spatial theory', has at its centre a theoretical structure in what this thesis calls 'constitutional space'. In keeping with time-honoured tradition of the use of metaphors and similes to explain theoretical constructs, spatial theory employs a metaphor to describe its core juristic concept. The adjective 'constitutional' bears its ordinary politico-legal meaning and requires no explanation. 'Space' is used throughout the thesis in the same way as Immanuel Kant employs it in his *Critique of Pure Reason*: a geometric dimension in which abstractions exist *a priori* and in which abstract events occur.[10] 'Constitutional spaces' are thus metaphorical geometric dimensions in which jurisprudential and political abstractions exist and where the legal and constitutional events involving them occur; places in which constitutional activities relevant to norms allocated to particular spaces are undertaken.

The theory posits that constitutional spaces already exist for the operation of federal, state, and territory governments through their respective three arms: the legislature, the executive, and the judiciary. It further posits that the creation of new spaces for fundamental human rights is possible under current Australian constitutional arrangements. There is, for currently relevant purposes, capacity to include a space dedicated to freedom of religion as a fundamental human right.

Spatial theory explains how, when, and why any new space or spaces should be created. It also describes how, through the prism of human dignity, rights and freedoms are allocated to their peculiar spaces; and how collisions of rights and freedoms are avoided or, at least, minimised; and how, when conflicts do arise, they can be resolved using devices and principles supplied by the theory.

As with the employment of any metaphor that is to lend itself as the name of a theory, thought has been given to the appropriateness of 'constitutional space'.[11] Employed, as it is here, as a part of Australian human rights discourse, 'constitutional spatial theory' is used to focus attention to the purpose of the theory and to facilitate exposition and elucidate contextual usage. The adjective

[10] Immanuel Kant, *Critique of Pure Reason*, tr Paul Guyer and Allen W Wood (Cambridge University Press, sixth printing, 2019) 157–62.

[11] See Foster, 'Freedom of Religion and Balancing Clauses' (n 2) 385–430 for a discussion of the metaphor 'balancing clause' and its application.

'constitutional' is used to distinguish the theoretical framework from the current regime. It is not suggested that the current regime is *unconstitutional*; rather, 'constitutional' is used to emphasise that the new framework would be constitutionally entrenched, incapable of variation or removal by simple Acts of Parliament.

When, as here, a metaphor is used to describe a new theory, care must be taken to avoid any concealment or distortion by its invocation.[12] The metaphor 'constitutional space' is used in the eponymous theory in ways that, it is hoped, will explicate and elucidate rather than obfuscate. There is no intention here, as Steven Smith would describe it, to 'smuggle' into the related rights debate some undisclosed objective or undeclared motive.[13] 'Constitutional space' is, hopefully, presented in the present study with sufficient clarity to allay any such concern. The endeavour is to present relevant concepts and principles so that the theory can be considered for adoption as a part of a law reform process—provided, of course, that the theory survives the hypothetical testing and is found to offer the solution it claims.

To give one example of where the metaphor 'constitutional space' might be accused of being a stalking horse for an undeclared object, the theory depends critically upon the instantiation of a constitutionally entrenched bill of rights. Use of the metaphor 'constitutional space' is not intended to divert attention from what, experience teaches, is a politically fraught issue in Australia.[14] This thesis recognises the resistance to a bill of rights. Moreover, it provides way in which to deal head-on with the anticipated political opposition. Strong opposition to a bill of rights is a matter with which the theory recognises it will have to contend.[15] It does not seek to avoid this by any obfuscation. The theory faces up to the issue in Chapter 2 with detail of the process needed to overcome the anticipated political and legal hurdles.

Neither is spatial theory, as some might suspect, an elaborate scheme to suppress religious expression in the public square. Even if in particular cases it were to have that effect, it is not an undisclosed purpose. There should be no doubt that the difficulty in proving an exception or exemption under the new regime, as discussed in Chapter 4, will have a chilling effect on the conscientious vendors' preparedness to bring disputes over discrimination to court. And there will

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[12] Ibid at 386–7, for the critical examination of the appropriateness of the metaphor 'balancing', citing observations from former New South Wales Chief Justice in James Spigelman, 'The Forgotten Freedom: Freedom from Fear' (2010) 59 *International and Comparative Law Quarterly* 1, 22–8.

[13] Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010) 26–39.

[14] Paul Babie and Neville Rochow, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) 2010(3) *Brigham Young University Law Review* 821–58. See also Paul Babie and Neville Rochow 'Protecting Religious Freedom under Bills of Rights' in Babie and Rochow (eds) *Freedom of Religion under Bills of Rights* (n 2) 1–28.

[15] See for example Julian Leeser & Ryan Haddrick (eds) *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (The Robert Menzies Institute, 2009).

be outcomes in disputes resolved under the auspices of the framework with which some people would disagree, and which they may well regard as curtailing public religious manifestation. Be that as it may, those outcomes that limit the occasions on which religious discrimination is permitted to cut across equality rights are no more than what has already been anticipated by various human rights documents in which religious manifestation is a conditional right and may be curtailed '[when] necessary to protect … the fundamental rights and freedoms of others'.[16]

'Constitutional spatial theory' is a self-contained, closed, constitutional theoretical system. For purpose of hypothetical testing, the emphasis is upon religious freedom and how the theory could assist to avoid or, at least, minimise its conflict with equality rights. And, despite the myriad circumstances in which these conflicts can occur, the thesis restricts its focus to the conscientious vendor. There is a simple reason for choosing the examples used in the exposition of the theory. If spatial theory is able to resolve this most difficult of tests—the conflict between religious freedom and equality—and in the instance of the most difficult of issues—offence to the religiously informed conscience—then, it is argued, it is reasonable to accept that spatial theory is a sufficiently robust and rigorous system to meet the balance of challenges that might arise in Australian human rights generally.

To recapitulate, if the theory passes the series of hypothetical tests set in succeeding chapters, it is a theory that could be used to replace the existing patchwork Australian human rights legislative regime.[17] In its place would stand a new unified constitutional framework with human dignity as its organising principle.

Part C: Why religious freedom?

Spatial theory has the capacity to resolve more conflicts than those between conscientious vendors and their consumers who have protected characteristics. The theory has the potential to replace all aspects of the Australian human rights regime because it has at its centre a bill of rights and the organising principle of human dignity. Indeed, human dignity is its hallmark. With dignity well-defined and its role properly explained, as this thesis will seek to do, it should attract any law reform agency to re-engage with human rights generally.

The choice of religious freedom as the human right upon which to test constitutional spatial theory is straightforward. Religious freedom has become a focus since the reform of marriage laws permitted same-sex marriage. This marriage reform has given rise to the case of the conscientious

[16] *International Covenant on Civil and Political Rights*, adopted and opened for signature 16 December 1966, 999 UNTS (entered into force 23 March 1976), art 18(3) ('ICCPR').
[17] Quinlan, 'An Unholy Patchwork Quilt' (n 2).

vendor. There is already an agenda for reform set by the report to the federal government on its current state in Australia[18] and by the draft legislation that formed part of the Australian Government's response to that report, with the passage of legislation intended in later 2021 or early 2022.[19] Moreover, if a theory can operate to minimise disputed claims in relation to religious freedom, it could be argued that the same theory is likely to work equally well in relation to other fundamental human rights.

The litmus-test nature of religious freedom as a fundamental right was captured in the oft-cited dictum from the payroll tax case, *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic).*[20] In that case, religious freedom was characterised as 'the paradigm freedom of conscience … the essence of a free society'.

It therefore seems a legitimate ambition for the thesis to test the proposed framework on religious freedom, with focus being placed upon the case of the religious vendor refusing to deal with a consumer who is protected in respect of one of their personal attributes to which the vendor has a conscientious objection.

Part D: Why the case of the 'conscientious vendor'?

Since 2017, when the definition of marriage in Australia was extended to include same-sex marriage,[21] it has come to be regarded as the new challenge confronting freedom of religion. Equality laws forbid discrimination on the basis of a person's relationship or marital status.[22] But, despite the expanded definition of marriage being legally recognised, people with religious beliefs who remain opposed to same-sex marriage seek to maintain and express their opposition; and they seek to do so in the public square, including when they are engaged in trade and commerce.[23]

The *locus classicus* of the 'conscientious vendor' case is *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* decided by the Supreme Court of the United States of America.[24] At the time of the

[18] Ruddock Report (n 1) 1–7.
[19] Attorney-General's Department, 'Australian Government Response to the Religious Freedom Review' (Media Release, 13 December 2018) <*https://www.ag.gov.au/rights-and-protections/publications/australian-government-response-religious-freedom-review*>. Regarding new plans for legislation, see Richard Ferguson, 'Michaelia Cash rules out broad, 'constitutionally barred' religious freedoms law' 2 September 2021, *The Australian* <https://www.theaustralian.com.au/nation/michaelia-cash-rules-out-broad-constitutionally-barred-religious-freedoms-law/news-story/db1ad0952e53bc5f3ed927af414b2c24> .
[20] (1983) 154 CLR 120 at [6] as per Mason ACJ and Brennan J (as they both then were).
[21] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).
[22] See, as an example, the federal prohibition in *Sex Discrimination Act 1984* (Cth) s 6.
[23] Deagon, 'Religious Schools, Religious Vendors' (n 2).
[24] *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 584 U.S. ___ (2018) ('*Masterpiece Cakeshop*').

events in the case, 2012, same-sex marriage had not been recognised in the state of Colorado[25] and was not recognised as legal nationally in the United States until 2015 by the decision of the Supreme Court in *Obergefell v Hodges*.[26] Jack Phillips, the owner of the Masterpiece business, was a devout Christian who believed that the Bible forbade same-sex marriage. He was, therefore, fundamentally and conscientiously opposed to it. The refusal of Philips had four elements, which appear recurrently in conscientious vendor cases: first, a shopfront meeting between the vendor, in this instance an artisan baker, and the prospective customers; secondly, the vendor learns, possibly by chance, that the product is to be used to celebrate a same-sex wedding; thirdly, dealing with the consumer in the goods or services is refused; and, fourthly, refusal to deal is sought to be justified by the vendor by reference to a religiously informed conscience that prevents promotion or support of same-sex marriage.

Although the same-sex wedding has been a recurrent theme in clashes between religious liberty and equality rights,[27] it is by no means the only situation in which a religiously conscientious right to discriminate might be claimed.[28] Other instances in which the religiously informed conscience claims can play a pivotal role include refusal of accommodation to same-sex couples,[29] supply of educational services on condition of heteronormativity,[30] refusals of employment,[31] and the practice of so-called 'conversion therapies' that encourage heteronormative lifestyles as a part of religious conversion.[32]

The precise manner in which opponents of same-sex marriage seek to maintain and express their disapproval is still developing. But since the principal manner in which such freedoms have been granted has been to create a statutory enclave of religious exemption, opponents of same-sex marriage rely heavily upon advocacy with legislatures and policymakers to create new exceptions and exemptions.[33]

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[25] Michael Karlik, 'Colorado Supreme Court Recognizes Same-sex Marriages Existed Prior to 2015 U.S. Legalization' *The Gazette* (11 January 2021, updated 9 February 2021) <https://gazette.com/colorado_politics/colorado-supreme-court-recognizes-same-sex-marriages-existed-prior-to-2015-u-s-legalization/article_79e4d866-8688-52c0-8011-60888a3a2773.html>.

[26] *Obergefell v Hodges* 576 US 644 (2015).

[27] *Masterpiece Cakeshop* (n 24). See also *Elane Photography v Willock* 309, P3d 53 (Sup Ct NM, 2013); *State of Washington v Arlene's Flowers Inc and Ingersoll* and *Freed v Arlene's Flowers Inc*; *In the Matter of Klein dba Sweetcakes by Melissa* (Sup Ct Wash, Docket no. 19-333, 2 July 2015, 2015) slip op; and see above n 2 for the discussion by Alex Deagon.

[28] See as examples, *Bull & Bull v Hall & Preddy* [2013] UKSC 73; and *Greater Glasgow Health Board v. Doogan and Wood* [2014] UKSC 68; See also Deagon, 'Religious Schools, Religious Vendors' (n 2) 766.

[29] *Bull & Bull v Hall & Preddy* [2013] UKSC 73.

[30] *Trinity Western University v. Law Society of Upper Canada* [2018] 2 SCR 453.

[31] *Bostock v Clayton County* 590 U.S. ___ (more) 140 S. Ct. 1731 (2020.

[32] Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic) and the *Equal Opportunity Act 2010* (Vic).

[33] Alex Deagon, 'Religious Schools, Religious Vendors' (n 2).

The problem is that the enlargement of existing exceptions and creation of new exceptions to permit an increase in discrimination against those that the law is self-defeating for any equality regime.[34] Advocacy with government for each new exception is also inefficient and cumbersome as a method of protecting religious freedom. That is where spatial theory suggests instead the creation of the space for religious freedom, including freedom of expression. Instead of ever-expanding exceptions to equality laws, an affirmative right to religious liberty is provided in an allocated space under the theory.

The case of the conscientious vendor raises squarely the question of why religious belief should ever provide a basis for exemptions from equality law at all; and, if there are to be exceptions, to point out where limits on those exceptions ought to be properly placed. Conscientious vendors raise a number of other issues in the area of freedom to contract and in relation to discrimination when dealing with one's own property.

The notions of contract and property require some elaboration. The popular notion in the common law of contract and property is that all are at liberty to contract with whom they choose.[35] However, no proprietary right can be absolute. While the popular notion is one of freedom to exploit and dispose of their property as they see fit,[36] one must always have regard to precisely what rights inhere in proprietorship. There are always some limitations on the manner in which one can deal, although they will for the most part be of no concern in ordinary trade and commerce. Equality laws preventing certain types of discrimination are only one limitation among many. That is so *unless* the law deems the transaction economically exceptional[37] or one that should be restricted in public policy.[38] Both common law and statute have developed limited sets of exceptions to that default position.[39]

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[34] Julian Rivers, 'Is Religious Freedom Under Threat from British Equality Laws?' (2019) 33 *Studies in Christian Ethics* 179, 179–81.

[35] J W Carter et al *Contract Law in Australia* (Butterworths, 5th ed, 2007) 8–9, [1-08]– [1-09].

[36] Brendan Grigg, 'Fundamental Concepts for Australian Real Property Law: Tenure, Estates, Possession and Adverse Possession', in Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge, 2016) 49–50. See also, for example, *Fejo v Northern Territory* (1998) 195 CLR 96 (deciding whether grant of fee simple extinguishes native title).

[37] See generally Brenda Marshall and Rachael Mulheron, 'Access to Essential Facilities Under Section 36 of the Commerce Act 1986: Lessons from Australian Competition Law' (2003) 248(9) *Canterbury Law Review* 248–67.

[38] Percy H Winfield 'Public Policy in the English Common Law' (November 1928) 42(1) *Harvard Law Review* 76, 91–100.

[39] Ibid. See also Marshall and Mulheron, 'Access to Essential Facilities' (n 37). For the Australian context and development of the law under s 46 of the then *Trade Practices Act 1974* (Cth) see *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at [15]– [16] ('*Queensland Wire Industries*'); and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 ('*Melway Publishing*'). For development of the essential facility doctrine in the United States, see *Sherman Antitrust Act 1890* (U.S.) s 2, and the Supreme Court decisions in *Aspen Skiing Co v Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985). and *Verizon Communications Inc v Law Offices of Curtis v. Trinko* (2004) 540 U.S. 398.

The word 'discrimination' also requires some elaboration. It can, of course, have negative connotations, and its use may suggest some attempt at denigration of the actor who discriminates. Here it is not intended that the term be used pejoratively. There is, however, no other term that can be used consistently with the statutory vocabulary. Discrimination occurs when any choice is made, including when the decision is made not to deal. In general, suppliers of goods or services or property owners are free to 'discriminate' among the parties with whom they will transact. One can usually deal or refuse to deal without ever having to justify the choice—unless it is a transaction that is economically exceptional or contrary to public policy. Or, it is a transaction caught within the meanings of the statutory vocabulary found in anti-discrimination law.

To the transactions regulated by public policy should be added those that are regulated by equality laws. An exception to the contractual norm is the requirement under anti-discrimination and equality laws to deal equally with persons possessed of protected characteristics.[40] Unlike other exceptions to the default position, refusals to deal in such cases raise issues of religious liberty and conscience. A law prohibiting discrimination has, as a matter of policy, elevated equality of treatment of a protected class of people over various freedoms, including those under property and contract law. Conscientious vendors seek to create an exception to the mandated equality of treatment to restore what they assert is a lost religious freedom and to discriminate in respect of an attribute possessed by the protected class.

The type of 'discrimination' under consideration,[41] conscientious vendor claims,[42] is justified by the religious conscience.[43] Opposing that claim is the legislated community standard of the right to equal treatment, by which supply without discrimination should be legally guaranteed.[44] On both sides of the conflict, it could also be claimed that the human dignity of the actor will be offended if the other claim prevails. Thus, there arises an apparently insoluble problem that does not admit of an economic or policy solution: how can there be a right to discriminate under a law prohibiting discrimination without the prohibition being diminished?

These are additional considerations beyond the ordinary economic and policy principles that dominate other refusals to deal. There are, at least, eleven considerations that support the adoption of the conscientious vendor as a principal focus for study as representative of the wider problem.

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[40] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 1st ed, 2017) 34–6. See also *Christian Youth Camps* (n 2) and *OW & OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606.

[41] *Masterpiece Cakeshop* (n 24).

[42] See Deagon, 'Religious Schools, Religious Vendors' (n 2).

[43] Ibid 770–4.

[44] See above n 1.

1. First, commercial refusals to deal raise all of the typical issues that characterise the general problem: breach of the statutory equality right; a contest as to whether the equality right or the liberty claim should prevail; and the claim that the religiously informed conscience should be an exculpatory justification for the statutory breach.

2. Secondly, in such a case, the conflict between liberty claims and the equality right presents a clear, direct, and factually uncomplicated binary. There can be only one of two outcomes;[45] one or the other claim must prevail.

3. Thirdly, consideration of 'human dignity' as a factor in the resolution of competing rights claims is easier in the conscientious vendor case because of its factual simplicity.

4. Focusing upon the individual trader, the effect, if any, of 'human dignity' is better analysed in the absence of questions regarding corporations or other entities endowed with the legal fiction of 'personality' and their entitlement, or otherwise, to claim the benefits of *human rights* and the status of *human dignity*.

5. The absence of these distractions is useful because of the important role that human dignity now plays in philosophical, theological, constitutional, and legal discourses on how best to frame human rights regimes.

6. Human dignity operates as the distinguishing feature of modern international and domestic human rights regimes from those that merely identify or catalogue rights.[46]

7. On the one hand, 'dignity', where it is invoked as an organising principle, distinguishes modern regimes that can best guarantee fundamental human rights. All rights and freedoms are interconnected through the principle of dignity. Human dignity provides a seamless interconnectivity of rights and freedoms. It thus enables a holistic approach to a case of conflict. Today, it is hard to dispute that this interconnection is critical to the proper operation of any human rights regime worthy of the name.

8. On the other hand, there are mechanistic systems comprising bare 'constitutional' or 'legal' rights. In this second category, exemplified by the Australian regime, each separate right or freedom is conferred but then left to operate siloed from sibling rights. Where the nominated rights and freedoms are borrowed from international human rights instruments, as is also the

[45] See Deagon, 'Religious Schools, Religious Vendors' (n 2).

[46] Oliver Sensen, 'Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms', *Dignity Genealogy* (Blog Post, 13 September 2016) <*https://dignitygenealogy.wordpress.com/2016/09/13/sintese-do-texto-human-dignity-in-historical-perspective-the-contemporary-and-traditional-paradigms-de-oliver-sensen/*>.

case in Australia, their isolation runs contrary to the intention of the sources from which they derive.

8.1. In those instruments, all rights and freedoms are expressed to be united in human dignity. Rights and liberties in Australia are instead selected and allocated into separate statutes, but never connected.[47]

8.2. Even in an instrument such as the American Bill of Rights—which, despite all of its amendments, has never espoused dignity as a unifying or organising principle—decisions by courts on one right or freedom are routinely made without consideration of other rights or freedoms or the impact that the decision might have in dignitarian terms.

8.3. Instead of literal applications of the text of the constitution or statute, resulting in technical mechanistic solutions, under dignity the judicial consideration has an eye to just outcomes based in principle. In the absence of human dignity, a constitutional or statutory normative expression conferring a right or freedom can be textually parsed for meaning without reference to any overarching principle or sibling rights and freedoms.

9. The conscientious vendor case can be used to demonstrate how a holistic human rights regime with dignity as its cornerstone may be preferred over the isolated rights approach under the Australian and American human rights regimes. As Joseph Singer has demonstrated, the conscientious vendor case also provides a useful model upon which to examine the rights theory developed by Wesley Hohfeld.[48] The two parties' claims to rights and obligations in contract and property and under equality laws give rise to a matrix of potential legal relationships, described by Hohfeld[49] as 'jural relations' to which, if validly claimed, the state will lend its coercive force or, if invalid, from which the state will withhold its power to enforce.

10. Next, the conscientious vendor is a specific religious freedom category that was recently considered[50] and rejected[51] as a matter for reform under equality laws. This decision to exclude the category from a package of proposed religious freedom reforms has been criticised as both inconsistent and the result of a failure to understand the implications of same-sex marriage upon a religious minority who wish to manifest their faith in business by being able to refuse

[47] See Ruddock Report (n 1) 128, Table C1 <*https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf*>.
[48] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Lawbook Exchange, 2010).
[49] Ibid 5–21 and 35–64. See also Albert Kocourek, 'Plurality of Advantage and Disadvantage in Jural Relations' (1920) 19(1) *Michigan Law Review* 47–61; John M Finnis, 'Some Professional Fallacies About Rights' (1972) 377(4) *Adelaide Law Review* 377, 378–82; and Arthur L Corbin, 'Jural Relations and Their Classification' (1920–1921) 30 *Yale Law Journal* 226–38.
[50] See Deagon, 'Religious Schools, Religious Vendors' (n 2).
[51] Ibid 766–8.

supply to same-sex weddings. Those criticisms have, to date, gone unanswered. The claims made on behalf of those business operators warrant testing and are critical to answering the question posed above.

11. Finally, the dispute and its typical physical location, the shopfront, conveniently raise the discussion of contractual and proprietary rights.[52]

    11.1. In contract and property law, there are many instances in which rights to deal with other parties and to exploit property are abrogated.

    11.2. By considering rights and obligations that arise at common law and under statute, it is possible to observe, by analogy, the significance of conscience in excusing to perform legal obligations.

    11.3. Using analogies from the common law, it can be seen how flawed is the reasoning that asserts the dominance of conscience, rather than human dignity, as a guiding principle.

This last set of considerations at [11] is important. The domain of conscience in the law must be carefully contained lest every person's conscience define the extent of the law's operation. How conscience is to be accounted for is part of the problem that spatial theory endeavours to solve.

Part E: Formulation of a hypothesis regarding a theoretical framework

In order to test whether the problem of conflict generated by the conscientious vendor case can be solved by spatial theory, I propose a hypothesis to be tested. From the discussion to this point, that hypothesis is framed in the following terms:

> The problem of conflict of conscience and equality arising in the conscientious vendor case could be resolved by the replacement of the existing Australian human rights regime with a new theoretical constitutional framework that features human dignity as its organising principle.

I test the hypothesis in three ways. First, I demonstrate that the theoretical framework of constitutional space theory has the *potential* to address the problem of conflict. Secondly, I demonstrate that the framework has a sufficiently robust conception of human dignity to do the work of resolution. Thirdly, I demonstrate that with the robust conception of dignity, the framework would, if implemented, actually address the problem of conflict.

[52] Joseph William Singer, 'Religious Liberty & Public Accommodation: What Would Hohfeld Say?' (Working Paper No. 18-04, Harvard Law School, 27 December 2017) <*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091333*>.

Each successive chapter develops the argument in respect of constitutional structures, human dignity, and the religious conscience by testing the theory in respect of those elements of the hypothesis. The thesis concludes that if it is accepted that the theoretical solution proposed has passed the hypothetical tests, the theory warrants consideration as a replacement for the current Australian human rights regime. Human dignity, as defined by the theoretical framework proposed, ought to be instantiated as the organising principle under which the regime should be unified within a national bill of rights.

As to the specific problem under consideration, that of the conflict of rights that arises in the conscientious vendor case, I conclude that, based on a consistency with principle and practice seen in other departments of the law and professional ethical regimes, conscientious exceptions to equality laws ought to be rare and reserved for only the most serious of cases. While there are additional considerations beyond the ordinary economic and policy principles that dominate other refusals to deal, in the ordinary or trivial case, conscience alone ought not to disturb the equality that the law has ordained to govern the public square.

In considering the problem, I devised the theory based upon the concepts of 'constitutional space'[53] and 'human dignity',[54] and with specific consideration given to the issue of 'religious conscience',[55] each of which I treat in subsequent chapters dedicated to that purpose.[56]

Thus, if I am able to demonstrate that the hypothesis is validated, it would follow that it could be proposed as a replacement for the existing patchwork Australian human rights legislative regime.

Part F: Formulation of a theory to address the problems arising from the case of the conscientious vendor

The three central chapters of the thesis formulate a theory aimed at responding to the problem generated by the case of the conscientious vendor. The thesis answers three questions of spatial theory. Chapter 2 poses the first: whether, under Australian constitutional arrangements,

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[53] Erbsen, 'Constitutional Spaces' (n 7); Tribe, 'The Curvature of Constitutional Space' (n 7); McNeil, 'Envisioning Constitutional Space for Aboriginal Governments' (n 7); Babie et al, 'Creating and Conserving Constitutional Space' (n 7); Scharffs and Mason, 'Constitutional Cultures Creating Constitutional Space' (n 7); Scharffs 'Conceptualising Reasonable Accommodation' (n 7) 164, 167–8; Evans and Read, 'Religious Freedom as an Element of the Human Rights Framework' (n 7) 23–9. For an overview of the concept of constitutional space as presented in this and subsequent chapters, see Rochow, 'Towards a Constitutional Spatial Theory' (n 7).

[54] See for examples Barak, *Human Dignity* (n 8); Rosen, *Dignity* (n 8); Fukuyama, *Identity* (n 8); and Hicks, *Dignity* (n 8).

[55] See Deagon, 'Religious Schools, Religious Vendors' (n 2).

[56] Chapter 2 provides a complete overview of spatial theory. Chapter 3 places human dignity in the context of the theory. Chapter 4 deals with the vexed issue of conscience.

constitutional spaces can be created to house a new human rights framework, including especially a space dedicated to religious freedom.

Chapter 2 examines in greater depth the concept of constitutional space and spatial theory and whether the preliminary question of creation of additional space is possible. It introduces the essential principles of the theory, described as 'spatial principles' in this thesis. Those principles set forth the necessary conditions upon which the theory operates. At their core are rigorous constitutionalism, the status of human dignity, and the allocation of constitutional spaces to fundamental human rights, including freedom of religion.

Validation of the hypothesis depends upon ability and need to create additional spaces. As Chapter 2 explains, while, under current Australian constitutional arrangements, spaces were created at federation *for government*,[57] none was created *for the governed*[58] in respect of human rights and, more specifically, for freedom of religion.[59] Despite what might have been expected at the time,[60] the Constitution was framed without any bill of rights.[61]

The absence of a bill of rights was the result of a deliberate choice made by the founders.[62] While there are human rights provisions scattered throughout, they are random in placement and theme and not what would be expected of a modern bill of rights.[63] There is no federal constitutional space for religious freedom.[64] The provisions of s 116 of the Commonwealth Constitution have never been successfully invoked in the protection of religious freedom;[65] and since s 116 has no operation at a state level,[66] it creates no constitutional space for religious freedom. And no constitutional space has been created since federation for religious freedom.[67]

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[57] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 12–14.
[58] Ibid.
[59] Babie and Rochow, 'Feels Like Déjà Vu' (n 14) 821–58.
[60] See Sawer, *Australian Federalism in the Courts* (n 57) 12–14.
[61] Ibid.
[62] Ibid. See also Robert Size, 'The Australian Constitution and the United States' 14th Amendment' (Constitution Education Fund Governor-General's Prize Essay, 2015) 3–5 <*http://www.cefa.org.au/robert-size*>; and Robert French, Chief Justice of Australia, 'Protecting Human Rights Without a Bill of Rights' (Speech, John Marshall Law School, Chicago, 26 January 2010).
[63] Neville Rochow QC, 'Paying for Human Rights Before the Bill Comes: Towards a More Comprehensive Domestic Implementation of International Human Rights in Australia' (University of Adelaide Law School Research Paper No. 2009-04, University of Adelaide, 2009) 14–34.
[64] Paul Babie et al, *Religion and Law in Australia* (Kluwer Law International, 2015) 34–5 and 56–68. See also Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018) 156–165; Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 68–99; and Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012) 69–93.
[65] Ibid.
[66] *Grace Bible Church v Reedman* (1984) 36 SASR 376, 388.
[67] Ibid.

Chapter 2 explains how the notorious difficulty in amending the Commonwealth Constitution by referendum can be addressed through a staged process via another constitutional space created since federation, the National Cabinet, utilising the device of intergovernmental agreements.[68] Once it is demonstrated that is possible that a new space or spaces *could* be created, despite the hurdles, the chapter explains why such spaces *should* be created to solve the problem at hand. Spatial theory can thus, on a preliminary basis, offer a solution to the problem at hand. If the arguments of Chapter 2 are accepted, the theory has passed the test that the hypothesis poses *in limine*.

Part G: Dignity as a part of the spatial theoretical resolution of the problem

Chapter 3 tests whether the theory has a strong enough conception of human dignity to undertake the task asked of it. If utilised as its organising principle, a strong conception of dignity allows spatial theory to pass the second hypothetical test: that dignity could be the organising principle for the alternative Australian human rights regime under the spatial theory framework.[69]

After distinguishing the principal conceptions of human dignity, the chapter faces up to the two challenges in utilising dignity as a juridical tool. The first is the inherent ambiguity in the term 'human dignity'; the second is the potential of mistaking dignity as a *human right* rather than a *status*. Spatial theory must contain sufficient content to be engaged in the arbitral function of judging which right or freedom should prevail in the case of a conflict.

Regarding the first difficulty, Chapter 3 surveys potential ways in which 'human dignity' may be defined. The chapter explains that since dignity is a 'status', describing certain legal conditions that comprise that status, the problem of definition of 'dignity' can be overcome by providing the most robust and comprehensive description that encompasses all of its roles as a status that has an arbitral role.

The second issue is the potential for treating dignity as a human right rather than a status. This confusion can lead to the logical difficulty of infinite regress. If dignity is to be regarded as the decisive element in the allocation of rights and their priority vis-à-vis one another, it cannot count twice in the process of dispute resolution, once as a right and once as a juridical tool. This potential is illustrated when a religious libertarian conflates dignity with religious freedom. When there is a conflict of rights and freedoms, ultimately an adjudicator must permit one or the other to prevail

[68] Rochow, 'Towards a Constitutional Spatial Theory' (n 7) 502–5. See also Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63) 41–3.
[69] Neville Rochow QC and Jacqueline Rochow, 'From the Exception to the Rule: Dignity, *Clubb v Edwards* and Religious Freedom as a Right' (2020) 47(1) *University of Western Australia Law Review* 92, 107–10.

in the case at hand. While religious liberty is a fundamental human right *deriving* from human dignity, so, too, is the right to equal treatment. All the invocation of dignity could achieve when treated as a right instead of a status would be to postpone by one regress the ultimate issue to be decided—namely, which right or freedom should prevail. To avoid this conflation of status and right, and the consequence of a potential infinite regress, in Chapter 3 spatial theory adds calibration to the content of the status of dignity.

Chapter 3 develops spatial theory so that dignity has the content necessary to perform its arbitral function as a tool in deciding among competing rights. Dignity is both status and source of human rights. It is not, therefore, itself a 'right' that can be placed in competition with equality. By its standard, the applicability of both the right of religious expression and the freedom to discriminate which are in question can be assessed. Thus, dignity is enabled to act as a jurisprudential scale to weigh competing rights claims.

Part H: Spatial theory and human dignity.

Religious libertarians, in support of the conscientious vendor, assume that the religious conscience is in some way privileged over other rights and freedoms. According to this a priori assumption, subordinating religious expression to any other right or freedom violates conscience. Furthermore, because other rights and freedoms—including equality—are not based in conscience, religious freedom should in their view take priority. Thus, the claim made by those seeking to expand religious freedom can be framed in terms that would make religious liberty preeminent when a matter of conscience is involved. Religious freedom should triumph over equality. But the dualist assumption needs to be supported by principle—and, on the argument based in spatial theory, it is not.

Thus, spatial theory must not only address the assumption concerning the privileging of religious conscience, but also justify any attempt at its subordination to other rights. This must be achieved by reference to principle and comparable examples; the assumption of privilege alone is not enough. The chapter argues that spatial theory provides that principled approach.

To demonstrate how spatial theory offers a principled approach to conscience claims, the chapter draws upon existing principles, norms, and practices found in doctrinal categories of law and professional ethical systems. They serve as analogies for how dignity, under spatial theory, would deal with the religious conscience. The examples instance circumstances in which conscience, deeply held convictions, and highly valued rights are in competition with a common good. If the achievement or maintenance of that good is placed at risk by creating an exception for individual conscience to a generally applicable rule that conduces to the good, the rule supporting the more

valuable good will prevail. Maintenance of a general good, as opposed to an individual's idiosyncratic belief, should and would be of more immediately pressing legal or ethical concern.

One such good that stimulates pressing concern is human dignity. The religious conscience, compared with other individual rights and other dictates of individual conscience, is, in principle, no different than the examples considered in Chapter 4. There will, therefore, be cases—as instanced by Chapter 4—when, as a matter of dignity, conscience, religiously informed or otherwise, could and should defer to another right in order to uphold dignity as the community standard for human rights.

Chapter 4 deals with the question of conscience and demonstrates how spatial theory properly deals with the conflict that would otherwise arise. Thus, in combination, chapters 3 and 4 present a robust structure and definition of human dignity as an organising principle for Australian human rights and demonstrate how the religiously informed conscience, under spatial theory, need not generate problems of conflict.

Conclusions

Because the modelling presented in the thesis is theoretical, the possible conclusions remain tentative. Nonetheless, the theory will have been successfully tested if it is shown that at each stage it has logical integrity and, consistent with principle, solves the problem at hand. If the three stages of hypothetical testing of constitutional spatial theory are successful, then the proposed framework warrants further consideration as the replacement for a currently inadequate national human rights regime. A theory can be proposed to resolve an apparently insoluble problem. That theory is supportable by a robust conception of human dignity as its organising principle. The religious conscience does not, of itself, carry the weight of justification for refusals to deal, as thought by many.

Since the theory is new and untried, there will be areas of further research that are suggested but are beyond the scope of this thesis. The problem presented by the thesis for resolution is no different in principle, its economic character, or in the policy questions it raises from any of the other instances in which the law and ethical practice have carved out exceptions to the right to discriminate. Therefore, as I argue throughout the thesis, spatial theory and its proposed approach to the issue of conscience are preferable to what is offered by the current Australian human rights regime.

As to the specific problem under consideration, the exceptions for conscientious exceptions to equality laws will be rare if constitutional spatial theory is accepted. Beyond ordinary economic

and policy principles in relation to refusals to deal, in the ordinary or trivial case, conscience is not, of itself, sufficient justification to depart from the standard that the law ought to be obeyed.

The thesis offers a framework that allocates space and prevents rights encroaching upon one another. Conducted through the prism of dignity, the theory determines precisely whether the religious freedom right to discriminate contrary to anti-discrimination laws was allocated constitutional space. If not, the debate is concluded; but if so, what right within which spatial boundaries is determined by comparing the space allocated to religious freedom with that allocated to equality. Such a constitutional framework, novel anywhere, would be entirely new to Australia.

In summary then, the thesis, if successful in the arguments presented, will produce a novel system for dealing with human rights in Australia and resolving the conflict identified in respect of religious freedom in the case of the conscientious vendor. It will satisfy the first test of the hypothesis by producing a formulated theory that could replace the current human rights regime. That theory will demonstrate how human dignity can be embraced and utilised as a part of its resolution of the problem of conflict arising from the case of the conscientious vendor. As a part of the resolution that the theory offers, it will provide, first, a constitutional space for religious freedom and, secondly, a durable solution to the problem without any need for the ongoing creation of exceptions and *ad hoc* exemptions to equality laws in order to accommodate conscience.

I will argue, in conclusion, that introducing a concept of 'constitutional space' would provide the missing principled rationale for limitation of religious freedom and other rights, utilising Hohfeldian theory to avoid any regress in the argument over rights and freedoms. I will submit as part in the conclusion that the theory would break the current mendicant cycle of advocacy, begging for a place for religious freedom in the broken paradigm of exemptions. There would be, instead, fixed spaces for each right and freedom. Each would be knowable and workable into the future.

Finally, by way of introduction, the following should be noted regarding the courts as arbiters of human rights under the proposed Bill of Rights. As is argued in closer detail in chapter 2 of this thesis, in the normal course, the governmental machinery, in those existing constitutional spaces, operates in harmonious balance in accordance with the Commonwealth and state constitutions. Most importantly, though, it is important to note the following points:

- Adherence to the respective constitutions is maintained by the courts, which oversee the operations of the legislature and the executive under the doctrine of judicial review. Operations of each political arm of government are distinct and confined within their allocated spatial

boundary, under the oversight of the courts, according to the principles contained in the constitution. In their respective constitutional spaces, the divisions of national and regional government perform their individual separate functions.

- The notion of 'boundaries' as used throughout the thesis. Constitutional rules provide the limits or 'boundaries' of operation. Australia has a Westminster parliamentary system of responsible government under which there is a strict separation of the judicial arm from the legislative and executive arms of government. This enables performance of the courts' arbitral functions on the correct use of powers by the other political arms of government.
- What is sometimes advanced by detractors from the concept of a Bill of Rights of the kind proposed in this thesis is that courts, staffed as they are in Australia, by unelected officials, are not appropriate arbiters of human rights and that such questions should devolve upon the several parliaments according to their constitutional functions. This argument misunderstands the constitutional function of courts. It is no more valid than to argue that the Prime Minister and Cabinet are not directly elected than to insist that electorally accountable judges should undertake any judicial function or that human rights should be artificially confined to the Parliament and denied the courts. The Australian constitutional arrangements just do not require it.
- In this type of argument against what is proposed here, it must be appreciated that it is a misplaced appeal to a democratic reaction against a Bill of Rights; the term 'unelected' is used in its most anti-democratic derisory sense, deprecatingly relegating judges as lesser constitutional functionaries. This deprecation is logically and constitutionally wrong.
- Judges are best able to perform their functions because they are not subject to the popular vote. They are thus able to perform their functions dispassionately, according to law, rather than popular perception. As far as deciding matters that may have political implications, it is their divorcement from matters political that make them the best arbiters.
- Indeed, they have been deciding matters of rights and policy for centuries. While there is the potential for some politicisation of judicial appointment in any Western democratic system, it is minimised in Australia and the potential for any real political influence after appointment diminished by strict adherence to the separation of powers doctrine in respect of the judiciary.

Chapter 2: Towards a constitutional spatial theory for the resolution of conflicts in rights and liberties claims[70]

Introduction

This thesis proposes a theoretical framework to replace Australia's existing human rights regime. It does so by considering a discrete question: can a religious vendor refuse to supply of goods and

[70] An earlier version of this chapter was published as: Neville Rochow QC, 'Towards a Constitutional Spatial Theory for The Resolution of Conflicts in Rights and Liberties Claims' (2021) 29(3) *Michigan State International Law Review* 469.

services in reliance on conscientious objection? Such a refusal raises questions of contract and property, the interpretation of statute, and constitutional questions of human rights and freedoms. Analysed from each perspective, none lend themselves to ready solution to the problem under the existing law.

Conscientious objection is not a part of usual common-law work. The common law in the departments of contract and property has not developed tools by which to address the objection of the conscientious vendor.[71] As a consequence, the common law is not, therefore, a likely source for an answer to the problem the subject of the present study. Similarly, no satisfactory statutory standard or principle exists through which an answer can be given, and there is no currently acceptable constitutional solution.[72] In consequence, the problem of two diametrically opposed claims remains without any satisfactory resolution.

The rights in question are incapable of undiminished coexistence. A vendor cannot be free to discriminate and the consumer at once be free from discrimination. If one claim is to prevail, the question arises of how that is to be determined. If a constitutional solution already exists, without any need of any assistance from spatial theory, that solution must be capable, first, of solving what appears to be an insoluble problem, and, secondly, of being implemented within existing Australian constitutional arrangements as a replacement for the current human rights regime. In this chapter, in four parts, I examine whether 'constitutional spatial theory' can satisfy these two preliminary criteria.

First, in Part A, I explain how terms are used throughout this chapter and other chapters of the thesis. Next, I present the six principles and doctrines that comprise the essential elements of constitutional spatial theory, referred to as the 'spatial principles'. I set those 'principles' out in full in Table A in Part A of this chapter and in the Schedule to the thesis. I then consider whether constitutional spatial theory could be an appropriate answer to the problem, including a

[71] See Carter et al *Contract Law in Australia* (n 35) 8–9, [1-08]– [1-09]; Grigg, 'Fundamental Concepts for Australian Real Property Law' (n 36) 49–50. See also, for example, *Fejo v Northern Territory* (1998) 195 CLR 96 (deciding whether grant of fee simple extinguishes native title); Marshall and Mulheron, 'Access to Essential Facilities' (n 37); Winfield 'Public Policy in the English Common Law' (n 38) 91–100. For the Australian context and development of the law under s 46 of the then *Trade Practices Act 1974* (Cth), see also *Queensland Wire Industries* (n 39) at [15]– [16] and *Melway* (n 39). For development of the essential facility doctrine in the United States, see *Sherman Antitrust Act 1890* (U.S.) s 2, and the Supreme Court decisions in *Aspen Skiing Co v Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985). and *Verizon Communications Inc v Law Offices of Curtis v. Trinko* (2004) 540 U.S. 398.

[72] See Marshall and Mulheron, 'Access to Essential Facilities' (n 37); Winfield 'Public Policy in the English Common Law' (n 38) 91–100. For the Australian context and development of the law under s 46 of the then *Trade Practices Act 1974* (Cth), see also *Queensland Wire Industries* (n 39) at [15]– [16] and *Melway* (n 39). For development of the essential facility doctrine in the United States, see *Sherman Antitrust Act 1890* (U.S.) s 2, and the Supreme Court decisions in *Aspen Skiing Co v Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985). and *Verizon Communications Inc v Law Offices of Curtis v. Trinko* (2004) 540 U.S. 398.

comparison with the potential for solutions from the common law, statute, and under s 109 of the Commonwealth Constitution.[73]

In Part A, I explain the influence, under spatial theory, of the contractual and property theory[74] of Wesley Hohfeld and its development by others, including Joseph William Singer. This includes explanations of the concepts of 'bundles of rights', 'jural relations' and 'liberty' under spatial theory drawn from Isaiah Berlin[75] and Singer.[76] As mentioned in Chapter 1,[77] and as will be seen in the Part, I argue that Hohfeldian theory assists spatial theory to avoid the potential of logical regress that could otherwise arise when loosely defined conceptions of human dignity are invoked as a mediating principle.

I conclude Part A with a discussion of the categories of 'constitutional space'. In that discussion, I accept that there are competing conceptions in the literature as to what 'constitutional space' means. The conception I have accepted into spatial theory will, therefore, need to be justified as the preferred conception.

I consider the central problem of the thesis in Part B. In that Part, I examine the competing conceptions of 'constitutional space' and their respective suitability to address the problem at hand. I discuss three conceptions: the 'contractionist', the 'expansionist', and the 'constitutionalist'. Contractionism is a description of the process of declining rights to religious expression currently underway. As the name suggests, expansionism seeks to expand the circumstances of exemption and exception of the religious conscience, including that of the conscientious vendor.[78] I conclude that Part, after comparison with the competing conceptions 'contractionist', and 'expansionist', by submitting that spatial theory could only adopt the 'constitutionalist' conception of constitutional space as that most likely to provide a solution to the problem of the conscientious vendor.

In the third part of the chapter, I address the question of how such a constitutional framework could be installed under Australian constitutional arrangements. I readily acknowledge the challenges of introducing a bill of rights via a referendum under s 128 of the Commonwealth Constitution. Instead, drawing upon precedent under Australian practice of cooperative

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[73] *Australian Constitution* s 109.
[74] See Hohfeld (n 48).
[75] See Isaiah Berlin, 'Two Concepts of Liberty', in Henry Hardy (ed), *Liberty* (Oxford University Press, 2016).
[76] See Joseph William Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* (Yale University Press, 2015) ch 1.
[77] See Hohfeld (n 48) 65–6; Rochow, 'Towards a Constitutional Spatial Theory' (n 7) 502–5.
[77] Rochow and Rochow, 'From the Exception to the Rule' (n 69) 107–10.
[78] See Rochow, 'Towards a Constitutional Spatial Theory' (n 7) 490–6.

federalism, I propose a staged approach under intergovernmental agreements leading into a referendum after a trial period of a bill of rights regulated by annual reviews and sunset clauses.

Finally, I weigh up whether spatial theory presents a viable potential alternative to the current regime. In that final Part, I also introduce the next two questions under the hypothesis: whether, as an organising principle, there is a conception of human dignity that should be adopted by spatial theory; and how, if implemented, the spatial theory framework would account for the religiously informed conscience. I explore those questions fully in chapters 3 and 4. This thesis, however, argues that the existing protections found in the Constitution are insufficient to achieve the result advocated. The existing protections are found in s 116 of the Constitution, which plays a role as a prohibition upon the exercise of federal legislative power in respect of religion. This has been outlined in chapter 1, but the main difficult with its operation is that, unlike the American First Amendment, it stands outside a bill of rights; the absence of a bill of rights was the result of a deliberate choice made by the founders; while there are human rights provisions scattered throughout, they are random in placement and theme and not what would be expected of a modern bill of rights. Section 116 provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Another significant constitutional provision, however, plays a central role in the argument for a federal bill of rights. Section 109 operates where a state law conflicts with a valid federal law, in which case that state law is suspended from operation during the currency of the federal law:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Thus, a validly passed federal human rights Act would prevail over conflicting state legislation.

Part A: The principles and elements of constitutional spatial theory

1. Constitutional space in literature

While there is a newly emerging literature exploring the meaning of 'constitutional space',[79] it has not developed the theoretical framework presented here to resolve the subject problem of

[79] See for examples Erbsen, 'Constitutional Spaces' (n 7); Tribe, 'The Curvature of Constitutional Space' (n 7); McNeil, 'Envisioning Constitutional Space for Aboriginal Governments' (n 7); and Babie et al, 'Creating and Conserving Constitutional Space' (n 7).

conflicting rights and freedoms.[80] Neither has there been any theory provided a clearly demarcated and protected space for religious freedom; to instantiate dignity as an organising principle; and to propose how conscience is to be accounted for. There is, of course, an abundant literature on constitutional theory.[81] The constitutional theoretical works of Jeffrey Goldsworthy,[82] TRS Allan,[83] Peter Hogg,[84] Gérard Beaudoin and Errol Mendes,[85] and Geoffrey Marshall[86] have assisted in formulating a theoretical framework. That framework has been further informed by philosophical works of Immanuel Kant on human dignity.[87] The matter of placement of an organising principle has been assisted by, among others, the works of Hans Kelsen,[88] HLA Hart,[89] Joseph Raz,[90] Ronald Dworkin,[91] and John Rawls.[92] Each has assisted in the development of the framework to be tested in the manner undertaken in this thesis.

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[80] James Griffin, *On Human Rights* (Oxford University Press, 2013) 57–82. Griffin develops a system of rights conflict resolution with tools analogous to those employed by Hohfeld, Singer, and as held in spatial theory.

[81] See for examples John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1976); Cheryl Saunders and Adrienne Stone, *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018); Sawer, *Australian Federalism in the Courts* (n 57); Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018); Justin T Gleeson, *Constituting Law: Legal Argument and Social Values* (The Federation Press, 2011); Helen Irving, *To Constitute a Nation* (Cambridge University Press, 1999); and Martin Hinton and John M Williams (eds), *The Crown: Essays on Its Manifestation, Power and Accountability* (University of Adelaide Press, 2018).

[82] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 2019).

[83] TRS Allan, *Constitutional Justice: A Liberal Theory of The Rule of Law* (Oxford University Press, 2001).

[84] Peter W Hogg, *Constitutional Law of Canada* (Thomson Canada Limited, 2005).

[85] The Honourable Gérald-A. Beaudoin and Errol Mendes, *The Canadian Charter of Rights and Freedoms* (Carswell Thomson Professional Publishing, 3rd ed, 1996).

[86] Geoffrey Marshall, *Constitutional Theory* (Oxford University Press, 1971). See also Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, 1984).

[87] Kant, *Critique of Pure Reason* (n 10); Immanuel Kant, *Critique of Practical Reason: Revised Edition*, tr Mary Gregor (Cambridge University Press, 2015); Immanuel Kant, *Groundwork of the Metaphysics of Morals,* tr Mary Gregor and Jens Timmerman (eds) (Cambridge University Press, 2014); and Immanuel Kant, *Critique of Judgment,* tr Werner S Pluhar (Hackett Publishing Company, 1987). See also JB Schneewind (ed), *Moral Philosophy from Montaigne to Kant* (Cambridge University Press, 2003); JB Schneewind, *Essays on the History of Moral Philosophy* (Oxford University Press, 2010) Part V: On Kant; Jens Timmerman (ed), *Kant's Groundwork of the Metaphysics of Morals: A Critical Guide* (Cambridge University Press, 2009); Thomas E Hill, Jr, *Human Welfare and Moral Worth: Kantian Perspectives* (Oxford University Press, 2002); Paul Guyer, *Kant on Freedom, Law and Happiness* (Cambridge University Press, 2000); Hannah Arendt, *Lectures on Kant's Political Philosophy* (The University of Chicago Press, 1992); Michael Cholbi, *Understanding Kant's Ethics* (Cambridge University Press, 2016); Martha C Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5(1) *The Journal of Political Philosophy* 1, 1–25; Martha C Nussbaum, *The Cosmopolitan Tradition: A Noble but Flawed Ideal* (The Belknap Press of Harvard University Press, 2019) 64–96; and Jennifer K Uleman, *An Introduction to Kant's Moral Philosophy* (Cambridge University Press, 2010).

[88] Hans Kelsen tr Max Knight, *Pure Theory of Law*, (Lawbook Exchange, 2009).

[89] HLA Hart, *The Concept of Law* (Oxford University Press, 1961).

[90] Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 2002). See also Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009).

[91] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 8th ed, 1996). See also Ronald Dworkin, *Law's Empire* (Fontana Paperbacks, 1986).

[92] John Rawls, *Political Liberalism* (Columbia University Press, 2005). See also John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, 1999); John Rawls, *The Law of Peoples* (Harvard University Press, 1999); and John Rawls, *Justice as Fairness: A Restatement* (The Belknap Press of Harvard University Press, 2001).

There are several works on Australian constitutional theory and history that have contributed to the development of spatial theory. The seminal work of John Quick and Robert Garran[93] supplies a commentary on how each section of the Australian Constitution developed up to the time of federation in 1901. The relevance of that history is further developed, particularly with respect to religion and s 116 of the Constitution, by the more recent works of Carolyn Evans,[94] Luke Beck,[95] Paul Babie,[96] Patrick Parkinson,[97] Nicholas Aroney,[98] Helen Irving,[99] Cheryl Saunders,[100] Adrienne Stone,[101] Alex Deagon,[102] and Renae Barker.[103]

However, it is the 1967 work of Geoffrey Sawer, *Australian Federalism in the Courts*,[104] that most clearly evokes a conception of 'constitutional space' (referred to by Sawer as 'matters'[105]) considered and developed by the founders for the distribution and allocation of powers and functions for a workable federal structure.[106] It is Sawer who points out[107] that logically, from the perspective of a North American observer at least, one might have expected a space provided for a bill of rights, but that the founders did not take that logical step. It is Sawer's work that points out the space left for human rights in the Australian Constitution and, thus, the possibility for the creation of such a space for religious freedom. This observation by Sawer, in part, inspired the current theory.[108]

2. Spatial theory terminology[109]

Before discussing the elements of spatial theory, it is necessary to specify the meaning of some terms used in this discussion of spatial theory. The terms 'constitutional space', 'constitutional spatial theory', and 'spatial theory' have specialised meanings. It is evident from the recently emerging literature on 'constitutional space' that the term has still to achieve a fixed meaning.[110]

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[93] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81).
[94] Evans, *Legal Protection of Religious Freedom in Australia* (n 64).
[95] Beck, *Religious Freedom and the Australian Constitution* (n 64).
[96] Babie et al, *Religion and Law in Australia* (n 64).
[97] Parkinson, 'Christian Concerns about an Australian Charter of Rights' (n 2) 117.
[98] Aroney (n 8).
[99] Irving, *To Constitute a Nation* (n 81).
[100] Saunders and Stone, *The Oxford Handbook of the Australian Constitution* (n 81).
[101] Ibid.
[102] See Rochow and Rochow, 'From the Exception to the Rule' (n 69).
[103] Barker, *State and Religion* (n 64).
[104] See Sawer, *Australian Federalism in the Courts* (n 57).
[105] Ibid 68–130 and 183–225.
[106] Ibid.
[107] Ibid.
[108] Ibid 12–14.
[109] The following terms bear their normal meaning, except where context shows another use: 'Constitution'; 'legislature'; 'executive'; 'judiciary'; 'courts'; 'tribunals'.
[110] See Foster, 'Freedom of Religion and Balancing Clauses' (n 2).

While the term 'constitutional space'[111] may not yet be familiar,[112] the concept is far from novel. As explained in Part B of Chapter 1, the term 'constitutional space' began as a geometric metaphor to describe the abstract spheres for constitutional activity.[113] Its use in this thesis is to describe the concept deriving from the metaphor: spheres of constitutional, jurisprudential, and political activity under a relevant constitution. 'Constitutional spatial theory' and 'spatial theory' refer to the theory advanced in this thesis and not any other theory about constitutional space. It is the theory as outlined in the next section of this Part.

Each function of government, both federal and sub-federal, has its own defined space.[114] 'Constitutional spaces' are arranged both vertically and horizontally. To illustrate vertical 'constitutional space' as a concept, a federal constitution, such as Australia's,[115] will generally provide for separate but parallel interrelated 'constitutional spaces' at national and sub-national levels in which their respective Parliaments legislate for their respective jurisdictions. They are vertically tiered, with the federal governmental space, at least in the Australian case, being at the highest level of federal, state and territory, and local government arrangements.

Within each of the arms of government, there will also be vertical and horizontal spatial relationships. At the federal–state interface there are constitutional rules that dictate how the two tiers interrelate. An example of federal hierarchical superiority is in s 109 of the Commonwealth Constitution. Where state and federal legislative powers both relate to the same subject matter, s 109 gives spatial dominance to powers exercised in federal legislative space by providing that '[when] a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. Another hierarchical dominance example is from the judicial arms of the respective governments. The federally constituted High Court of Australia, as the national court of last resort, stands at the pinnacle of the Australian hierarchy, with its pronouncements being binding on all state, territory, and lower federal courts.

In the normal course, the governmental machinery in those spaces operates in harmonious balance in accordance with the Commonwealth and state constitutions. Adherence to the respective constitutions is maintained by the courts, which oversee the operations of the legislature and the

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[111] Ibid.
[112] Ibid.
[113] See nn 6–10 in Chapter 1 and Kant, *Critique of Pure Reason* (n 10)157–62.
[114] See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*'); *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 ('*Kable*'); and *Victoria Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 467 CLR 73 ('*Dignan*').
[115] And as in the United States of America, Canada, Germany, and Switzerland.

executive under the doctrine of judicial review.[116] Operations of each political arm of government are distinct and confined within their allocated spatial boundary, under the oversight of the courts, according to the principles contained in the constitution.[117]

Constitutional rules provide the limits or 'boundaries' of operation. The notion of 'boundaries' as used throughout the thesis is illustrated by the separation of powers doctrine.[118] In Australia, strict separation of the judicial arm from other arms of government enables performance of the courts' arbitral functions on the correct use of powers by the political arms of government, the legislative and executive. Australia has a Westminster parliamentary system of responsible government.[119] Legislative and executive functions, under the Westminster system,[120] are less strictly separated.[121] Convention governs the legislative and executive relationship,[122] but the essence of the system is that the executive is held responsible to the legislature on the floor of each of the two Houses of Parliament.[123] In their respective constitutional spaces, the divisions of national and regional government perform their individual separate functions, exercise their discrete powers, discharge their constitutional obligations, and interface with one another as prescribed by the requirements of the constitution.

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[116] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262–3 per Fullagar J. See also Steven Gageler, 'Deference' (2015) 22 *Australian Journal of Administrative Law* 151.

[117] Ibid.

[118] *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434; *Dignan* (n 114) 467 CLR 73; *Roche v Kronheimer* (1921) 29 CLR 329; *Boilermakers* (n 114) 94 CLR 254; *(NSW)* (n 114) 189 CLR 51; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Sawer, *Australian Federalism in the Courts* (n 57) 14–15, 152–4, 158–67; Sir Owen Dixon, *Jesting Pilate* (The Law Book Company Ltd 1965) 44, 52–4, 102, 107, 167, 206; Michelle Foster, 'The Separation of Judicial Power' in Saunders and Stone, *Oxford Handbook of the Australian Constitution* (n 81) 672; *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)* [16.1]–[16.3] <*https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/16-delegating-legislative-power/the-separation-of-powers/*>. As in the United Kingdom, the Westminster doctrine of ministerial responsibility on the floor of Parliament diminishes the strictness of the separation between the legislative and executive branches but the doctrine insists, in Australia, upon a strict separation of judicial power and Ch III courts from the other two arms of government.

[119] See Sawer, *Australian Federalism in the Courts* (n 57) 14–15, 130–1 and 149–54. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81) 703–6.

[120] Sawer, *Australian Federalism in the Courts* (n 57) 14–15, 130–1 and 149–54. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81) 703–6.

[121] See Sawer, *Australian Federalism in the Courts* (n 57) 14–15, 84, 152–4 and 165–7; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81) 628–31.

[122] Sawer, *Australian Federalism in the Courts* (n 57) 14–15, 84, 152–4 and 165–7; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81) 628–31.

[123] Sawer, *Australian Federalism in the Courts* (n 57) 14–15, 84, 152–4 and 165–7; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81) 628–31.

As I discuss in this chapter in Part B, there are competing conceptions in the literature as to what 'constitutional space' means.[124] As a developing conception,[125] there is a question as to how constitutional space might best be shaped. In Australia, two views currently compete for attention with the conception presented here. As mentioned in the introduction to this, the two competing conceptions are referred to as the 'expansionist', the 'contractionist'. A third, the 'constitutional spatial' perspective, is the conception for which this thesis argues.

The choice of conception of constitutional space chosen is critical to the solution of the problem at hand. If, for instance, a space with ill-defined or readily permeable boundaries were to be selected for religious freedom, rights contained in that space would be difficult to audit. New claims could pass in and out of the boundaries. On an analysis of the rights contained within such an easily entered space, it would be difficult to know whether or not conscientious objections to dealing formed a legitimate part of religious freedom. The result would be less guidance of principle, resulting in less clarity. Instead of minimising disputes, the lack of principle and clarity would generate more conflict.

A religiously conscientious vendor in the position of Jack Phillips in *Masterpiece*[126] claims 'religious freedom' *includes a right* to discriminate *when the individual's conscience dictates*. The essence of the problem in such a case is that there is no discernible end to what conscience may lawfully dictate.[127] The debate over whether any such 'right' to discriminate exists depends upon how constitutional space is conceived. That debate involves, in part, the question of whether the volume of constitutional space allowed for religious freedom is perceived as needing to expand, contract, or be maintained as effectively static, within constitutional limits.

In general terms, an 'expansionist' perspective supports the retention of exemptions and exceptions to permit religious discrimination in a wide set of circumstances,[128] certainly extending to conscientious vendor cases[129] and other situations involving the religiously informed conscience.[130] For the expansionist, the ideal would be a general right under religious freedom for

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[124] Babie et al, 'Creating and Conserving Constitutional Space' (n 7); Evans and Read, 'Religious Freedom as an Element of the Human Rights Framework' (n 7) 20–39; Scharffs, 'Conceptualising Reasonable Accommodation' (n 7) 167–8; Scharffs and Mason, 'Constitutional Cultures Creating Constitutional Space' (n 7)

[125] Babie et al, 'Creating and Conserving Constitutional Space' (n 7). The term 'expansionist' was devised by Carolyn Evans and Cate Read; see Evans and Read, 'Religious Freedom as an Element of the Human Rights Framework' (n 7).

[126] *Masterpiece Cakeshop* (n 24).

[127] Paul Strohm, *Conscience: A Very Short Introduction* (Oxford University Press 2011) 82–3.

[128] Evans and Read, 'Religious Freedom as an Element of the Human Rights Framework' (n 7); Deagon, 'Religious Schools, Religious Vendors' (n 2).

[129] Deagon, 'Religious Schools, Religious Vendors' (n 2).

[130] Ibid.

the conscientious refusal to deal. Expansionism seeks to provide as much space to act upon the religiously informed conscience without clearly set limits. In spatial theoretical terms, it seeks an expanding rather than a fixed constitutional space. It is important to understand that the expansionist position is informed by a dualist perception of religious liberty.[131] In legal theory, the dualist position holds that one can inquire into the ethical foundations of any law.[132] As a matter of personal morality, or conscience, it is permissible to disobey a law that runs contrary to the conscience.[133] The dualist perception holds that religious adherents are bound by secular law, but only conditionally. Dualists owe a concurrent but superior duty to a higher power to obey their religiously informed conscience whenever secular law conflicts with revelation.[134] In the end, expansionism is mendicant in requiring the indulgence of legislatures and courts to recognise ongoing exceptions. There must be a limit to the indulgence that will be granted to expansionism.

In contrast to the expansionist position, the 'contractionist' position seeks to restrict or even eliminate altogether the circumstances in which there is any religious exemption exception. It rejects any concept of dualism. It is not necessary to argue for or against a contractionist position. In reality, it is not a 'position' or a 'conception' at all. It represents the default condition in which religion will find itself unless a different approach from expansionism is adopted to religious liberty in Australia.[135] The 'position' is opposed to all circumstances in which there is a right to discriminate on religious grounds. Its concern is to restrict the rights and freedoms of religious adherents to the narrowest range of activity.[136] It seeks to promote equal treatment without exception. Where the spatial theoretical position limits the right to object on conscientious grounds under spatial principles, contractionism tends to allow no space for conscientious objection. It is often informed by a contemptuous perception of religion.[137]

The third position, the 'constitutionalist', describes the type of position that has been incorporated into spatial theory. The 'constitutionalist' seeks to describe constitutional boundaries for the space allocated to religious freedom and to protect that space from contractionist incursions. Equally, it does not permit the religiously informed conscience to expand those boundaries or to extend the

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131 Scharffs and Mason, 'Constitutional Cultures Creating Constitutional Space' (n 7).

132 Joshua P Davis 'Legality, Morality, Duality,' (2014) 2014(1) *Utah Law Review* Article 2 <*http://dc.law.utah.edu/ulr/vol2014/iss1/2*>. See also discussion in Strohm, *Conscience* (n 127) 184 at 76–94.

133 Strohm *Conscience* (n 128); Eberhard Schockenhoff, *Natural Law & Human Dignity*, tr Brian McNeil (The Catholic University of America Press, 2003) 11–12 and 161. See also Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, tr Jane Marie Todd (Harvard University Press, 2011) 4 and 69–84.

134 Davis 'Legality, Morality, Duality' (n 133) at 59–60; 87–93; 99–102. See also Farrah Raza, 'Limitations to the Right to Religious Freedom: Rethinking Key Approaches' (2020) *Oxford Journal of Law and Religion* 1.

135 Rochow, 'Towards a Constitutional Spatial Theory' (n 7) 469–537.

136 Ibid.

137 See for example Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Atlantic Books, 2007).

rights and freedoms allocated to that space by the constitution. Neither does it tolerate conscientious incursions into other constitutional spaces under claims of freedom of religious expression. The term 'spatial principles' is used in the thesis to refer to the six doctrinal bases that are essential to spatial theory. In the next part, I consider those 'principles'.

3. The essential elements of constitutional spatial theory: the 'spatial principles'

As I discuss further in Chapter 3, human dignity is an essential element of spatial theory. For the purposes of this chapter, it is sufficient to understand that spatial theory regards dignity as a status and the source of all human rights and freedoms. Rights derive from human dignity and not the other way around. Human dignity as a status is found in in Kant's philosophy on dignity and the human status.[138] It features as such in the instrumental uses of 'dignity' in the *Universal Declaration on Human Rights* (UDHR)[139] and the *International Covenant on Civil and Political Rights* (ICCPR)[140] and is supported as a status by its several constitutions from the second half of the twentieth century.[141]

There are, as mentioned, certain essential principles and doctrines, described as 'spatial principles', upon which the theory depends for its operation. Those principles set forth the necessary conditions for the theory to operate. They mandate a rigorous adherence to constitutional principles, an enshrinement of the status of human dignity, an entrenched bill of rights, and the allocation of constitutional spaces to fundamental human rights. Dignity is, it will be seen below, a central principle of the theory.

Spatial theory can be summarised in six principles, reproduced both in Table A, below, and in the Schedule to this thesis.

Table A. Statement of the Six Spatial Principles of Spatial Theory	
First	The theory relies upon the concept of 'constitutional space': a sphere or 'space' created by a constitution for the functions of government to be performed and where individual rights and freedoms are preserved and protected.
Second	There is a framework under which constitutional spaces are organised.

[138] Nussbaum, 'Kant and Stoic Cosmopolitanism' (n 87); Nussbaum, *The Cosmopolitan Tradition* (n 87) 64–96; Kant, *Critique of Pure Reason* (n 10); Kant, *Critique of Practical Reason* (n 87); Kant, *Groundwork of the Metaphysics of Morals* (n 87); and Kant, *Critique of Judgment* (n 87). See also Schneewind, *Moral Philosophy from Montaigne to Kant* (n 87); Schneewind, *Essays on the History of Moral Philosophy* (n 87) Part V: On Kant; Timmerman, *Kant's Groundwork of the Metaphysics of Morals: A Critical Guide* (n 87); Hill, Jr, *Human Welfare and Moral Worth* (n 87); Guyer, *Kant on Freedom, Law and Happiness* (n 87); Arendt, *Lectures on Kant's Political Philosophy* (n 87); Cholbi, *Understanding Kant's Ethics* (n 87); and Uleman, *An Introduction to Kant's Moral Philosophy* (n 87).

[139] *Universal Declaration of Human Rights,* GA Res 217A (III), UA GAOR, UN Doc A/810 (10 December 1948), Preamble (UDHR').

[140] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Preamble.

[141] Barak, *Human Dignity* (n 8) 49–65.

Third	Under that framework, human dignity must be constitutionally instantiated as: a. a universal, innate, and inviolable status; b. the source of all guaranteed fundamental rights and freedoms; and c. the organising principle for the spatial theoretical framework. Its constitutional role is to be acknowledged in all relevant constitutional, legislative, and procedural instruments to ensure that courts implement dignity as it is intended by each instrument.
Fourth	There must be a constitutional arrangement that provides for the framework to have the following spaces for: a. government, divided among the legislative, executive, and judicial branches, and, in the case of a federation, that allocates powers among the entities constituting the federated nation; b. a constitutionally entrenched bill of rights guaranteeing fundamental rights and freedoms; c. a separated, apolitical, and independent judiciary to act as the guarantor of fundamental rights and freedoms, free from all external influences, including from the legislative and executive branches of government; d. valid legislative and procedural machinery implementing the framework to enable the judiciary to perform its role as guarantor.
Fifth	Constitutional doctrine of spatial theory provides: a. all fundamental rights and freedoms are related to one another through human dignity; b. there is no *a priori* precedence among rights and freedoms; and c. in the event of any conflict between any of the human rights and freedoms expressed in the bill of rights, human dignity is to operate as the mediating principle to determine which right or freedom, limited to that given circumstance, is to take precedence.
(Table A continued)	
Sixth	Constitutional doctrine of spatial theory provides: a. only recognises the state's power and authority to govern provided the power and authority are validly exercised pursuant to the provisions of the constitution and in accordance with principles of human dignity; b. under which the individual is immune from the interference of the state only to the extent of any right or freedom conferred by the bill of rights and that any such attempted interference is to that extent constitutionally invalid or *ultra vires*; c. under which the individual is immune from the interference from the state only to the extent of any right or freedom conferred by the bill of rights from any other person and is entitled to the coercive power of the state to protect against any such interference; d. provides the default position under spatial theory that all constitutionally valid laws must be obeyed; e. provides that the only exceptions to the requirement that valid laws must be obeyed are in those cases where, in accordance with principles of human dignity, a court or tribunal with jurisdiction has recognised exceptional circumstances excusing obedience; and

	f. under which the installation of all constitutional spaces with human dignity as their organising principle and that fully implement each of the spatial principles is to occur: i. validly utilising existing constitutional mechanisms; ii. over such a period as may be necessary to ensure that the content and boundaries of each space created implements human dignity as the status of all persons within the subject jurisdiction and accords them with all rights and freedoms that derive from that status; iii. ensuring during the period of implementation that each right and freedom is enforceable through the courts by remedies appropriate to ensuring those rights and freedoms are known and respected throughout the jurisdiction; and iv. after such a period, by taking such steps as are constitutionally necessary to entrench the constitutional spaces for human rights and freedoms so that they entrenched and cannot be amended, repealed, or varied by any arm of government or any other agency.

First, and fundamental to the theory, is the concept of 'constitutional space': a sphere or 'space' created by a constitution for the functions of government to be performed and where individual rights and freedoms are preserved and protected. Secondly, all rights and freedoms are organised under a framework. It is by reference to the framework that distinct constitutional spaces are organised. Thirdly, under the framework, human dignity must be constitutionally instantiated. The spatial conception of dignity must include the elements that make it a universal, innate, and inviolable status; the source of all guaranteed fundamental rights and freedoms; and the organising principle for the spatial theoretical framework.

Fourthly, the constitutional role of dignity is mandated to be acknowledged in all relevant constitutional, legislative, and procedural instruments to ensure that courts implement dignity as it is intended by each instrument. Fifthly, among the requirements of the theory is that there be a constitutional provision for spaces to accommodate government, divided among the legislative, executive, and judicial branches, and, in the case of a federation, that allocates powers among the entities constituting the federated nation; a constitutionally entrenched bill of rights guaranteeing fundamental rights and freedoms; a separated, apolitical, and independent judiciary to act as the guarantor of fundamental rights and freedoms, free from all external influences, including from the legislative and executive branches of government; and valid legislative and procedural machinery implementing the framework to enable the judiciary to perform its role as guarantor.

In performing its role as guarantor, the judiciary must implement the constitutional doctrine of spatial theory. In every case, the doctrine requires the court to recognise that: all fundamental rights and freedoms are related to one another through human dignity; there is no *a priori* precedence among rights and freedoms; and in the event of any conflict between any of the human rights and

freedoms expressed in the bill of rights, human dignity is to operate as the mediating principle to determine which right or freedom, limited to that given circumstance, is to take precedence.

Sixthly, within a limited set of exceptions, the default position under spatial theory is that all constitutionally valid laws must be obeyed. Constitutional doctrine found in the spatial principles only recognises the state's power and authority to govern under the provisions of the constitution and in accordance with principles of human dignity.

The spatial principles, and spatial theory, categorically reject any form of dualist doctrine that posits a higher power or authority as either an addition or alternative to state power. There is no other authority than the state to which obedience is owed. No putative law that contradicts or qualifies laws made in accordance with the constitution can be contemplated. Spatial theory posits a closed constitutional system. It does not admit of laws outside of the constitutional structure. Under spatial doctrine, an individual is immune from the interference of the state only to the extent of any right or freedom conferred by the bill of rights under the constitution. Any attempted interference that exceeds the power of the state under the constitution is, to that extent, *ultra vires* and invalid. An individual, where immune from interference, is entitled to the coercive power of the state to protect against any such interference.

As appears from Table A, there are limited exceptions to the requirement that valid laws must be obeyed. These will be rare cases. They would be cases in which a court or tribunal with jurisdiction has recognised exceptional circumstances. The spatial principles permit these exceptions only in accordance with principles of human dignity.

In the following sections of the chapter, from the six spatial principles, I argue that, first, the theory offers an appropriate solution to the problem the thesis seeks to address. That is the subject of the next section of this Part. Secondly, and related to the first proposition, I argue that there are theoretical advantages that spatial theory brings to the solution of the problem of conflict arising from the case of the conscientious vendor. That argument is in sections 5, 6, and 7 of this Part. In those sections I examine how the common law, statute, and the current constitutional structure are unlikely to provide a satisfactory solution to the problem of conflict in the conscientious vendor case. Third is the description of how constitutional space is to be organised to provide its solution. I provide that description in section 8, the final section of this Part.

The template with which Australia should commence its development of the necessary constitutional spaces to protect religious freedom and other rights and freedoms would be the ICCPR. First, Australia is obliged under international law to implement that covenant

domestically.[142] Secondly, it is a set of human rights norms, that if implemented, would fall within the legislative power conferred on the federal Parliament by the external affairs power, s 51 (xxix).[143] Thirdly, it is a set of norms that are collected under the organising principle of human dignity.[144]

4. Whether constitutional spatial theory is an appropriate answer to the problem to be solved

As appears clearly from spatial principles 4 and 5, a constitutional bill of rights is an essential element of the solution that spatial theory offers. While it is beyond the scope of this chapter to revisit the previous political debates regarding the need for a bill of rights in Australia,[145] objection to a constitutional bill of rights, including that proposed under the theory, must be anticipated.[146] There are two hurdles that any constitutional bill of rights must vault. First, political experience that teaches that any referendum is doomed to fail unless it has bipartisan political support.[147] Secondly, the notion of a bill of rights attracts particular opposition among Australians who are politically conservative.[148] Because of these factors, constitutional amendment under s 128 of the Commonwealth Constitution to incorporate a constitutional bill of rights has been considered foredoomed as a political impossibility.[149]

There is no current scheme of legislation in Australia that satisfies the criteria of the spatial principles. The federal approach to human rights has, to date, been statutory. Its pattern is for individual human rights to be placed in siloed enactments. Each enactment treats a particular right separately.[150] Previous suggestions for comprehensive legislation or even consolidation of existing legislation have been rebuffed.[151] Only Victoria,[152] the Australian Capital Territory,[153] and Queensland[154] have passed comprehensive human rights legislation. These laws are commendable in their domestic adoption of international human rights norms. However, since each is an ordinary statute with no constitutional entrenchment, they are amenable to repeal or amendment by ordinary legislative manner and form.[155] From a theoretical perspective, having regard to spatial

[142] See above n 60, ch 1, Sawer, *Australian Federalism in the Courts* (n 57) 12–14.
[143] *Australian Constitution* s 51(xxix).
[144] Rochow, 'Towards a Constitutional Spatial Theory' (n 7).
[145] See for example Leeser and Haddrick, DON'T *Leave Us with the Bill* (n 15).
[146] Ibid.
[147] See Babie and Rochow, 'Feels Like Déjà Vu' (n 14) *passim* and 829–34.
[148] See Leeser and Haddrick, *Don't Leave Us with the Bill* (n 15).
[149] Babie and Rochow, 'Feels Like Déjà Vu' (n 14) *passim* and 829–34.
[150] See legislation at n 1 above.
[151] Babie and Rochow, 'Feels Like Déjà Vu' (n 14) *passim* and 829–34.
[152] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[153] *Human Rights Act 2004* (ACT).
[154] *Human Rights Act 2019* (Qld).
[155] See Goldsworthy, *The Sovereignty of Parliament* (n 82) 14–16.

principles, the modelling of these sub-federal human rights laws is deficient in a number of respects. First, they confer no judicial power to invalidate laws that are inconsistent with conferred rights or freedoms.[156] Secondly, there is no clear enshrinement of human dignity as the organising principle in any of the jurisdictions with dedicated human rights laws. There is a third deficiency in these law that follows from the previous two: they leave a popularly elected body, the Parliament, in control of rights and freedoms, instead of the courts. This entails that what may, in time, become unpopular causes, which may include freedom of religion, may be repealed on the judgment of a majority in Parliament rather than by the principled judgment of a court. Spatial theory seeks to avoid that outcome by leaving the final judgment in all cases to the courts, which are bound to administer rights according to principle applied to the evidence rather than to popular or political opinion.

The defect in current state and territory statutory schemes for state human rights is manifest in two ways. The first, the amenability to amendment or repeal when a particular right or freedom becomes unpopular or inconvenient, has already been mentioned. Fundamental human rights are thus enjoyed as an indulgence of the political will. Just as egregious is a second defect. Each of the laws has adopted the 'dialogue' model of enforcement.[157] This contrasts with the type of bill that spatial theory proposes, in that under the 'dialogue' model, the courts as the arbiters of rights and freedoms are usurped by Parliament. Under the constitutional model of a bill of rights that spatial theory envisages, it would be possible, upon *Marbury v Madison* style judicial review, for laws inconsistent with the bill to be struck down as constitutionally invalid. In proceedings under the 'dialogue' model, the principal judicial remedy is not one of striking down the inconsistent law. Rather, under these laws, the court enters into a 'dialogue' with the Parliament to inform the legislature of the inconsistency that has been found.[158] This leaves the author of the defective legislation, the legislature, as the final arbiter on human rights, rather than the independent judiciary.

This entails that in none of the Australian jurisdictions has any constitutional or otherwise durable solution to the conscientious vendor problem been devised: neither in those that remain with the system of exemptions, exemptions, and exclusions, nor in those that have dedicated human rights laws. That leaves the search for a solution back at a basic level of searching the common law, legislative formulae, and the federal constitution for currently existing solutions.

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[156] Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 16(219) *Australian International Law Journal* 219 <*http://classic.austlii.edu.au/au/journals/AUIntLawJl/2009/10.pdf*> 223–30.
[157] Ibid.
[158] Ibid.

5. A common-law solution

It is commonly argued by those opposed to a bill of rights that the common law, as a custodian of rights, has proven adroit in the past in setting public policy boundaries and there is, therefore, no need of a bill.[159] It would be argued that the common law has shown itself capable of determining the terms and conditions upon which rights might or might not be exercised, and as an assiduous protector of rights, once enunciated, it can be left to do its work unaided by any bill or charter.[160]

The common law has developed social and economic policy exceptions to freedom of contract.[161] Examples of its development of social protections under the rubric of 'public policy' can be seen in the prohibitions against contracts entered by minors for any goods or services beyond necessaries,[162] prohibitions against contracts entered to further illegal purposes,[163] and prohibitions against contracts entered with enemy aliens during times of military conflict.[164]

Under the rubric of 'public policy', the common law has developed economic policy to protect communal interests. One obvious example is the prohibition against contracts in restraint of trade unless the restraint is, in the circumstances, reasonable.[165] Economic policy has also been upheld by enforcing rights of access to vital infrastructure under the common-law doctrine of prime necessity.[166] Subsequently, after the passage of anti-trust and competition laws,[167] the common law developed, as part of its interpretation of those laws, a similar economic policy regulating freedom of contract developed under the essential facilities doctrine.[168]

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[159] John Howard, 'Don't Risk What We Have' in Leeser and Haddrick, *Don't Leave Us with the Bill* (n 15) 67.

[160] Australian Human Rights Commission, 'Common Law Rights, Human Rights Scrutiny and the Rule of Law', *Australian Human Rights Commission* (Web Page) <*https://humanrights.gov.au/our-work/rights-and-freedoms/common-law-rights-human-rights-scrutiny-and-rule-law*>.

[161] Winfield, 'Public Policy in the English Common Law' (n 38) 91–100; Carter et al, *Contract Law in Australia* (n 35) 8–9, [1-08]– [1-09].

[162] DW Greig and JLR Davis, *The Law of Contract* (The Law Book Company Limited, 1987) 758–67.

[163] Ibid 1130–2.

[164] Ibid 1306–7.

[165] See *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co* [1894] AC (HL) 535; *Attorney-General v Adelaide Steamship Company* [1913] AC 781 (PC); *Buckley v Tutty* (1971) 125 CLR 353; *Lindner v Murdock's Garage* (1950) 83 CLR 628; *Amoco Australia Pty Ltd v Rocca Bros Motor Co Engineering* (1973) 133 CLR 288; *Adamson v NSW Rugby League Ltd* (1991) 31 FCR 242; *Lloyd's Ship Holding v Davros* (1987) 17 FCR 505; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126; *Hydron Pty Ltd v Harous* [2005] SASC 176; and *Just Group Ltd v Peck* (2016) 344 ALR 162. See also JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed, 2008) and Neville Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (2014) 5 *Western Australian Jurist* 25.

[166] Marshall and Mulheron, 'Access to Essential Facilities' (n 37). See also *Allnutt v Inglis* [1810] EngR 359, 538–9; and *Minister of Justice for the Dominion of Canada v City of Levis* [1919] AC 505, 512–13.

[167] In Australia, the *Trade Practices Act 1974* (Cth) Part IV.

[168] Section 46 of the then *Trade Practices Act 1974* (Cth): *Queensland Wire Industries* (n 39); *Melway Publishing* (n 39).

However, each of these economic policy developments is strewn with fine distinctions designed to ensure as narrow a scope for their invocation as could be formulated.[169] No comprehensive set of human rights protections has ever been developed at common law.[170] Despite the opportunity to do so, the common law has never developed any doctrine of conscientious objection, leaving such matters to be provided for by statute.[171] Critical to the solution of the problem involving the conscientious vendor, the common law has never countenanced any fundamental guarantee of religious freedom of expression.[172]

Equity, the other system of unwritten law that develops in parallel with the common law,[173] does concern itself with matters of conscience.[174] However, its invocation of conscience as a consideration has confined itself to breaches of duty by fiduciaries and others who stand in a relationship of advantage to one who is disadvantaged. The circumstances that give rise to an equitable duty not to exploit a disadvantage unconscientiously are, therefore, limited to those relationships and circumstances recognised by equitable doctrine.[175] It is an entirely different discourse of 'conscience' from that engaged in by the religious vendor in the problem under consideration. There is no realistic basis upon which equity could develop a system of human rights or in which it could be called upon for aid in the case of the conscientious vendor.

Even if the common law or equity were capable of developing a response to the problem at hand, the conflict of rights that arises in conscientious vendor cases, neither has shown any inclination to do so through the judges that adjudicate on such matters. Even assuming the courts were inclined to develop such doctrines, the doctrine of precedent is such that development is slow and often incrementally dependent upon specific cases presenting the necessary questions for doctrinal development. If either common law or equity were so capable, one could not confidently predict

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[169] See Australian Competition Law, 'Melway Publishing Pty Ltd v Robert Hicks Pty Ltd', *Australian Competition Law* (Web Page, 14 October 2014) Facts <*https://www.australiancompetitionlaw.org/cases/melway.html*>.

[170] Evans, *Legal Protection of Religious Freedom in Australia* (n 64) 88; *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376, 388; Australian Law Reform Commission, '*Traditional Rights and Freedoms—Encroachments by Commonwealth Laws' (ALRC Report 129)* [5.08]–[5.24] <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/5-freedom-of-religion/the-common-law-9>.

[171] Australian Law Reform Commission, '*Traditional Rights and Freedoms' (n 170)* [5.08]–[5.24]; Michael Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228.

[172] *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376, 388; Australian Law Reform Commission, '*Traditional Rights and Freedoms' (n 170)* [5.08]–[5.24].

[173] See e.g. Justice Virginia Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System', The Sir Ninian Stephen Lecture (29 April 2016); Chief Justice Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law', Address at the 2016 Hochel (Oct. 20, 2016) (transcript available at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020).

[174] See Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis, 4th ed, 2019) 3–9.

[175] *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 [14]– [19], [57]– [58] *per* Kiefel CJ and Bell J; [82]– [93] *per* Gageler J; [118]– [123] *per* Keane J; [282]– [295] *per* Edelman J; *Pitt v Commissioner for Consumer Affairs* [2021] SASCA 24 [184]– [188] *per curiam* (Supreme Court of South Australia Court of Appeal).

the conditions upon which any exemption from the statutory obligation to treat all consumers equally might operate. It seems, therefore, that a common law, or even an equitable, solution is a forlorn hope and can be safely ignored as a possibility.

6. A statutory solution

Since the common law (and equity) are unlikely to play any role in the resolution of the problem, the next potential solution lies in a statutory response. The problem of the conscientious vendor itself, as a clash of religious freedom to discriminate with the right to be treated equally, free of discrimination, is of statutory creation.

The problem does not appear to be a question of interpretation. Qualification for a religious exemption from compliance with the requirement of equal treatment under so-called 'balancing clauses'[176] adds the tier of consideration that the legislature intended. The asserted right to discriminate seeks to insert conscience as a yet *further* basis for exemption beyond those expressly provided. It seeks to restore freedom of contract when the religious conscience dictates discrimination against the consumer. In the absence of an express provision, it could only do so by ignoring the express wording of the statute. This runs contrary to every relevant canon of statutory interpretation.[177]

There arise, inevitably, circumstances where there is either no religious exemption from the equality law at all,[178] or, if there is, it is not wide enough to cover the particular religious objector in the instant case.[179] There is no generally applying principle in Australian law, such as human dignity, to which a party could appeal. As noted in Chapter 1, the method for resolving the problem of the conscientious vendor is to advocate for new classes of vendor to be included among the exceptions already provided for. The obvious policy drawback in this approach is that every expansion of the classes of exception is a further dilution of the effect of the original equality law. At some unpredictable point, the advocacy will fall upon deaf legislative ears.

A problem with the 'balancing clause' approach by which exceptions are installed into equality laws is that to date, no universal criterion equivalent to human dignity has emerged as the metric by which balance can be achieved. It would, however, be possible to amend the balancing clauses

[176] Foster, 'Freedom of Religion and Balancing Clauses' (n 2).
[177] John Middleton 'Statutory Interpretation: Mostly Common Sense?' (2016) *Melbourne University Law Review* 626 Michael Kirby 'Statutory Interpretation: The Meaning of Meaning' (2011) 35(1) *Melbourne University Law Review* 113. See also Justice Perram 'Constitutional Principles and Coherence in Statutory Interpretation', paper delivered 11 November 2016 <*https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perram/perram-j-20161118*>.
[178] Deagon, 'Religious Schools, Religious Vendors' (n 2).
[179] Ibid.

to allow for considerations of human dignity. While this would be progress of a kind, it would be too much to expect the operation of such clauses to implement significant change. Divorced from a wider concept of dignity as an overarching guiding principle for *all* human rights and freedoms, there is the risk that mere invocation would, through process of interpretation, render dignity a cipher.[180] Merely adducing the concept of dignity is insufficient for this purpose.[181] Dignity must do the work of connecting each right or freedom with all others.[182] If this can be achieved, isolated statutory amendment cannot even approach the potential that human dignity offers as the organising principle of Australian human rights. Indeed, balancing, to be complete, must not only take account of the competing rights of being free of discrimination and the right to discriminate, but all other relevant rights and freedoms. That is only possible in the context of a bill of rights.

This need for multifaceted balancing of the religious conscience and other rights is illustrated by Charles Taylor and Jocelyn Maclure when they draw attention to the example[183] of *B. (R.) v. Children's Aid Society of Metropolitan Toronto.*[184] In that case, the Supreme Court of Canada weighed the religious liberty of Jehovah's Witness parents to refuse a blood transfusion for their ailing infant child against the right of the child to live.[185] In deciding in favour of the child's right to live, the Court undertook its analysis respectfully, understanding the comparative dignities that were at stake in the context of the broader spectrum of rights and freedoms.[186]

It seems, therefore, that a statutory solution is an inadequate response to the problem to be solved. Thus, if there is to be a solution to the problem, it would appear to leave a federal constitutional solution as most viable.

7. A constitutional solution: s 109 of the Commonwealth Constitution

A convenient starting point for this constitutional solution is in the recommendations made in the final report of the Religious Freedom Review Expert Panel (the 'Ruddock Report'), delivered on

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[180] Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) ch 6.

[181] As in the Religious Discrimination Bill 2019 (Cth) clause 3(2)(b):

> (2) In giving effect to the objects of this Act, regard is to be had to:
>
> (a) the indivisibility and universality of human rights, and their equal status in international law; and
>
> (b) the principle that every person is free and equal in dignity and rights.

[182] Waldron, 'Is Dignity the Foundation of Human Rights?' (n 180); Rochow and Rochow, 'From the Exception to the Rule' (n 69) 93–4, 109–110.

[183] Discussed to illustrate the 'reasonable limits of conscience' at 100–102 in Maclure and Taylor, *Secularism and Freedom of Conscience* (n 133).

[184] [1995] 1 RCS 315.

[185] Ibid.

[186] Ibid. For the undertaking of a similar exercise, see *Law Society of British Columbia v. Trinity Western University* [2018] 2 SCR 293; *Trinity Western University v. Law Society of Upper Canada* [2018] SCC 33.

18 May 2018. The expert panel had examined and reported on whether Australian law adequately protects the human right to freedom of religion.

There is acknowledgment by some expansionists of the need for some federal constitutional solution. This can be found in the submissions made to both the Ruddock Panel[187] and, subsequently, to the Attorney-General in relation to the Australian Government's response to the Religious Freedom Review ('the Response').[188] Those submissions seek the widest possible religious freedom to be secured by a positive federal statutory right to religious freedom, to replace the state and territory system of exemptions under balancing clauses.[189] An aim of those submissions was to permit conscientious vendors the right to refuse supply to LGBTQI+ consumers when supply of goods or services[190] would facilitate a same-sex marriage celebration or promote the institution of same-sex marriage.[191]

The constitutional goal sought by those submissions[192] was that those state laws requiring equal treatment of those possessed of a protected attribute would, to the extent of their inconsistency with the new affirmative federal law, be rendered invalid under s 109 of the Commonwealth Constitution.[193] This would enable state anti-discrimination laws to be invalidated for inconsistency with the new federal law.

In the Response, the federal government accepted the central conclusion of the Ruddock Report, that there was opportunity to further protect, and better promote, the right to freedom of religion under Australian law and in the public sphere.[194] Critically, the panel reached two important conclusions.

First, the Panel, while making suggestions as to how there could be improvements to the protection of religious freedom, did *not* support enactment of a standalone Commonwealth law

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[187] See above Chapter 1 nn 8, 131–133. Ruddock Report (n 1) 8–10, 56–62.
[188] Ibid.
[189] Ruddock Report (n 1) 49.
[190] Ibid.
[191] Ibid.
[192] Deagon, 'Religious Schools, Religious Vendors' (n 2) 769–70; Foster, 'Freedom of Religion and Balancing Clauses' (n 2); Neil Foster, 'Submission on Second Draft of Religious Discrimination Bill', *Law and Religion Australia* (Blog Post, 28 January 2020) <*https://lawandreligionaustralia.blog/2020/01/28/submission-on-second-draft-of-religious-discrimination-bill/*>.
[193] Section 109 provides:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

[194] Prime Scott Morrison and Attorney-General Christian Porter, 'Government Response to Religious Freedom Review' (Media Release, 13 December 2018) <www.pm.gov.au/media/government-response-religious-freedom-review>.

relating to religious freedom.[195] It considered that protecting freedom of religion in standalone legislation would be out of step with the treatment of other rights. The Panel considered, instead, that the statutory expression of positive rights would need to be carefully crafted, having regard to the need to reconcile them with other human rights.

The Ruddock Panel rejected submissions seeking a general commercial exemption for religious vendors.[196] The federal Attorney-General's exposure drafts of the Religious Discrimination Bill[197] adopted a course for a standalone religious discrimination law, which approach the Panel had specifically rejected.[198] Enactment of a standalone law for religious freedom, the Panel correctly reasoned,[199] would be out of step with the international standard for the treatment of human rights.[200] The standard is, instead, for a comprehensive instrument that provides for all fundamental human rights. The Panel's reasoning regarding the undesirability of a standalone law was, with respect, correct: standalone religious freedom laws are sub-optimal.

The Panel's view that, as a matter of practicality, religious freedom should only be protected within a framework which provides equal treatment for a wide range of human rights was not acceptable to the federal government.[201] Despite the views of the Panel, the federal government, for reasons that it has not made clear, has, instead, produced two discussion drafts of a Religious Discrimination Bill,[202] prepared at the direction of the then Attorney-General, Christian Porter.[203] Both drafts have been the subject of extensive public comment[204] but have not, at the time of writing, been placed on the legislative agenda.

Secondly, for current purposes, it is important that the Panel decided *not* to accept the argument in submissions that it should recommend a broad exemption for religious vendors to be protected in discriminating against consumers on conscientious grounds; this rejection has naturally drawn criticism from the supporters of an expansionist position, who advocated such a reform.[205] As has been argued, and as the Panel concluded, that type of reform, divorced from a broader scheme of

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[195] Ruddock Report (n 1)49–50, 57–62.
[196] Ibid 105 at [1.425]– [1.426].
[197] Exposure Drafts and the Australian Government response to the Religious Freedom Review can be found at <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/freedom-religion>.
[198] Ruddock Report (n 1) 105 at [1.425]– [1.426].
[199] Ibid.
[200] Ibid.
[201] See Exposure Drafts and the Australian Government response (n 197).
[202] Ibid.
[203] Attorney-General's Department, 'Submissions received for the Religious Discrimination Bills—First Exposure Drafts Consultation', *Attorney-General's Department* (Web Page, 31 October 2019) <*https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-freedom-bills-first-exposure-drafts-consultation*>.
[204] Foster, 'Submission on Second Draft of Religious Discrimination Bill' (n 192).
[205] Deagon, 'Religious Schools, Religious Vendors' (n 2).

human rights reform, is sub-optimal because international human rights standards make clear that all human rights are interrelated.[206]

As expressed in spatial principle 3, all human rights are interconnected to all other rights and freedoms through human dignity.[207] But, to be clear, spatial theory goes further than the proposals of the Panel on the preferability of treating human rights as a complete set rather than in isolation from other rights. The theory insists upon a comprehensive bill of rights. It posits that to protect religious liberty, the right must form part of a constitutionally entrenched bill of rights; a bill of rights that creates the necessary constitutional spaces, and under which all rights and freedoms can be reconciled with each other through the medium of human dignity. The constitutional formulation urged by submissions to the Ruddock Panel, comprising reliance upon a federal statute and s 109, is fundamentally flawed in two ways. The first is structural while the second relates to doubts surrounding the constitutional validity of the proposed federal statute.

First, on a geometric dimensional analysis, the s 109 model is structurally flawed. It provides only two-dimensional (temporal and vertical) protection of a right. Multidimensional protection of constitutional space is required if religious freedom is to be protected. Spatial theory posits that any protection that falls short of a constitutional entrenchment of all rights and freedoms will be inadequate. Under a Kantian geometric spatial analysis,[208] all constitutional spaces are multidimensional. There are flaws in the three dimensions in which any new law must operate constitutionally: the temporal; the vertical; and the horizontal. The key element of the s 109 model, the new federal statute, would be the repository of a standalone right, religious freedom. Whatever content or form the right might assume statutorily, its temporal continuance remains at the discretion of political will. An example of the granting and loss of a right is in the Northern Territory's *Rights of the Terminally Ill Act 1995*. Because the law did not meet with the approval of the federal Parliament, it was voided two years later by the *Euthanasia Laws Act 1997* (Cth).

The entire s 109 model is, thus, limited in its temporal dimension and contrasts poorly with the notional permanence of a constitutionally entrenched right having the same content and form. The vertical dimension of the space is that in which the invalidating effect of s 109 occurs. Any federal law in the model would be protected from vertically sub-federal law incursion by that

[206] Ruddock Report 105 (n 1) at [1.425]– [1.426]; Rochow, 'Towards a Constitutional Spatial Theory' (n 7).
[207] Waldron, 'Is Dignity the Foundation of Human Rights?' (n 180).
[208] Kant, *Critique of Pure Reason* (n 10) 157–62.

invalidating effect which s 109 has upon any inconsistent sub-federal law.[209] Naturally, that dimension is only protected while the temporal dimension is maintained.

Of greater concern are two difficulties in the horizontal dimension: lack of comprehensive legislative content to prevent incursion by actors; and the potential for other federal legislation to diminish or prevent operation of the religious freedom law. The strength of the s 109 model in the horizontal dimension depends, in part, upon what substantive rights it grants in that plane against government and others. It may fail to protect the freedom ostensibly granted by federal legislation if spatial incursions upon that freedom are permitted from federal executive action, or by certain individuals or corporations. So much for content. But the other fundamental weakness also persists. Unless the religious law is given constitutional status, that s 109 model federal law is vulnerable to *other* federal laws being passed after instantiation of the model. Because the model law has no constitutional status *per se*, new federal laws may detract from its operation by impairing its scope or even effecting implied partial repeal. The s 109 model law, as an ordinary statute, has no constitutional sanctity or superiority over other federal laws. So, although a valid exercise of federal legislative power will have the vertical effect of invalidating inconsistent state laws, that is so only unless and until its statutory nature fails under one of the weaknesses in the temporal and horizontal spatial planes. A comprehensive, multidimensional, constitutionally entrenched protection would, thus, be superior in both of the respects in which the s 109 model is weak.

The second flaw in the s 109 model is fundamental. Doubt surrounds the constitutional validity of the federal standalone statute upon which the model is built. There is no head of federal legislative power generally for human rights or specifically for religious freedom.[210] And, to date, there have been no referrals of state legislative powers under s 51 (xxxvii).[211] Validity of both of the current exposure drafts and their invocation of s 109 law will, therefore, depend entirely upon legitimate importation of norms from an international covenant: norms which Australia is bound to implement domestically.[212]

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[209] As examples of the operation of s 109, see: *R v Licensing Court of Brisbane* (1920) 28 CLR 23; *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151; *Telstra v Worthing* (1999) 197 CLR 61; *Bell Group N.V. (in liquidation) v Western Australia; W.A. Glendinning & Associates Pty Ltd v Western Australia; Maranoa Transport Pty Ltd (in liq) v Western Australia [2016] HCA 21*; *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; and *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545.

[210] See *Australian Constitution* s 51.

[211] Section 51 (xxxvii) provides:

> matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law

[212] *Dietrich v The Queen* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J. See also Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63) 8–12.

The doubt thus arises as to whether it is a valid exercise of the external affairs power under s 51 (xxix) to pass a law, the Religious Discrimination Bill,[213] that does *not* adopt the text of Art 18 of the ICCPR.[214] Neither of the current Bill versions specifically seeks directly to implement that Article or any other text contained in any other part of the covenant. Despite Australia being obliged to implement the entire covenant, no effort has been made to do so.[215] Detailed analysis of the lacking nexus is beyond the scope of this thesis. For current purposes, it is enough to say that the current exposure draft is attended by sufficient doubt to render it a flawed reform proposal.[216] The doubt is so significant as to risk generation of expensive, complicated, constitutional litigation. Consequently, until validity of the federal law is determined, those who seek to benefit will not do so.

8. A constitutional spatial solution

Since none of the three possible solutions considered—common law, statute, or s 109—presents a viable solution to the problem of the conscientious vendor, the question becomes one of whether the constitutional spatial theoretical framework might offer a solution. Doubt mentioned in the preceding section could readily be dispelled by domestic enactment of the entire ICCPR, which is the position spatial theory adopts.

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[213] *Dietrich v The Queen* (n 213); Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63) 8–12

[214] *Dietrich v The Queen* (n 213); Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63) 8–12

[215] For the international obligations that Australia undertakes in entering a treaty or covenant that would enliven s 51 (xxix) see *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26 ('*Vienna Convention*'). See also: James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 8th ed, 2012) 377–8; ME Villiger, 'Article 26: Pacta Sunt Servanda' in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009) 359–68. For a discussion of the effect of international covenants and treaties, see Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63) 8–12. As to s 51(xxix) and its operation in invoking covenants and treaties that will enliven the legislative power, see *Dietrich v The Queen* (1992) 177 CLR 292; at 305 Mason CJ and McHugh J summarised the dualist position in Australian constitutional law and the effect of the ICCPR:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provision. (Emphasis added).

For the constitutional doctrine on external affairs and the criteria for valid exercise of the power, see Australian Parliament, 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties' (Website, undated) <*https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/treaty/report/c05*>; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *R v Sharkey* (1965) 113 CLR 54; *Airlines of New South Wales Pty Ltd v New South Wales* (1965) 113 CLR 54; *New South Wales v The Commonwealth* (1975) 135 CLR 337; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Simsek v MacPhee* (1982) 148 CLR 636; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 211-212; *Kioa v West* (1985) 159 CLR 550; *Dietrich v The Queen* (1992) 177 CLR 292; *Richardson v The Forestry Commission* (1988) 164 CLR 261; *State of Queensland v The Commonwealth* (1989) 167 CLR 232; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; *Horta v The Commonwealth* (1994) 181 CLR 183. See also the decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 for the indirect effect international covenants and treaties may have in the interpretation of legislation, even though not implemented by federal legislation under s 51(xxix) of the Constitution, and the discussion in Chapter 6 of Australian Parliament 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties', cited above.

[216] *Dietrich v The Queen* (1992) 177 CLR 292, at 305 Mason CJ and McHugh J.

Assuming the requirements of the first four principles are met, under the fifth principle of spatial theory the principal questions fall to be decided by the requirements of human dignity. Principles 2 and 3 provide a framework that is organised under a single and universal standard, human dignity, that is absent from the statutory regimes currently in existence and, notably, only faintly imprecated in the federal religious law Bills. Since there is no *a priori* precedence among rights and freedoms, human dignity operates as the mediating principle to determine which right or freedom, limited to that given circumstance, should take precedence. The outcome will depend upon a weighing of potential outcomes for their maximisation of human dignity.

Dignity provides the foundational principle that enables the relative priority of rights and freedoms in a given circumstance to be adjudged under a comprehensive framework. As a merely faint suggestion in the most recently proposed Religious Discrimination Bill,[217] dignity is only present as decorous rhetoric.[218] By the implementation of principles 4, 5, and 6, which provide for a comprehensive framework, the problems associated with piecemeal treatment of human rights would be avoided: a comprehensive implementation of Australia's international obligations to implement the ICCPR as a whole and the enshrinement of dignity as the organising jurisprudential principle. This structure is strengthened by the systematic analysis tools incorporated from Hohfeldian theory.

9. The place of Hohfeldian theory within spatial theory: bundles of rights and the concept of 'democratic liberty'

In order for the spatial principles to be implemented, clear conceptions of what is being claimed by each party must be understood. Claims may thus be weighed in the scales of human dignity. This is no mere impressionistic balancing exercise. Impressionistic balancing would, inevitably, bring the bias and prejudices of the arbiter to the decision without those influences being accounted for in the process. Further, as discussed in Chapter 1, with impressions alone to guide, there is the potential for the use of dignity as an ersatz right, which results from the confusion between *rights* on the one hand and the *status* of human dignity on the other.[219]

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[217] Religious Discrimination Bill 2018 (Cth) <*https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/freedom-religion*>.

[218] Clause 3 (2) (b) provides:

> In giving effect to the objects of this Act, regard is to be had to:
> (a) the indivisibility and universality of human rights, and their equal status in international law; and
> (b) the principle that every person is free and equal in dignity and rights. (Emphasis added).

See Waldron, *Dignity, Rank, & Rights* (n 8) 79, 88–93.

[219] Brett G Scharffs, 'Freedom of Religion and Belief for Everyone Everywhere: Lessons Learned and Good Practices', *Talk About: Law and Religion* (Blog Post, 1 April 2020) <*https://talkabout.iclrs.org/2020/04/01/freedom-of-religion-and-belief-for-everyone-everywhere-lessons-learned-and-good-practices/*>; Robin Fretwell Wilson and Tanner Bean, 'Fairness for All: An Answer to the Special Rapporteur's Call for a Practical Resolution between Freedom of Religion or Belief and LGBT+ Non-discrimination', *Talk About: Law and Religion* (Blog Post, 20 April 2020)

9.1 A theory of jural relations

This is where Wesley Hohfeld's notion of 'jural relations' assists in understanding the conscientious vendor.[220] In assessing[221] *Masterpiece*,[222] Joseph William Singer applies the basic Hohfeldian framework to the case of the conscientious vendor. This Hohfeldian analysis supplies certainty in application of spatial principles outlined above.[223]

Originally conceived to analyse property rights,[224] Hohfeldian theory has proven useful in various rights discourses,[225] including the analysis of human rights.[226] In implementing spatial principles 2, 3, 5, and 6, Hohfeldian theory assists in at least two important ways. First, and perhaps, for spatial theory, most importantly, Hohfeld demonstrates that all rights are relational. This Hohfeldian notion is reflected in spatial principles 3 and 5.1. Second is the Hohfeldian requirement to examine rights beyond their abstract labels, since labels of themselves betray nothing meaningful for analytical purposes. This notion is reflected in spatial principles 5 and 6. The requirement to examine bundles of rights also conforms to spatial principles 2, 3, 5, and 6, and conduces to principles 1 and 4. Hohfeld's question is a very practical one: what claim, right, or immunity will the government enforce as between the parties in relation to the particular claim, right, or immunity? In answering that question, spatial theory adopts Hohfeld's 'bundle of rights' as its analytical tool.

9.2 'Bundle of rights' analysis

Hohfeldian theory is one of action. It predicts the circumstances in which parties are entitled to act or resist action in relation to their claim-rights. They act or resist action in the confidence that the state will take action to support their position if it is upheld by analysis. Hohfeld sought through

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<https://talkabout.iclrs.org/2020/04/20/fairness-for-all-an-answer/>; Christine M Venter, 'Human Dignity, SOGI Claims, and the Obergefell Decision' *Talk About: Law and Religion* (Blog Post, 1 July 2020) *<https://talkabout.iclrs.org/2020/07/01/human-dignity-sogi-claims-and-the-obergefell-decision/>*.

220 Rick Sarre, 'The First World War and Conscientious Objection in Australia' (2019) 31(4) *A Journal of Social Justice* 548; Howard Kislowicz, Richard Haigh and Adrienne Ng, 'Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom' (2011) 48(3) *Alberta Law Review* 679; Steven Clarke, 'Conscientious Objection in Healthcare, Referral and the Military Analogy' (2017) 43 *Journal of Medical Ethics* 218.

221 Singer, 'Religious Liberty & Public Accommodations (n 52).

222 *Masterpiece Cakeshop* (n 24).

223 Hohfeld (n 48) 35–64.

224 Ibid.

225 Henry Shue, *Basic Rights: Subsistence, Affluence & US Foreign Policy* (Princeton University Press, 40th ed, 2020) 58–9, 160–1, 202; Joseph William Singer and Isaac Saidel-Goley, 'Things Invisible to See: State Action and Private Property' (2018) 5 *Texas A&M Law Review* 439; Joseph Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' [1982] 6 *Wisconsin Law Review* 975; Singer, *No Freedom Without Regulation* (n 76). See also Albert Kocourek, 'Plurality of Advantage and Disadvantage in Jural Relations' (n 49); Finnis, 'Some Professional Fallacies About Rights' (n 49); Corbin, 'Jural Relations and Their Classification' (n 49).

226 Shue *Basic Rights* (n 225) 58–9, 160–1, 202.

his scheme of jural relations, often interpreted as a bundle of rights conception, to determine which claims would be enforceable, which in practical terms means legitimately attracting the coercive power of the state under the law.[227]

For a Hohfeldian analysis of jural relations between relevant parties, the theory utilises a scheme of four different categories of relationship. Those categories are *duty* and *liberty*, *right* and *no-right*, *liability* and *immunity*, and *power* and *disability*. As shown in Table B, below, taken from Hohfeld's text,[228] categories of relations are interrelated as either jural correlatives or jural opposites. Hohfeld's rights analysis centres in the exercise of the legal position described within each category. Logically, they either entail one another, in the case of jural correlatives, or negate one another, in the case of jural opposites. Standard rights in property are treated as bundles of rights the owner holds against others.[229] Hohfeld splinters each right into a series of jural relations, bundles of 'rights' comprising liberties, claim-rights, powers, and immunities and their jural correlatives and opposites. That analysis promotes a proper understanding of the nature of 'rights' from the legal, logical, and practical perspectives, without descending into questions of *moral* right or the dictates of conscience.

Any bundle will break down into four different sets of jural relations as depicted in Hohfeld's table.

Table B Hohfeld's Table of Jural Relations

Jural Correlatives[230]

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Jural Opposites[231]

Right	Privilege	Power	Immunity
No-right	Duty	Disability	Liability

Through this separation of bundles of rights into their constituent elements, an arbiter of a rights claim can assess where the claim-rights sit in relation to one another. As Nikolai Lazarev notes,

[227] Singer and Saidel-Goley, Things Invisible to See' (n 225) p 503.
[228] Hohfeld (n 48) 36, 65.
[229] Ibid 35–64; J Penner, 'Hohfeldian Use-Rights in Property' in JW Harris (ed) *Property Problems: From Genes to Pension Funds* (Kluwer Law International, 1998) 164–74.
[230] Hohfeld (n 48) 36, 65.
[231] Ibid.

'[it] is this clear and precise method that makes Hohfeld's analysis of rights not only elegant and attractive but also fundamental to anyone wishing to make an informed and intelligible assessment of the legal position of the parties'.[232]

As to 'jural correlatives', Hohfeld's theoretical analysis tells the arbiter of a rights claim where the coercive force of the state lies in any claims or transaction. A Hohfeldian *right* means a legal claim-right that has the coercive force of the state to support it.[233] This *right* amounts to legal protection from interference by another and prevents the withholding of assistance to exploit the claim-right.[234] The other who is not permitted to interfere, or is required to cooperate in the exploitation or realisation of the right, is under the correlative *duty* to do so.

A *privilege* is a liberty, or an *absence of a duty* to abstain from any particular action. It is to be free of the constraints of duty owed to another.[235] A *power* is the ability to *alter* jural relations. It may be a power to enter a contract, gift property, or to receive profits. Its correlative is a *liability* on the part of another to bring the subject of that power to fruition. An *immunity* means that another has no power to change a legal position with respect to any entitlements falling within the immunity. The corresponding correlative, a *disability*, means a lack of power to compel a change in legal position.

This concept of an *immunity* is of particular application in determining the limits of state coercive power with respect to rights and freedoms conferred by a bill of rights. As spatial principle 6 describes, the individual has an immunity from laws or actions that trespass into the space allocated for the particular right or freedom. That individual has the right to the coercive force of the state to protect that right or freedom.

As to *jural opposites*, the terms appearing in that section of the chart have corresponding meanings in cases where there is adjudged to be a no-right claim. They can be illustrated by reference to the *Masterpiece* case, described earlier in Part D, where the devoutly religious baker, Jack Phillips, epitomises the conscientious vendor.[236] The Supreme Court majority in that case[237] avoided the central question of conflicting rights: the conflict between First Amendment rights and equality under the Colorado statute[238] was overtaken by the *ratio decidendi* that the Colorado Commission

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[232] Nikolai Lazarev, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights' [2005] *Monash University Electronic Journal of Law* 9 <http://classic.austlii.edu.au/au/journals/MurUEJL/2005/9.html>.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] *Masterpiece Cakeshop* (n 24).
[237] Justice Kennedy, joined by Roberts CJ, and Breyer, Alito, Kagan, and Gorsuch JJ.
[238] *Colorado Anti-Discrimination Act*.

had acted with bias, which was sufficient reason for its process to be set aside. Conscience, and its position under the First Amendment and Colorado law, was thus not essential to that decision.[239]

Phillips claimed he was motivated by a religious conscience in refusing to deal with Charlie Craig and David Mullins.[240] Were his actions to have had no detrimental impact upon Craig and Mullins' rights or freedoms, neither Hohfeldian theory nor spatial theory would interfere. Hohfeld might say, if such were the case, that the religious actor, the proprietor and artisan baker, Phillips, had a right, a privilege, a power, and even an immunity to make his cakes and to run his business 'to honor God through his work'[241] as he claimed. However, once his refusal to deal became part of a jural relation, and he deprived consumers Craig and Mullins of their rights to equal treatment, the claim to freedom of religious conscience fell to be analysed. Hohfeld[242] and Singer[243] look past the label of Phillips' claims of 'religious liberty' and 'conscientious objection'. At the point of his refusal to deal, a set of potential jural opposites arose. Did Phillips have a 'right' to refuse to deal? Did Craig and Mullins have the 'privilege' to compel Phillips to accept a 'duty' to supply goods and services equally to them? Or did Phillips enjoy an 'immunity' under the First Amendment?

In his defence to the Commission's action to enforce the equality law in *Masterpiece*,[244] Phillips claimed that because of his religious conscientious objection to same-sex marriage, the First Amendment excused him from obedience to equality laws and permitted his refusal to provide goods and services to the same-sex couple.[245] He claimed, in Hohfeldian terms, an *immunity*. Because the Supreme Court found for Phillips on other grounds, no Hohfeldian analysis needed to be undertaken by the Court.[246] The majority decided that Phillips had a right to a fair hearing at first instance by the Commission, which he had not received.[247] Had the Court undertaken a Hohfeldian approach to the case, it should have determined that Phillips had 'no-right' to refuse.[248] As Singer clearly demonstrates, under the Innkeeper's Rule,[249] as the controller of a 'public accommodation'—that is, the cake store—he had no right to refuse supply of goods or services

[239] *Masterpiece Cakeshop* (n 24), Opinion of Kagan J, 4.
[240] Ibid 3–4.
[241] Ibid, opinion of Kennedy J (for the Court) 3.
[242] Hohfeld (n 48) 36, 65.
[243] Singer, 'Religious Liberty & Public Accommodations' (n 52).
[244] *Masterpiece Cakeshop* (n 24).
[245] Ibid, opinion of Kennedy J (for the Court) 3–4.
[246] Ibid 18.
[247] Ibid. Opinion of Kennedy J (for the Court) 3–4, 18; Opinion of Kagan J 4.
[248] Singer, 'Religious Liberty & Public Accommodations' (n 52) 3–6.
[249] Ibid 2–3.

to any customer.[250] The common law and statutory origins of the rule[251] were aimed at preventing racial and other prejudices preventing travellers from finding lodgings. The rationale of the rule applies equally to race and to any other attribute that a traveller, or purchaser of goods and services, might possess. Phillips was an 'innkeeper',[252] running an 'accommodation', a publicly accessible retail space. He was, therefore, squarely within the 'innkeepers' rule'[253] and was thus obliged to set aside his conscientious objection and under a duty to deal with Craig and Mullins.[254] His bundle of religious liberty rights did *not* extend to a right to refuse to deal from public accommodations as an innkeeper.

Once a jural relational duty to deal had been found, the case would have fallen outside of First Amendment considerations. A right of refusal was simply not a component of his bundle of property rights as a public vendor, conscientious or otherwise. The freedom to contract and deal in his property and services as he saw fit had already been removed by the applicable rule under the Colorado statute.

From a spatial theoretical perspective, the constitutional space for religious liberty does not include a right for Phillips to discriminate among members of the public. There is no right within that space to discriminate against others with any constitutional immunity. Whatever conscientious objection Phillips may have had; it does not translate into a constitutional immunity from legal consequence.

Hohfeldian theory carries with it a different conception of religious liberty from that which is based in conscience. It is one that falls within the boundaries of constitutional space. It is what Singer refers to as a 'democratic liberty'.[255]

9.3 The concept of 'democratic liberty'

Spatial principle 6 posits a constitutional freedom that is enjoyed within the walls of the constitution and the spaces it creates. The state will only underwrite freedom within the law as authorised by the constitution. That statement of principle, consistent with Art 18 of the ICCPR, provides relevantly as follows:

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[250] *Masterpiece Cakeshop* (n 24), opinion of Kennedy J (for the Court) 4–6; Singer, 'Religious Liberty & Public Accommodations' (n 52) 4, 9–10.
[251] *Masterpiece Cakeshop* (n 24), opinion of Kennedy J (for the Court) 4–6; Singer, 'Religious Liberty & Public Accommodations' (n 52) 4, 9–10.
[252] Singer, 'Religious Liberty & Public Accommodations' (n 52) 3–6.
[253] Ibid.
[254] Ibid.
[255] Singer, *No Freedom Without Regulation* (n 76) 261–62.

> 1. Everyone shall have the *right to freedom of thought, conscience and religion*. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching…
>
> 3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations* as are prescribed by law and are *necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*. (Emphasis added)

Spatial principles are consistent with an unlimited and unconditional right to freedom of thought, conscience, and religious belief. As under Art 18, it is in the manifestation that there is potential for conflict of the kind that is the subject of current examination. It is only as 'manifestation' that jural relations fall to be examined by Hohfeldian theory. What spatial theory contemplates is a regulated freedom or 'democratic liberty',[256] a concept devised by Singer that is consistent with Art 18, Hohfeldian theory, and constitutional doctrine.

This notion of 'democratic' as used by Singer[257] as a part of constitutional doctrine, is reiterated by TRS Allan:

> Democracy is an aspiration to self-government that is erroneously equated with majority rule; and the corresponding idea of popular sovereignty should be understood to embody the claim of every citizen to equal respect. A majority decision to remove the legal foundations of the dignity and independence of a single citizen, in violation of the principles of the rule of law, is not to be understood as an exercise of popular sovereignty, however great the majority or passionate the specious claim of legitimacy. Citizenship in a liberal democratic regime cannot be equated merely with liberty to vote, and subjection to whatever treatment a majority vote endorses, on the other.[258]

9.4 Manifestation of belief as a 'democratic liberty'

Under Art 18, the manifestation of religion or belief may be limited 'subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[259] That expression was the subject of General Comment 22 made by the United Nations[260] and the *Siracusa Principles on the Limitation and Derogation*

[256] Ibid 18–25, 56–7.
[257] Ibid.
[258] TRS Allan, *Constitutional Justice* (n 83) 261–2.
[259] Art 18 (3).
[260] Singer, *No Freedom Without Regulation* (n 76) 18–25, 56–7

Provisions in the International Covenant on Civil and Political Rights.[261] The concept of 'democratic liberty' under spatial principle 6 is consistent with the Comment and the Principles.

'Democratic' in this context takes account of the entirety of constitutional processes. A law providing 'democratic liberty' will meet all conditions of validity under the provisions of the constitution and its bill of rights, as contemplated by spatial principles 3 to 6 inclusive. Otherwise, as de Tocqueville warned, the rights of the minority are subject to the tyranny of the majority,[262] under which sheer numbers could be used to justify denials of fundamental rights and freedoms.[263]

As Allan explains, all of the fundamentals of constitutional government form part of the 'democratic' doctrine, including 'sovereignty', 'dignity', and the 'rule of law'.[264] Political numeracy, that is possessing ability to form a majority, is *per se* insufficient. Principled sovereignty and democratic liberty are guided by the rule of law rather than the 'rule of men' or women.[265]

'Democratic liberty' facilitates communal harmony.[266] Spatial theory, consistent with Singer's regulated freedom or 'democratic liberty', goes another step. Singer and spatial theory hold that individuals are generally free to do whatever they wish *within the boundaries of the law*. Under spatial principle 6, individuals are not free to exceed the boundaries set by the law unless they have previously demonstrated an exceptional case. Spatial theory has as its default position that the first duty is to obey the law. It cannot encourage individuals to take self-styled liberties contrary to the law. Singer's concepts of regulated freedom[267] or 'democratic liberty'[268] are consistent with spatial theory, as Singer explains:

> Freedom does not mean doing whatever we like; it means collectively and freely adopting laws that enable us to live with others in harmony and prosperity. We do what we like within boundaries adopted by democratic means. Freedom entails government of the people, by the people, and for the people. The liberty we cherish is not the absence of regulation; it is the

[261] UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex, 1985 <*https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf*>.
[262] Alexis de Tocqueville, *Democracy in America: Volume 1*, tr Henry Reeve (Bantam Classics, 2000) 295–333.
[263] Ibid.
[264] Ibid.
[265] Kenneth Hayne, 'The Rule of Law' in Saunders and Stone, *Oxford Handbook of Australian Constitutional Law* (n 81) 167–189.
[266] Gerald L Johnston, Liberty, Equality, Fraternity: Democratic Ideals and Educational Effects' (1991) 12(4) *British Journal of Sociology and Education* 483.
[267] Singer, *No Freedom Without Regulation* (n 76).
[268] Ibid

> freedom to live with others under the rules we have adopted together and which set the minimum standards that enable us—each of us—to pursue happiness.[269]

With the analytical and theoretical tools adopted from Hohfeld and Singer, spatial theory has a clear position on how religious liberty is founded. It does not accept expansionist assertions, such as those made by Robin Fretwell Wilson and Tanner Bean, that '[freedom of religion or belief] promotes human dignity in and outside the contexts of religion, sex, sexual orientation, and gender identity … When rights are protected … human dignity flourishes'.[270] These assertions have the analysis backwards.

The loose phraseology and imprecise use of terminology surrounding 'human dignity' suggests either that 'dignity' is, like religious liberty, a *right* rather than a *status*; and that religious liberty is in some way antecedent to and promotional of dignity.[271] Dignity is thus made to appear *contingent upon* religious liberty. As will be discussed in the next chapter, human dignity cannot be in any way contingent. It is dignity that promotes freedom, not the other way around.

Dignity cannot depend upon the acknowledgment of rights. It is a universal human status that is innate and non-derogable. Rights depend upon and derive from human dignity. Freedom of religion cannot 'promote' dignity. If that were so, then it would be freedom of religion, a right without any apparently prescribed bounds, that would inform the content of a status. It is this misunderstanding that can lead to the conflation of the status, dignity, with the right, religious liberty.

This type of error into which Wilson and Bean fall is avoided by an understanding of constitutional space in all of its dimensions: dignity is the *source* of all human rights and all manifestations of those rights and not the other way around. Dignity, both as an organising principle and a status, prescribes the limits of rights and freedoms. This understanding is advanced by first examining the categories of constitutional space, discussed in the next section of this Part, and then by utilising the correct conception of constitutional space, which is the subject of the next Part.

10. Categories of constitutional space: federal; sub-federal; legislative, executive, and judicial; space for government; space for the governed

It will have been evident from the discussion so far that there are different categories of constitutional space. It is divided at the national and sub-national levels into federal, state/territory

[269] Ibid 19.
[270] Wilson and Bean, 'Fairness for All' (n 219).
[271] Ibid.

and local spaces. Each of those is, in turn, divided into the legislative, executive, and judicial spaces to correspond with the arms of government and their functions.[272] In each of these spatial departments, the Australian constitutional arrangements have proven amply equal to the task.[273] There is, however, a broader division into two wide expanses of constitutional space. The existence of these divided expanses is poorly reflected in the current Australian arrangements. Within the first are the spaces for government already mentioned. For these *spaces for government*,[274] the Australian arrangements provide very well.

It is in the second expanse, *space for the governed*, that the Australian arrangements are all but completely deficient.[275] While there are constitutional chapters allocated to 'The Parliament',[276] 'The Executive Government',[277] 'The Judicature',[278] 'Finance and Trade',[279] 'The States',[280] various incidental matters,[281] and amendment of the Constitution,[282] there is no chapter dealing with the people of the nation or their relationship with government or, indeed, with one another.[283] Australian government is, thus, strongly skewed away from constitutionally guaranteed individual rights and freedoms, favouring only such rights and liberties as successive governments choose to permit by ordinary legislation or that exist as a matter of custom or tradition.[284] Rights and freedoms are in the political gift rather than in any constitutional strong box.

Under the Australian Constitution, the states and territories have far greater *inter se* rights enforceable against one another and the Commonwealth than are enjoyed by individuals in respect of their rights and freedoms under the Constitution.[285] There are scattered throughout the Constitution a handful of what would be considered human rights,[286] but no systemised approach to individual rights and freedoms is to be found.

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[272] Sawer, *Australian Federalism in the Courts* (n 57).
[273] Ibid 196–208.
[274] Ibid 12–14.
[275] George Williams, 'Legislating for a Bill of Rights' (2000) 25(2) *Alternative Law Journal* 62; Andrew Byrnes et al 'Bill of Rights in Australia: History, Politics and Law' (2009) 15(1) *Australian Journal of Human Rights* 175;
Michael Kirby 'Human Rights: The International Dimension', Papers on Parliament No. 26, August 1995 <*https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop26/c01*>.
[276] *Australian Constitution*, Chapter I.
[277] Ibid Chapter II.
[278] Ibid Chapter III.
[279] Ibid Chapter IV.
[280] Ibid Chapters V and VI: States and New States.
[281] Ibid Chapter VII.
[282] Ibid Chapter VIII s 128.
[283] Sawer, *Australian Federalism in the Courts* (n 57) 12–14.
[284] Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63).
[285] Ibid.
[286] Australian Constitution Section 51(xix).

Indeed, of the forty enumerated heads of legislative power of the Parliament found in s 51, 'with respect to'[287] which it is given power 'to make laws for the peace, order, and good government', apart from naturalisation and aliens,[288] marriage,[289] divorce and matrimonial causes,[290] invalid and old-age pensions,[291] the provision of welfare payments,[292] special race laws,[293] and immigration and emigration,[294] no head of power touches upon the fundamental rights of individuals. If the Parliament were disposed to legislate with respect to human rights generally, it could only do so by invoking the external affairs power in s 51(xxix) in relation to a relevant human rights convention or treaty or by referral of power from the states under s 51(xxxvii).

The imbalance in provision for space between government and governed is avoided in every Western constitution other than Australia's by some form of bill of rights.[295] Bills of rights feature, for instance, in most post-British-colonial constitutional arrangements,[296] including Canada,[297] and, in a statutory form, in New Zealand,[298] a country that is not federated and has no written constitution.

Adoption of a bill of rights according to spatial principles is a practical way to resolve the problem at hand and to avoid other conflicts of rights into the future. Under spatial theory, a bill of rights is the vehicle for two advances: the creation of dedicated spaces by which conflicts can be avoided; and the instantiation of human dignity as a constitutional principle as the basis for fundamental human rights and freedoms that occupy those spaces.[299]

Experience teaches that in the second half of the twentieth century,[300] human rights blossomed under such international and constitutional instruments; and human dignity, featuring in those instruments, has become increasingly a part of national and sub-national constitutional arrangements.[301] The bill of rights proposed by the spatial theory, with human dignity at its centre, is based upon the spatial

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[287] Ibid Section 51, chapeau.
[288] Ibid Section 51(xix).
[289] Ibid Section 51(xxi)
[290] Ibid Section 51(xxii).
[291] Ibid Section 51(xxiii).
[292] Ibid Section 51(xxiiiA).
[293] Ibid Section 51(xxvi).
[294] Ibid Section 51(xxvii).
[295] Kirby, 'Human Rights—The International Dimension' (n 275).
[296] Charles O Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press 2007).
[297] *Canadian Charter of Rights and Freedoms*, entrenched in the Constitution of Canada, forming the first part of the *Constitution Act 1982*.
[298] *New Zealand Bill of Rights Act 1990*.
[299] Barak, *Human Dignity* (n 8).
[300] Ibid.
[301] ICCPR Preamble.

theoretical position that dignity is the source of all human rights and all manifestations of those rights. According to spatial theory, and as can be observed from international human rights and constitutional instruments,[302] all rights are relational to one another.[303] That relationship is strongest when rights are derived through the status of human dignity.[304]

The bill of rights operates as a form of roadmap to identify the places in which dignity is best served. Boundaries are drawn around rights and freedoms to ensure each right or freedom has its allocated space. These are categorical divisions rather than strict separations since all derive from a single source, human dignity. Rights and freedoms are, thus, all interrelated under spatial theory through the status of human dignity. Dignity directs their interrelationship.

Since there was no bill of rights as part of the Australian federation constitutional arrangements in 1901 and has been none since,[305] spatial theory must devise a manner in which this second expanse of constitutional space is to be created and populated. Before that task can be undertaken, there must be a discussion of which conception of 'constitutional space' is to be adopted as most suitable for the solution of the subject problem.

It will be necessary next to distinguish the constitutional space for religious freedom among the various conceptions. In this process, the problem to be solved can be considered from the perspective of each competing conception of constitutional space.

Part B: Competing conceptions of 'constitutional space'

1. Competing positions: 'expansionism' and 'contractionism' and the choice of a constitutional space

Part A argued that two approaches to religious freedom— 'expansionist' and 'contractionist'— compete for attention in Australia. Indeed, it would appear from the Ruddock Report that the choices for the future of religious freedom in Australia are more limited than need be the case. The recommendation of the Panel, consistent with the argument made here, is that there not be any standalone right to religious freedom but that it should be a part of a collection of fundamental rights and freedoms. Expansionists seek, instead, the continuation and extension of the model of exceptions and exemptions. The government has opted to reject the suggestion of the Panel and proceed instead with the federal Religious Discrimination Bill. In the meantime, the default position of contractionism proceeds, reducing the instances in which religion is privileged and exceptions

[302] Kirby 'Human Rights—The International Dimension' (n 275).
[303] Rochow and Rochow, 'From the Exception to the Rule' (n 69) 93–4, 109–10. Cf Waldron, 'Is Dignity the Foundation of Human Rights?' (n 180).
[304] Rochow and Rochow, 'From the Exception to the Rule' (n 69).
[305] Sawer, *Australian Federalism in the Courts* (n 57) 12–14.

operate. Instances of permitted discrimination are gradually being reduced rather than expanded. Thus, there are two positions in contention and a third entirely disregarded: first, expansionism; secondly, contractionism; and the third disregarded option, the adoption of a bill of rights.

As to discriminatory exclusion in education, the South Australian government has published a Bill for comment, the Equal Opportunity (Religious Groups) Amendment Bill 2020 (SA), that would contract religious rights to discriminate.[306] Under the Bill, if passed, it would be illegal for schools with a religious ethos to expel or deny admission to LGBTQI+ students on the basis of their sexuality.[307] No longer would there be any exemption that permitted discrimination on the basis of sex or LGBTQI+ identity when providing preschool, primary, or secondary education, health services, aged care, disability support services, foster care placement, emergency accommodation, or public housing services. Current legal exemptions would no longer apply to schools. The liberty of schools to discriminate with regard to sexuality would be lost entirely and no longer a part of the bundle of rights that comprise that liberty.

Outside of the normal exceptions to prohibitions on discrimination, another example can be seen in the state of Victoria in a legislative move against the strong emphasis placed by conservative Christians upon heteronormativity and marriage between man and woman. Proselytising to a heterosexual lifestyle, which is central to the mission of many conservative Christians, is challenged by the Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic), which passed both Houses of Parliament in 2020[308] but is yet to pass into law with royal assent.[309]

Once assented to, it will prohibit practices used to convert LGBTQI+ individuals from their current gender identity and sexual preferences. Prohibited practices include religious methods such

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306 Equal Opportunity (Religious Groups) Amendment Bill 2020 (SA) <https://www.agd.sa.gov.au/sites/default/files/equal_opportunity_religious_bodies_amendment_bill_2020.pdf>.

307 Ibid cl 4.

308 See Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic) cl 2:

> 2 Commencement
>
> (1) Subject to subsection (2), this Act comes into 25 operation on a day or days to be proclaimed.
>
> (2) If a provision of this Act does not come into operation within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it comes into operation on the 30th day after the end of that period.

See also, Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 2020, Second reading speech, Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Jill Hennessey, Attorney-General) *<https://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Change+or+Suppression+Conversion+Practices+Prohibition+Bill+2020&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2020&IW_FIELD_IN_SittingMonth=November&IW_FIELD_IN_SittingDay=26>*.

309 Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 2020, Second reading speech, Change or Suppression (Conversion) Practices Prohibition Bill 2020 (n 309).

as preaching to and praying for or with the individual.[310] It will no longer be permissible for lifestyles other than the heteronormative to be treated as sinful or abhorrent.[311]

2. The increased difficulty for expansionism in a system of exceptions, exemptions, exclusions, and accommodations

Moreover, the system of exceptions, exemptions, exclusions, and accommodations favoured by expansionism is becoming increasingly impossible to administer. Julian Rivers has observed an increased difficulty in the balancing of religious liberties and equality rights since the first equality laws were passed.[312] In their infancy, anti-discrimination laws covered only a few protected characteristics, namely sex and race. Balancing was a simpler matter when the protected characteristics were so few. Freedom of religion could be readily accommodated by exceptions to the operation of the laws. The types of accommodation sought were generally in relation to priesthood ordinations and employment within the faith tradition in church-sponsored schools.[313] But, as Rivers points out, discrimination laws have widened their scope to protect characteristics that reflect a changed set of social norms and accepted lifestyles.[314] This more nuanced scenario makes exemption and accommodation a greater challenge.

Rivers also suggests that a voluntary abandonment of religious discrimination is just not possible. Religion, he insists, is inherently discriminatory. [315] It must discriminate to maintain and protect its ethos. Compromise would be regarded as a capitulation. Because of that discriminatory nature, there appears no viable solution to the problem of conflict.

3. Spatial theory, dualism, and expansionism

Instead of the alternatives of an expanding space for religious freedom or a contracting space that, over time, would end public religious practice, the 'constitutional' alternative that spatial theory represents should be regarded as offering a third way. But expansionists are unlikely to adopt it because underlying their expansive view is a dualist insistence that secular law is not final in its authority. Spatial theory, as a secular doctrine, is, therefore, completely unacceptable to the expansionist.

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[310] Neil Foster, 'Victoria's Conversion Practices Bill is as Bad as They Say It Is', *Freedom for Faith* (Web Page, 18 January 2021) <https://freedomforfaith.org.au/articles/victorias-conversion-practices-bill-is-as-bad-as-they-say-it-is/>.
[311] Ibid.
[312] Rivers, 'Is Religious Freedom Under Threat from British Equality Laws?' (n 34) 179–81.
[313] Ibid.
[314] Ibid.
[315] Rivers, 'Is Religious Freedom under Threat from UK Equality Laws?' (Conference Paper, McDonald Centre, Christ Church, Oxford/Is Religious Freedom under Threat? A Trans-Atlantic Dialogue, 23 May 2018). A copy is in the possession of the author.

As spatial principle 6 makes clear, while allowing for limited rights of conscientious objection where compatible with the principle of human dignity, the default position in spatial theory is that the civil law must be obeyed. In any conflict between one human right and another, human dignity is to operate as the mediating principle to determine which right or freedom, limited to that given circumstance, is to take precedence. But this is the opposite of what the expansionist position seeks to achieve. An example of the conscientious independence expansionism seeks is found in the submissions of The Anglican Church Diocese of Sydney to Joint Standing Committee on Foreign Affairs, Defence and Trade:

> We submit that there should be a general protection in federal law that protects the individual's freedom of thought, conscience and belief, which will prevent a person being compelled in the course of their employment to perform an action contrary to conscience or religious belief.[316]

In principle 6, it is made clear that spatial theory only recognises the state's power and authority to govern. If the conscientious need to obey another, and higher, authority were to be recognised, the state's power and authority would be diminished; it would become dependent upon the assertions of those who claim esoteric knowledge obtained through sacred texts or revelation. There would arise small pockets of theocratic rule in exception to the community subscription to the secular rule of law to which the constitution is not relevant.

While spatial principle 6 does provide for the possibility of conscientious exceptions, it is framed in such a way that such exceptions, under the constitution, should be rare, based upon principle, in accordance with the requirements of human dignity, and the subject of adjudication. The objection from the expansionist would be, therefore, that it is secular and statist with little capacity given for the type of freedom expansionism seeks. The freedom spatial theory would instantiate would be a constitutional freedom, or, in Singer's terms, 'democratic liberty'.

There are, on the argument so far, good reasons to reject the expansionist conception of a space for religious freedom. There remains the question of whether expansionism could adequately address the problems that arise in the case of the conscientious vendor. From arguments presented on behalf of expansionism,[317] it will be seen that it offers little by way of a viable solution.

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[316] Anglican Church Diocese of Sydney, Submission No 178 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (26 April 2017) 8 <https://www.aph.gov.au/DocumentStore.ashx?id=6394869d-88a2-47d3-b275-0f6408b621f5&subId=510531>. See also Evans and Read, 'Religious Freedom as an Element of the Human Rights Framework' (n 7) 20, 30–1 citing the submission at footnote 50.

[317] Foster, 'Freedom of Religion and Balancing Clauses' (n 2); Deagon, 'Religious Schools, Religious Vendors' (n 2).

4. The expansionist solution

From the expansionist perspective, the Ruddock Panel is considered to have been wrong to confine itself to recommending that the Commonwealth progress legislative amendments clarifying that religious schools are not required to provide their facilities, or goods or services, for any marriage, provided that the refusal to deal conforms to the doctrines of the relevant religion and is necessary to avoid injury to the religious susceptibilities of adherents to that religion.[318] That recommendation is, from the expansionist perspective, too narrow. It should extend to all conscientious vendors whose goods or services might be used to support same-sex marriage, to which the vendor objects.[319]

What is unacceptable is that the Panel distinguished in its recommendations between protection for religious schools and the refusal to extend similar legislative protections to religious small business owners and managers who choose to provide goods or services in accordance with their religious convictions.[320] Conscientiously held positions of vendors with religious beliefs, it is argued,[321] have led to advocacy for special exemptions from the laws for religious small business operators in commercial contexts.[322] All conscientious vendors, it is argued,[323] should, as a matter of consistency, have the same benefit of exemption from equality laws so that they may refuse to supply goods or services, *provided* the refusal is on conscientious religious grounds and not the result of mere prejudice.[324] How those ostensibly distinct motivations of the proviso are to be distinguished is not made clear.

There is no exception to the common law freedom of contract that has been made in respect of political disagreement.[325] No law requires a dressmaker to make a dress for someone they do not like or with whose political position they disagree. Political statements made in the political arena, not in respect of protected attributes,[326] are not to the point. They provide no analogy to discrimination against a particular inherent or unchangeable attribute. For current purposes, it is sufficient to focus on three elements of the argument in favour of expansionism: first, legislative consistency;[327] secondly, the claimed disproportionate distribution of the burden of anti-discrimination laws;[328] and,

[318] Deagon, 'Religious Schools, Religious Vendors' (n 2) 767–9.
[319] Ibid 767, 768–72.
[320] Ibid.
[321] Ibid.
[322] Ibid.
[323] Ibid.
[324] Ibid 774.
[325] Other than, of course, the innkeepers' rule, which could arguably be invoked against a shopfront dressmaker.
[326] Such as age, sex, or race.
[327] Deagon, 'Religious Schools, Religious Vendors' (n 2) 768–73.
[328] Ibid.

thirdly, the effect on dignity and conscience[329] in the distinction between refusals made on conscientious religious grounds and those resulting from bigoted prejudice.[330]

5. Legislative policy consistency

There are various distinctions and comparisons that expansionists are at pains to make in order to make their expansions more acceptable to a legislature. There appears to be a tacit division between the vendor of generic goods, such as the pizza shop owner, and the provider of services, such as an artisan baker or a wedding photographer. As to the distinction of the artisan baker from the pizza maker,[331] as one the examples given, another tacit assumption appears. It is regarding the degree to which individuals will be affected in conscience by reference to the product sold. However, it is arbitrary to assume that depth of conviction varies according to the service or good they would be required to provide. And it ignores the effect on the victim of the discrimination. In each case, it is likely to be precisely the same: the victim is being excluded from supply on the basis of an inherent characteristic.

If the expansion applies only in special cases, the basis for speciality should be express. It also appears that it is assumed by expansionists making the argument, that there is more likelihood that their advocacy will be successful by confining the exception to more limited cases. The guiding principle by which to distinguish meritorious cases for exemption is thus difficult to discern. Either conscience is an important issue for all vendors, or it is not. And if conscience is important, why should it not extend beyond the religiously motivated. Why should not a person be permitted to refuse supply if their conscientiously held political principles dictate a refusal to a person with a protected characteristic? While neither seems objectively meritorious, the expansionist argument does not provide clarity regarding the distinctions it seeks to make. How is one to distinguish between the artisan's conscience and that of the pizza salesperson; or between the conscience of the Christian baker and that of the person whose political convictions are against supply? They are each a distinction without difference.

Since the ostensible principle employed in the expansionist argument is legislative policy consistency, like circumstances should be treated in like manner, there must be clarity as to the relevant elements of likeness.[332] If there are material differences that justify different policy applications, a comparison argument should fail. The expansionist contention of policy

[329] Ibid.
[330] Ibid.
[331] Ibid.
[332] Ibid 774.

inconsistency in the Ruddock Report between public institutions and small shopfront businesses[333] seems too hastily drawn. On closer consideration, there are material distinctions that would inform a policy of differentiation in treatment.

Chapter 1 demonstrated that in a classical conscientious vendor case, such as *Masterpiece*,[334] there are four recurrent elements: first, a shopfront meeting between the vendor and the prospective customers; secondly, the vendor learns that the product is to be used to celebrate a same-sex wedding; thirdly, dealing with the consumer in the goods or services is refused; and, fourthly, refusal to deal is justified by the vendor by reference to a religiously informed conscience that prevents promotion or support of same-sex marriage.

In the case of the school, the first element is likely to be missing. And its beliefs on marriage and same-sex marriage are far more likely to be known because of its identity or association with a particular religious institution. Because of its publicly known religious ethos and readily known position on marriage, refusal could be more readily anticipated. So, any inquiry is less likely to be made, and, if made, refusal is far less likely to offend. Both a religious school and a religious vendor can, of course, be alike in their levels of commitment to certain beliefs on marriage and their opposition to same-sex marriage. It is more likely, in the formation of policy, to take account of the manner in which one is likely to learn of institutional policy and its effect upon the consumer making the inquiry would be relevant considerations. One predication of anti-discrimination laws would be to spare persons with protected attributes the humiliation of being treated unequally in public. A public refusal to deal would be just the kind of humiliation such laws would seek to avoid. Advance public notice of an intention not to deal in same-sex wedding supplies, via a website or a telephone inquiry, would reduce the humiliating effect of the refusal.

Generalising then, it seems reasonable from a policy perspective to expect that differences could be expected in how consumers come to learn of the religious commitments of large institutions before seeking to deal in transactions to which they might object in contrast with how one might learn of the positions held by small businesses. Typically, it might be expected, in the case of the school, the first inquiry contact would be made with the larger institution, remotely, either online or by telephone. Schools that intend to discriminate may even give advance notice of their intention on their websites or through other media.

In general, from a policy perspective, it could be expected that there would be expected less likelihood of public embarrassment in a refusal to deal. If a policymaker, called upon to make an

[333] Ibid 768–73.
[334] *Masterpiece Cakeshop* (n 24).

exception to an equality law, were to consider the comparative likelihood of embarrassment over a protected attribute in a dealing with a large institution and a small owner-operated venture, there would seem less likelihood in the case of the former. In the case of an owner-operated business run by a conscientious vendor, the religious belief is, speaking generally, less likely to be knowable in advance and more likely to be ascertained personally, in the public setting of the shopfront.

The school and the shopfront vendor are also in different product markets. The likelihood is that personal consumables, such as cakes or photography, would be provided by the owner-operated business. Goods and services such as venue hire, and possibly seating, tent, and tarpaulin hire would, in general, be sought from a larger institution. The face-to-face public refusal seems more likely from the shopfront owner. It is in that case that policy would lean away from exemption to protect from the confrontation of a personal and publicly visible refusal to deal.

There are, thus, at least arguably, distinguishing factors that weigh in favour of a policy distinction and an exemption for schools but not for the small trader conscientious vendor. They are distinctions that expansionists appear to overlook in their argument for policy consistency.

6. Disproportionate distribution of the burden of anti-discrimination laws

Apart from policy consistency, expansionists argue that the legislative burden falls unfairly on the religious minority that is conscientiously opposed to same-sex marriage. This unfair burden, it is argued, comes about because of the absence of recognition of conscientious objection.[335] Equality laws, it is argued, should extend their protection to the religious in the same way that they protect the attributes of sexual practice. As a consequence, there is a win-lose paradigm established under current legislation, skewing outcomes in favour of equality rights in the event of conflict.

Missing in this argument is an appreciation of the clear policy position against discrimination with respect to protected attributes. Conscientious vendors, and others who share the desire to discriminate, bear the burden because they are seeking to engage in a practice that runs contrary to *that* policy position. While they may disagree with the laws that implement the policy, those laws are in place to diminish and even abolish a practice that is injurious to the dignity of others and runs contrary to their fundamental rights and freedoms. The equality laws prohibiting discrimination fall directly within the anticipation of Art 18(3) of the ICCPR, which permits the limitation of religious practices when a prohibition of a particular manifestation is 'prescribed by

[335] Deagon, 'Religious Schools, Religious Vendors' (n 2) 771.

law [to be] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

Expansionist arguments regarding the unfair burden cast by equality legislation betray an apparent unwillingness to accept, first, that it is discrimination that is the policy target; and, secondly, that religious freedom, particularly as manifest in discriminatory conduct, has its legal limitations when the fundamental rights and freedoms of others need to be protected. The constitutional space allocated to religious liberty must have boundaries that are not exceeded in order to permit those rights and freedoms to be enjoyed.

7. The effect of dealing upon dignity and conscience

Expansionist arguments on the effect of dealing upon conscience are overstated. Of the many manifestations of conscientious religious belief that could be injurious to others, discrimination by a refusal to deal is one that falls within the meaning of the Art 18(3) proviso. In such cases, the religious conscience has to be reconciled to what is permitted. Analogy can be seen in the Supreme Court of the United States decision in *Reynolds v United States*.[336] The Court held that despite a deeply held conscientious commitment to the belief in and practice of the religious doctrine of polygyny,[337] that commitment could lawfully be held as a belief but, under the *Morrill Anti-Bigamy Act*, could not be put into practice.

Similarly, in *Pichon and Sajous v France,*[338] the European Court of Human Rights refused an application from pharmacists who conscientiously refused to stock and sell contraceptives because of their religious beliefs. The Court held this to be 'manifestly ill-founded'. The Court determined that it could not permit practice of the pharmacists' religious beliefs to take precedence over pharmaceutical needs or be imposed on others. The pharmacists had many ways, it was reasoned, to manifest their beliefs outside the public and professional spheres in which they engaged as pharmacists.[339]

Chapter 4 deals with conscience as the third and final hypothetical testing of spatial theory. That chapter deals with the position of the religiously informed conscience as a matter of principle and procedurally. Expansionists make a silent assumption, present in *Masterpiece*[340] and the 'ministerial

[336] 98 U.S. 145 (1878)
[337] That is, plural wives, as opposed to polygamy (plural spouses) and polyandry (plural husbands).
[338] Application No. 49853/99 (2 October 2001) 191 <*https://www.echr.coe.int/Documents/Reports_Recueil_2001-X.pdf*>.
[339] Ibid.
[340] *Masterpiece Cakeshop* (n 24).

exception' cases,[341] that courts and tribunals ought not inquire into the truth of religious belief claims. As will be argued in Chapter 4, all claims for an exception to the law should be the subject of strict proof. Outlining the theory in this chapter, it is to be noted that spatial theory principle 5 proposes a constitutional doctrine as part of the new theoretical framework that runs directly contrary to the privileging of conscience. With dignity as its organising principle, no right or freedom is accorded any special privilege under the framework. Principle 5 holds, *inter alia*, that all fundamental rights and freedoms are related to one another through human dignity, and that there is no *a priori* precedence among rights and freedoms. There is no *a priori* principle that could justify an assumption that the religious conscience is privileged or that it is unable to be tested forensically. Indeed, no such principle has been identified in *Masterpiece*[342] or other conscientious vendor cases[343] or by expansionist commentators.[344]

Finally, there is the problem of the evaluation of religious conscientiousness.[345] While only the earnestly held conscientious belief is, on the expansionist proposal, to be privileged, the forensic problem of ascertaining the sincerity of belief and sifting the religious motivation from and determining the degree of conscientious objection. The exemption is not to extend to those individuals who use religious belief as a pretext for bigoted treatment of others. But sincere or not, it is a distinction without a difference. The religious vendor has, on any view, prejudged the consumer by reference to the particular protected attribute and predetermined what the reaction will be, namely refusal of supply. Whether the discrimination is characterised in a way that one escapes the opprobrium that attaches to the being 'biased', 'prejudiced', or 'bigoted', in the context of discrimination, the harm done is the same. The effect of the refusal upon the consumer is the same.

Expansionism, then, appears unable to deliver any resolution of the problem at hand. If no other strategy is devised in support of religious freedom than expansionism,[346] and in the absence of an adoption of spatial theory as a policy strategy, contractionism is most likely to deliver a continued curtailment of religious liberty.

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[341] See *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012); *Our Lady of Guadalupe School v Agnes Morrissey-Berru*; *St. James School v Darryl Biel, as Personal Representative of the Estate of Kristen Biel* 591 U. S. ____ (2020).

[342] *Masterpiece Cakeshop* (n 24).

[343] *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49.

[344] Deagon, 'Religious Schools, Religious Vendors' (n 2); Foster, 'Freedom of Religion and Balancing Clauses' (n 2); Scharffs and Mason, 'Constitutional Cultures Creating Constitutional Space' (n 7).

[345] Deagon 'Religious Schools, Religious Vendors' (n 2) 771–2.

[346] Such as by Deagon, 'Religious Schools, Religious Vendors' (n 2), Foster, 'Freedom of Religion and Balancing Clauses' (n 2), and Scharffs, 'Conceptualising Reasonable Accommodation' (n 7).

Part C: How a constitutional spatial framework could be installed under current Australian constitutional arrangements

The current system, with its tacit acceptance of expansionism, has had three principal flaws exposed that make it unsuitable as a solution to the problem of conflict between anti-discrimination laws and the religious claim to the right to discriminate. First, it remains a siloed approach, separated from other rights and freedoms and any guiding principle. Secondly, even if there were to be a federal law that gave any reform the benefit over state laws that comes via s 109, it suffers from any lack of entrenchment and may, therefore, at any time, be amended or repealed. Thus, any freedom it gives is a fragile one. Thirdly, it suffers from the logical and forensic difficulties discussed in the preceding section.

This leaves spatial theory as a principled source of reform by which the necessary constitutional space might be created for religious freedom as a part of a bill of rights. But there remain the questions of whether such a reform is possible in principle and how it could be instantiated as a matter of Australian political and constitutional practice. As to the first, there are philosophical barriers to spatial theory that need to be examined. They are barriers that have been erected in the past in opposition to a bill of rights. Without descending into the previous political debates over the question whether there should be a bill of rights at all, it is necessary to consider issues raised in those debates that are centred in originalism and parliamentary sovereignty. As will be seen from the discussion below, neither, upon analysis, constitutes the barrier that they may have been first thought to present.

Next, this Part deals with the practical issue. If it is accepted from the arguments presented in the first section that there is no maintainable philosophical objection, there remains the fact that constitutional amendment in Australia is very difficult to achieve. That is why the emphasis in the second section is upon how, utilising tools from Australian cooperative federalism, a staged approach to constitutional reform may, in the end, deliver the constitutional space currently lacking for religious freedom and other fundamental human rights.

1. The renewed importance of religious freedom and other human rights

The current constitutional arrangements in Australia suffer from an imbalance between well-defined constitutional spaces for government and an effective void yet to be filled with protections for religious freedom and other fundamental rights and freedoms. A nation's treatment of religious freedom has been characterised by the High Court of Australia as a test of human rights. In the

1983 decision in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*,[347] it was described as the 'paradigm' for fundamental rights and freedoms. As the litmus test of how conscience is treated by the law and the community,[348] there should be a constitutional space preserving it. There is not. Equality is likewise a fundamental human right and constant throughout the existing Australian human rights regime.[349] It is the central precept by which Australia's anti-discrimination laws are ordered.[350] Equality of treatment in Australia[351] and other jurisdictions[352] has become a community standard.

The clarity of dicta on the significance of religious freedom uttered by the High Court almost four decades ago has not led to delivery of any significant federal legislative or constitutional reform.[353] Since 2013, when the High Court struck down territorial legislation permitting same-sex marriage,[354] declaring it to be a matter for the federal Parliament, religion and its relation to other rights and freedoms have become a major political, social, legislative, and constitutional talking point.

The subject of religious freedom is firmly within current public contemplation. Events that brought the spotlight onto religion include: a national postal plebiscite returning 61 per cent support for same-sex marriage;[355] the resulting passage of legislation permitting same-sex marriage;[356] the report of the Royal Commission into Institutional Responses to Child Abuse,[357] which found that religious institutions had been responsible for egregious abuse of children over decades;[358] the report of the Ruddock Panel;[359] and the trials and successful appeals of Archbishop Philip Wilson in relation to suppression of sexual abuse[360] and Cardinal George Pell over historical child sex abuse charges.[361]

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[347] (1983) 154 CLR 120.
[348] Ibid at 130: 'Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society'.
[349] Gaze and Smith, *Equality and Discrimination Law in Australia: An Introduction* (n 40) 34–6.
[350] Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford University Press, 2nd ed, 2012) 112–17.
[351] Gaze and Smith, *Equality and Discrimination Law in Australia: An Introduction* (n 40) 34–36.
[352] Ellis and Watson, *EU Anti-Discrimination Law* (n 350) 112–17.
[353] Babie and Rochow, 'Feels Like Déjà Vu' (n 14) *passim*
[354] *Commonwealth v Australian Capital Territory* (2013) 88 ALJR 118.
[355] Australian Bureau of Statistics, 'National Results: Response', *Australian Bureau of Statistics* (Web Page, 30 January 2018) <*https://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0*>.
[356] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).
[357] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) <*https://www.childabuseroyalcommission.gov.au/final-report*>.
[358] Ibid.
[359] Ruddock Report (n 1).
[360] Ben Millington, 'Phillip Wilson's Overruled Conviction Explained and Why Public Opinion Was "Dashed"', *ABC News* (7 December 2018) <https://www.abc.net.au/news/2018-12-07/philip-wilson-sex-abuse-conviction-overturned-explained/10595040>.
[361] Babie et al, 'Creating and Conserving Constitutional Space' (n 7) 1, 12–14.

What has been evident throughout is the absence of any guiding principle in relation to freedom of religious belief, particularly in relation to the clash between equality laws that now include same-sex marriage as a protected category of marital status and the claim to the religious freedoms to speak against same-sex marriage—and, of course, to refuse to deal in goods and services that support entry into such marriages.[362]

8. Philosophical barriers to constitutional reform on religious freedom and other human rights: parliamentary sovereignty and originalism

Spatial theory posits a bill of rights as the only viable manner in which to protect religious freedom in Australia. The proposed framework depends upon such a bill. While it is not necessary to resolve the political debate over a bill of rights as a part of spatial theory, the background of opposition is important for an understanding of why spatial theory proposes an elaborate scheme by which to introduce a bill of rights. Recently, religious freedom has attracted renewed public interest. It would be an opportune time to consider how religious freedom might be protected while there is the current level of interest.

Among the solutions that spatial theory offers to the problem of conflicting rights claims is a bill of rights. It describes the spaces reserved for the protection of religious freedom and other fundamental rights. It is proposed as the replacement for the current Australian regime, which has no federal bill of rights.[363] But this raises the question of why, over a century since federation, a bill of rights is still missing from Australia's constitutional spaces.

Although the framers of the Australian constitution considered a bill of rights at the time of federation in 1901, they decided against inclusion.[364] Their principal focus was, at that time, on the creation of constitutional spaces for the respective Commonwealth, state, and territory governments, omitting a bill of rights.[365] While they decided against inclusion,[366] they did not foreclose the potential for such a bill in the future.[367]

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[362] See Hicks, *Dignity* (n 8). See also Fukuyama, *Identity* (n 8); Mary Ann Glendon, 'The Bearable Lightness of Dignity' *First Things* (Web Page, May 2011) <https://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity>; and Rochow and Rochow, 'From the Exception to the Rule' (n 69).
[363] Kirby 'Human Rights' (n 275).
[364] Sawer, *Australian Federalism in the Courts* (n 57) 8–12.
[365] Ibid. Dixon, *Jesting Pilate* (n 118) 101–2.
[366] Robert Size, 'The Australian Constitution and the United States' 14th Amendment' (n 62). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne 1898, 666 (John Forrest); and French, 'Protecting Human Rights Without a Bill of Rights' (n 62) 4.
[366] Ibid. See also Sawer, *Australian Federalism in the Courts* (n 57).
[367] See Sawer, *Australian Federalism in the Courts* (n 57) 12–14.

The prevailing British constitutional thought at the time of federation was against bills of rights.[368] William Blackstone[369] and AV Dicey[370] favoured parliamentary sovereignty as the source of rights and freedoms in combination with the common law, rather than a bill of rights.[371] Modern opposition to a bill of rights has seized upon the original decision to omit one from the Commonwealth Constitution.[372] It bases its arguments on the sovereignty of Parliament and the contention that the common law, as supplemented from time to time by Parliament, has been hitherto adequate and should remain so into the future.[373] As appears from the Ruddock Panel report, however, any argument that the current situation is adequate is increasingly difficult to sustain.

It is the case that, influenced by eighteenth and nineteenth century constitutional thought, the founders were not predisposed to include a bill of rights at the time of federation.[374] But, as Jeffrey Goldsworthy's analysis of parliamentary sovereignty demonstrates,[375] it is also clear that the founders were not committed to British notions of absolute sovereignty.[376] Such a commitment would be incompatible with the concept of a federal constitution under which each of the Parliaments had limited powers functioning only within the constitutional spaces allocated to them.

Once the British unitary concept of a Parliament of unlimited powers was seen as unsuitable for uniting six separate colonies,[377] the adoption of the federal model led to the establishment of a Parliament with powers tied to the heads found in s 51,[378] modelled on the American federal concept. The structure of Chapter III of the constitution also anticipates federal courts that would exercise a judicial power that included a *Marbury v Madison*[379] doctrine of judicial review, which can be stated simply:

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368 George Williams, 'The Federal Parliament and the Protection of Human Rights' (*Research Paper 20 1998–99,* 11 May 1999, Australian Parliamentary Library) <*https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20*> at nn 70–3.

369 Ibid. See also William Blackstone, *Commentaries on the Laws of England, Book the First*, *Chapter the Second of the Parliament,* (The Legal Classics Library Special Edition, 1983) 145–61.

370 Ibid.

371 Ibid.

372 Typical of the originalist argument is that of former Attorney-General (then) George Brandis QC, 'The Debate We Didn't Have to Have: The Proposal for an Australian Bill of Rights', in Leeser and Haddrick, *Don't Leave Us with the Bill* (n 15) 17–30, at 28–30.

373 See, in Leeser and Haddrick, *Don't Leave Us with the Bill* (n 15), former Prime Minister of Australia John Howard, 67–72, James Allan, 83–95, Helen Irving, 169–82 and John Hirst, 215–22.

374 Sawer, *Australian Federalism in the Courts* (n 57) 8–12.

375 Goldsworthy, *The Sovereignty of Parliament* (n 82) 3–7, 9–16, 159–65.

376 Ibid, 3–16.

377 Ibid, 604–98, 767–8.

378 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81) 604.

379 *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. ... Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. [380]

The very concept of constitutional invalidation of statutes by the courts runs directly against the Diceyan view of parliamentary supremacy.[381] An anticipation that there could and should be constitutional change is evident from the inclusion of s 128, which confers the power of amendment on the populace.[382] The framing of a Chapter III capable of judicial review and inclusion of s 128 were strong indications that the Constitution as framed in 1901 was not intended to be the final word on Australian arrangements.

The decision at federation *not* to include a bill of rights was fortunate in hindsight. The only consideration given at that time was to the United States Bill of Rights, not a model that had embraced the notion of human dignity.[383] That model of rights was inappropriate to Australian needs in a number of respects given the different histories of the two countries.[384] Perversely, it was Australian colonial racism that prompted the rejection of the Fourteenth Amendment,[385] since, unlike the United States, so the claims went, its inclusion could serve no purpose in the new federation which was anticipated at the time to remain a 'white' nation.[386]

Had the founders installed a bill of rights at federation, it is unlikely to have been one that would solve the problem under consideration. It was only with the advance of the human rights project

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[380] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 81) 604–98, 767–68; *Marbury v. Madison* (n 379).

[381] AV Dicey, 'The Nature of Parliamentary Sovereignty' in *Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan 1979) 39: 'The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions.'

[382] Quick and Garran (n 81) 985–95.

[383] Barak, *Human Dignity* (n 8) 185–90.

[384] Ibid. See also Steven Waldman, *Founding Faith: How our Founding Fathers Forged a Radical New Approach to Religious Liberty* (Random House, 2009); Steven Waldman, *Sacred Liberty: America's Long, Bloody Battle and Ongoing Struggle for Religious Freedom* (Harper One, 2019); Andrew L Seidel, *The Founding Myth: Why Christian Nationalism is Un-American* (Sterling, 2019); John Fea, *Was America Founded as a Christian Nation? A Historical Introduction* (Westminster John Knox Press, revised ed, 2016); Kevin Seamus Hasson, *Believers, Thinkers, and Founders: How We Came to be One Nation Under God* (Image, 2016); Denis Lacorne, *Religion in America: A Political History*, tr George Holoch) (Columbia University Press, 2011); Denis Lacorne, *The Limits of Tolerance: Enlightenment Values and Religious Fanaticism*, tr C Jon Delogu and Robin Emlein (Columbia University Press, 2019); Diarmaid MacCulloch, *A History of Religion: The First Three Thousand Years* (Penguin Books, 2010) 905–9; Kurt Anderson, *Fantasyland: How America Went Haywire—A 500 Year History* (Ebury Press, 2017) 43–4, 51–2, 58.

[385] Robert Size, 'The Australian Constitution and the United States' 14th Amendment' (n 62).

[386] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne 1898, 666 (John Forrest).

that dignity-based models for a bill of rights began to emerge.[387] The United States Bill of Rights, ground-breaking though it was for its time, has now been surpassed by twentieth century models devised to promote human rights internationally.[388]

That no bill of rights adopted at the time of federation could have provided a solution to the current problems of conflict between equality rights is evident from the performance of s 116 in the Commonwealth Constitution and that of the First Amendment. Section 116, which is modelled, in part, upon the First Amendment, has proven an effective dead letter in the protection of religious freedom. Section 116 was not intended to confer upon individuals the right of religious freedom as if a part of a bill of rights, [389] Even had it been intended to operate as conferring a right to individual religious freedom—rather than as a prohibition on federal legislative power—the indications are that it could not have proven effective. As appears from the Ruddock Report, the problem manifests itself primarily at the state level, to which s 116 has no application.[390]

Amendment of s 116 to extend to the states also offers no solution, since, given its interpretational history as a legislative prohibition on federal legislation, merely extending it to state legislation on religion would create a constitutional *lacuna*. Attempts to amend and expand s 116 have been made and failed politically.[391] Given the complications as to the First Amendment's purpose and proper interpretation, evident in American jurisprudence, adoption of its provisions and that jurisprudence would provide no solution to the case of the conscientious vendor.[392]

Moreover, it would be a backward step for Australia, since as Barak has observed, the United States Bill of Rights is not tied to any concept of human dignity;[393] and, thus, divorced from other rights and freedoms, it operates in isolation. Steven Shiffrin[394] has catalogued the difficulties that result

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[387] George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror*, (UNSW Press, 2004) 21. See also Renae Barker, 'Freedom of Religion Without a Bill of Rights: Australia's Peculiar Approach to Tackling Freedom of Religion and Other Human Rights Issues' in Babie, Rochow and Scharffs, *Freedom of Religion or Belief* (n 7); Sir Anthony Mason, 'Why Do We Need a Bill of Rights?', *Human Rights Act for Australia* (Web Page, 29 March 2006) <*http://www.humanrightsact.com.au/2008/2006/03/29/mason-why-do-we-need-a-bill-of-rights*>; and Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63).

[388] Barak, *Human Dignity* (n 8) 185–90.

[389] See above in 64 and the works at places cited, in particular Beck, *Religious Freedom and the Australian Constitution* at 161–163 and his discussion at 162, of *Attorney-General (Vic); Ex rel. Black v Commonwealth* (1981) 146 CLR 559 and *dicta* cited. See also Barker, *State and Religion* (n 64) 278–9; Luke Beck 'Higgins' Argument for Section 116 of the Constitution' (2013) 41(3) *Federal Law Review* 393; and Luke Beck 'The Constitutional Prohibition on Imposing Religious Observances' (2017) 41(2) *Melbourne University Law Review* 593.

[390] Ruddock Report (n 1) 35–6.

[391] Ibid. See also Babie and Rochow, 'Feels Like Déjà Vu' (n 14) *passim* and 829–34; Beck, *Religious Freedom and the Australian Constitution* (n 64) and Barker, *State and Religion* (n 64) 130–42

[392] Steven Shiffrin, *What's Wrong with the First Amendment* (Cambridge, 2016) 2–10.

[393] Ibid.

[394] Ibid.

from this isolation of the First Amendment from other fundamental rights.[395] Frank Ravitch[396] has confirmed that the First Amendment has proven inadequate in relation to the conflict between religious freedom and equality rights since the emergence of same-sex marriage.[397] Nothing in American jurisprudence indicates that a solution is in the offing.

It has been demonstrated that a different solution is required than those attempted to date. That constitutional solution cannot be based in either s 109 or s 116. There is nothing in any Diceyan sovereignty philosophy or in any originalist argument that would preclude a new constitutional regime to replace the current regime. Neither is there anything in the history or philosophy of Australian constitutionality that would confine the country to a constitutional void on human rights that cannot provide a solution to the problem under consideration. There must be a new constitutional solution.

There remains one substantial barrier to such a solution—namely, the reality that s 128 is a notoriously difficult provision for successful constitutional amendment. What spatial theory proposes is that the bill of rights, based upon the ICCPR, be tried practically rather than theoretically before adoption as a part of the Commonwealth Constitution. It is only by trial, and, of course, error, that the necessary dimensions of an Australian constitutional space for religious freedom, and for other fundamental rights, can be known. The next section of this Part explains how that could be achieved.

9. Overcoming practical barriers to the creation of constitutional space: co-operative federalism

An objection that can be raised to constitutional amendments is that once implemented they are extremely hard to remove. If the courts misinterpret an amendment, the cure can be worse than the disease. So, a conservative aversion to constitutional amendment is perfectly justified. This is where spatial principle 6 provides the theory an advantage over other forms of amendment and proposed human rights reforms. The theoretical model proposed can be moulded and modified as necessary during its period of trial to solve, among others, the subject problem of conflict between religious conscience and the right to equal treatment.

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[395] Ibid 1159–73.

[396] Frank Ravitch, *Freedom's Edge—Religious Freedom, Sexual Freedom, and the Future of America* (Cambridge, 2016) 39–58.

[397] In the United States, the Supreme Court found that same-sex marriage was a right under the Fourteenth Amendment in *Obergefell v. Hodges* (n 26). For treatment of the First Amendment prior to *Obergefell*, see Shiffrin, *What's Wrong with the First Amendment* (n 393), Kevin Seamus Hasson, *The Right to be Wrong: The Enduring War Over Religion in America* (Encounter Books 2005) and Anthony Lewis, *Freedom for the Thought We Hate: A Biography of the First Amendment* (Basic Books, 2007).

The proposed model comes, thus, as a political experiment. By a system of intergovernmental agreements and annual reviews, it would give effect to a temporary bill of rights. Under the agreements, it would perform *as if* constitutionally entrenched during the period of trial.[398] Subject to a legislated sunset clause,[399] the framework experiment would give effect to a real time experience with rights and freedoms. Only after the trial period, suggested as ten years, and after amendments agreed to by all participating Australian jurisdictions, would the bill be put to a referendum for final constitutional entrenchment. The proposed framework thus seeks to put paid to speculative debates, for and against, which have, to date, incited sufficient doubt and fear as to stand in the way of constitutionally secured fundamental rights.[400]

Section 128 of the Australian Constitution, which permits constitutional amendment, is notoriously difficult to satisfy unless there is bipartisan support.[401] The proposed gradualist approach to reform would, if the experiment were successful, attract not only bipartisan support but also multijurisdictional endorsement. In this way, the political opposition that could be anticipated in moving immediately to constitutional amendment in an area as sensitive as human rights would be reduced.

Australia has a strong tradition of cooperative federalism. The national, state, and territory governments work through councils in order to work in the national interest. Where national legislation is required, the respective governments have entered intergovernmental agreements as to uniform national legislation to be passed in each jurisdiction. There has been success in national legislative reform via the mechanism of intergovernmental legislative agreements. Rather than a referendum for constitutional amendment or passing invalid manner and form legislation, an alternative is found in the intergovernmental agreement.[402] In consequence of the COVID-19 pandemic, a cooperative model known as the 'National Cabinet' was developed[403] and, while not

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398 Rochow, 'Paying for Human Rights Before the Bill Comes (n 63) 41–4. See also Prime Minister Scott Morrison, 'National Cabinet' (Media Release, Prime Minister of Australia, 11 December 2020) <*https://www.pm.gov.au/media/national-cabinet-3*>.

399 *Legislative Instruments Act 2003* (Cth). See also Judith Bannister et al, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015) 135.

400 Leeser and Haddrick, *Don't Leave Us with the Bill* (n 15). See also Michael Kirby, 'A Bill of Rights for Australia—But Do We Need It?' (Speech, Queensland Chapter Young Presidents Association, 14 December 1997) <*http://www.lawfoundation.net.au/ljf/app/&id=/A60DA51D4C6B0A51CA2571A7002069A0*>; and Michael Kirby, 'Arguments for An Australian Charter of Rights' *Constitutional Education Fund of Australia (CEFA)* (Blog Post, September 2009) <*https://www.michaelkirby.com.au/images/stories/speeches/2000s/2009%2B/2398.Cefa_-_Blog_-_Arguments_For_Aust.Charter_Of_Rights.pdf*>.

401 Babie and Rochow, 'Feels Like Déjà Vu' (n 14) 832–4.

402 Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63) 41–4.

403 Office of the Prime Minister and Cabinet, 'National Cabinet Statement' (Media Release, 29 March 2020). See also Tom Burton, 'National Cabinet Creates a New Federal Model', *Financial Review* (online at 18 March 2020) <*https://www.afr.com/politics/federal/national-cabinet-creates-a-new-federal-model-20200318-p54bar*>.

a 'cabinet' in any constitutional or traditional sense, its cooperation worked to control spread of the virus.[404] Of course, the National Cabinet concept requires strong political leadership in order to be successful as part of a strategic model. But that has manifested itself in the past in the guise of the intergovernmental agreement.

Intergovernmental agreements which have grown out of national government meetings have, in the past, served as vehicles for national policy delivery. Agreements have covered national and multilateral policy areas including national disability insurance, Indigenous welfare, rural drought relief, redress for institutional child abuse, and the national digitisation of health records.[405] In each case, the executive government of the Commonwealth agrees with state and territory governments to bind federal governments not to amend legislation without multilateral notice and unanimous consent.[406] In effect, legislation is 'entrenched' since it cannot be changed by ordinary manner and form[407] in virtue of the executive agreements and the reciprocal nature of the legislation.[408] Prohibitions on entrenchment of legislation by special manner and form[409] do not come into play because the agreement is among the respective executive governments. The constraint is not in the legislation itself.

One prominent success of intergovernmental agreements commenced with the Hilmer Report[410] and the *Competition Principles Agreement* of 4 November 1997.[411] This was a national agreement to achieve and maintain consistent and complementary competition laws and policies. It was designed

[404] Babie and Rochow, 'Feels Like Déjà Vu' (n 14) *passim*.

[405] Examples of intergovernmental agreements include the following: Intergovernmental Agreement on the National Disability Insurance Scheme Launch—7 December 2012; Bilateral Agreement between the Commonwealth of Australia and the Northern Territory on the National Disability Insurance Scheme—29 March 2019; Bilateral Agreement between the Commonwealth of Australia and the Australian Capital Territory on the National Disability Insurance Scheme—22 March 2019; Bilateral Agreement between the Commonwealth of Australia and the State of Tasmania on the National Disability Insurance Scheme—10 December 2018; Bilateral Agreement between the Commonwealth of Australia and the State of South Australia on the National Disability Insurance Scheme—29 June 2018; Bilateral Agreement between the Commonwealth of Australia and the State of New South Wales on the National Disability Insurance Scheme—25 May 2018.

[406] See Intergovernmental Agreement on Competition and Productivity-Enhancing Reforms (9 December 2016) cls 26–29 <*https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-competition-and-productivity-enhancing-reforms*>.

[407] Goldsworthy, *The Sovereignty of Parliament* (n 82) 2, 14–16, 144, 244–5 and 259.

[408] John Kain et al, 'Australia's National Competition Policy' (Brief, Parliamentary Library, Parliament of Australia, June 2001, updated 3 June 2003) <*https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief*>.

[409] Goldsworthy, *The Sovereignty of Parliament* (n 82) 2, 14–16, 144, 244–5 and 259.

[410] Frederick Hilmer et al, *National Competition Policy: Report of the Independent Committee of Inquiry* (A. J. Law Commonwealth Government Printer, 25 August 1993) ('the Hilmer report').

[411] See Competition Principles Agreement—11 April 1995 (As amended to 13 April 2007) <*https://www.coag.gov.au/sites/default/files/agreements/competition-principles-agreement-amended-2007.pdf*>.

to apply to all businesses in Australia regardless of ownership or their constitutional status.[412] The *Competition Principles Agreement* followed the Commonwealth *Trade Practices Act 1974* and a series of state-based reforms which followed during the 1970s and 1980s.[413] The latest of this suite of reforms was amendments to the *Trade Practice Act 1974* to give the modern Australian Consumer Law. It is to this series of economic and legal reforms that the country owes much of its current prosperity.[414]

If an intergovernmental agreement could be achieved to pass uniform human rights legislation—a bill of rights—on condition that the legislation was passed for trial and annual review, with a sunset clause, similar success would be possible. The legislation would, at the end of the period of review, either be put forward for constitutional adoption under s 128 or it would lapse completely. This trial of the legislation would be a complete answer to forms of opposition based in speculation. In addition to the bill of rights, there would also have to be procedural and other facultative legislation and regulations to provide structure to claims hearings. This legislation would implement spatial theory and provide a summary procedure designed that would be efficient for the prompt disposal of matters.

Part D: Conclusion—whether spatial theory has survived the preliminary question of the thesis

In this chapter, I have responded to the first of the three essential elements of the hypothesis posed in Chapter 1, demonstrating that a new theoretical constitutional framework can be formulated to replace the existing Australian human rights regime. By provision of the spatial principles and the testing of those principles against alternatives, this chapter has demonstrated that not only could a theory be formulated to fill the constitutional void of space for those who are governed, but also that, in comparison with alternatives, spatial theory is more likely to provide a satisfactory solution to the problem under consideration: whether a religious vendor is entitled to refuse supply of goods and services because of a religious conscientious objection.

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412 *Competition and Consumer Act 2010* (Cth) ss 2, 2A, 2B, 2BA, 2C and 4. See also Russel V Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia, 36th ed, 2014) 211–28.

413 Steven Kennedy, 'An Introduction to the Australian Consumer Law' (Speech, Standing Committee of Officials of Consumer Affairs Forum for Consumers and Business Stakeholders, 26 November 2009) <https://treasury.gov.au/sites/default/files/2019-03/SCOCA_Steven_Kennedy.pdf> 5.

414 Australian Government 'Reinvigorating Australia's Competition Framework', *The Treasury* (Fact Sheet, March 2019) <*https://treasury.gov.au/sites/default/files/2019-03/Govt_response_comp-policy_factsheet.pdf*>. See also John Fraser, 'The Australian Economy and Challenges of Change' (Speech, The Treasury/China Advanced Leadership Program, 25 November 2015) <*https://treasury.gov.au/speech/the-australian-economy-and-challenges-of-change*>.

Implementing Hohfeldian theory, spatial theory has a rigour lacking in any competitors. Instead, spatial theory, including the bill of rights it proposes, guided by human dignity as its organising principle, provides a solution that is more likely to succeed than that proposed by the only viable alternative theoretical structure proposed by expansionism. While expansionism has been the subject of ardent advocacy, this chapter has argued that it tends to perpetuate the problem rather than solve it. Its tendency is to reinforce the very vice that equality laws seek to prohibit, discrimination. The consequence of continuing to create exceptions for discrimination, in this instance in commercial settings, is that the problem of two diametrically opposed claims remains unsolved.

What has also been shown is that, while the problem is created as a statutory exception to the common-law doctrine of freedom of contract, neither the common law nor statute is capable of providing a solution to the problem. The constitutional solution under a dominant federal statute invoking s 109 to invalidate troublesome state equality laws has also been demonstrated to be unlikely to succeed for a number of reasons, including its own questionable constitutional validity.

Finally, this chapter presents a method of implementation that is respectful of the existing federal arrangement, constitutional requirements, and of the electorate, which is entitled to understand a reform before being asked to pass it by referendum under s 128. By any measure, spatial theory has satisfied the tests of the hypothesis and answered the preliminary question in the affirmative.

In the next chapter, I explore the potential of human dignity as an organising principle for the proposed framework as the second phase of testing the hypothesis.

Chapter 3. Human Dignity in Constitutional Spatial Theory

Introduction

In Chapter 2, I have demonstrated that a new human rights framework could be devised that conforms with current Australian constitutional arrangements. That chapter introduced spatial theory by reference to the six spatial principles. The theory was then tested to see, first, whether there was capacity within Australian constitutional arrangements to accept a novel human rights regime and, secondly, whether there was a way in which spatial theory could be introduced as that new regime.

In this chapter, I now pass to the definition and role of human dignity as a part of the proposed new Australian regime. There are two principal arguments in this chapter as to why human dignity is suitable as a principle in Australian human rights. First, human dignity is not, as sometimes supposed, inherently ambiguous. That perception regarding the term 'human dignity' is overcome in this chapter. The second is that dignity, correctly conceived, could be deployed to assist in solution of the subject problem, that of the conscientious vendor. In this chapter, I will demonstrate how human dignity can be defined and utilised as the organising principle for the spatial theoretical framework.

In the first part of the chapter, Part A, I provide a workable definition of 'human dignity'. It contrasts theological conceptions of dignity with secular conceptions. The latter have received

modern iterations. Those expressions are epitomised in the writing of preeminent Enlightenment philosopher Immanuel Kant.[415] By a process of contrast, the Part provides a clear and robust definition that is consistent with the spatial principles provided in Chapter 2. It is this definition that is adopted as a part of spatial theory. It is clear, concise, and works so that dignity can take its position as the foundation and the guiding principle of Australian human rights under the new framework.[416] This model definition is suitable for adoption as part of an Australian constitutional bill of rights and legislation passed in relation to it. It is referred to here as an 'instrumental' model: the type of model used in human rights and constitutional instruments beginning in the second half of the last century with the commencement of the human rights project. It is also the type of model that courts could readily invoke in resolving disputes of the kind under consideration here.

In Part B, I place human dignity in its theoretical context as a constitutional value and in relation to Hohfeldian theory. Because the theoretical framework is constitutional in nature, the Part examines how, as a feature of the bill of rights that the theory posits, dignity can become a validly instantiated constitutional principle in Australia. Part B examines how the goals of spatial theory would be achieved by purposive drafting invoking the definition arrived at in Part A. With the capability of adjustment during the trial period under the intergovernmental agreements explained in Chapter 2, spatial theory, with a definition of human dignity, can operate until the constitutional intention achieves the intended human rights outcome.

In Part C, I take the constitutional value of human dignity into account, and present a theory with human dignity at its centre. The Part examines how, with the aid of Hohfeldian theory, dignity can be used in the solution of the problem at hand. It has roles as a metric in the weighing of competing claims to rights and freedoms; and it is to be used as a mediating influence in the allocation of constitutional space and the prescribing of appropriate boundaries. It is a solution that avoids the problems of superficial invocation of dignity, which can either diminish the esteem in which the status is to be held or, as discussed in previous chapters, lead to a regress that renders it meaningless. That is unless, again with the benefit of Hohfeldian theory, there are analytical and allocative goals that human dignity is to achieve in resolving conflicts.

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[415] See other works cited in nn 10 and 87 and, in particular *Groundwork of the Metaphysics of Morals* (n 87). See also Oliver Sensen, *Kant on Human Dignity* (Berlin/Boston: de Gruyter Verlag, 2011); Dieter and Elke Elisabath Schmidt 'E Kant's Ground-Thesis. On Dignity and Value in the Groundwork' (2018) 52 *Journal of Value Inquiry* 81 and works cited by the authors.

[416] Waldron, 'Is Dignity the Foundation of Human Rights?' (n 180); Glendon, 'The Bearable Lightness of Dignity' (n 362).

The spatial theoretical conceptualisation of dignity, if implemented, would make a difference to human rights in at least three ways.

First, the enthronement of human dignity would give a reason to reinvigorate the human rights project domestically by moving the question from parliamentary sovereignty to a national sovereignty underwritten by universal dignity. It would avoid the need for compromises in the manner in which human rights are protected in Australia. Two such compromises are proposed: use of the so-called 'dialogue' model for a bill of rights and reliance upon the legislative scrutiny model.

Secondly, it would overcome the problems of potential logical regress that result from ambiguous references to 'dignity'.

Thirdly, it would lay a foundation for a solution to the subject problem with respect to the religiously informed conscience component.

In Part D, I conclude the chapter with an assessment of the uses to which spatial theory puts human dignity in the respective roles discussed in the chapter. Using that assessment, it appraises the success of spatial theory against the second hypothetical test: whether, and how, human dignity could be utilised as the organising principle for the new theoretical framework. The Part concludes that the foundation has been laid for dealing with the issue of the religiously informed conscience, the subject of Chapter 4.

Part A: Towards a definition of 'human dignity'

This Part works towards a definition of 'human dignity'. Two different types of conceptions are examined for their conformability with and potential use within constitutional spatial theory: the theological and the philosophical. The criteria for a definition are within the spatial principles articulated in Chapter 2. Principle 3, it will be recalled, requires that, under the framework, human dignity be constitutionally instantiated. The principle requires a particular conception of dignity under the framework. First, it must possess a universal, innate, and inviolable status. Secondly, it is to operate as the source of all guaranteed fundamental rights and freedoms. Thirdly, it functions as the organising principle for the spatial theoretical framework. As to its universal operation, its role is to be acknowledged in all relevant constitutional, legislative, and procedural instruments to ensure that courts implement dignity as it is intended by each instrument.

Principles 5 and 6 provide for the mediating role that dignity is to have under the framework. They also provide for it to be the organising principle for rights under the framework. In essence, those principles lay down constitutional principles under which the default position is that the law should

be obeyed unless there has been a court ruling that the law is unconstitutional or a conscientious exemption has been granted. By providing a definition, using spatial principles criteria, this chapter overcomes any notion that human dignity cannot be defined so as to operate as a constitutional principle.

1. Defining human dignity

The difficulty in defining 'dignity' is well-known.[417] Some of its invocations in preambles of human rights conventions, constitutions, and in scholarly discourse have been described as 'a piece of decorative rhetoric'.[418] Unthoughtful use of 'dignity' is a notorious source of the apprehended ambiguity.[419] However, as Mary Ann Glendon has observed,[420] despite difficulty in definition dignity has nevertheless played critical role in the development of rights and freedoms. Much like other terms that are difficult to define in the abstract, such as 'justice', 'rule of law', 'independence', and 'value', given a context, 'dignity' is capable of operating as an organising principle and taking meaning from the purpose to which it is put.[421] But it is also now so well-established as a central part of human rights and constitutional discourse that its use cannot be avoided.[422]

Its unavoidability as a human rights principle is evident from the appearance of human dignity in the preamble to the *Universal Declaration of Human Rights* (UDHR), linking inseparably '*equal and inalienable rights'* and 'the *inherent dignity* and of all members of the human family'.[423] That linkage is repeated in the preamble to *International Covenant on Civil and Political Rights* (ICCPR). The Council of Europe, in the *Convention for the Protection of Human Rights and Fundamental Freedoms*,[424] adopted the UDHR by reference as the foundation for the rights and freedoms provided for by in the Convention, thus indirectly adopting dignity as a foundational principle.

A model for dignity's constitutional invocation is found in the 1949 German Constitution, *Die Grundgezetz für die Bundesrepublik Deutschland*. It provides at Art. I (1): 'A person's dignity is

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417 Ibid.

418 Waldron, *Dignity, Rank, and Rights* (n 8) 26. See also Waldron, 'Is Dignity the Foundation of Human Rights?' (n 180).

419 Ibid and the following works cited by Waldron: Jeremy Waldron, 'Dignity and Rank' (2007) 48 *European Journal of Sociology* 201; Rosen, *Dignity* (n 8); Kateb, *Human Dignity* (n 8); Christopher McCrudden, 'Human Dignity in Human Rights Interpretation' (2008) 19 *European Journal of International Law* 655; Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press/British Academy, 2013); George Fletcher, 'Human Dignity as a Constitutional Value' (1984) 22 *University of Western Ontario* 178; Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge University Press, 1989) 44–5 and 52–7. See also Fukuyama, *Identity* (n 8).

420 Glendon, 'The Bearable Lightness of Dignity' (n 362).

421 Ibid.

422 Barak, *Human Dignity* (n 8) 38–42, 114–35 and 156–9.

423 UDHR (n 139) Preamble, art 1. Emphasis added.

424 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, UNTS 213 (entered into force 3 September 1953).

inviolable. To protect it is the duty of all state authorities.'[425] 'Dignity' has been either acknowledged or invoked as a constitutional principle in the United Kingdom,[426] South Africa,[427] Israel,[428] and Canada.[429] There has been some consideration of dignity as a 'constitutional value'[430] in the United States.[431] Its emergence as a juristic principle in Australian domestic law appears from recent jurisprudence,[432] its use in legislation,[433] and extrajudicial writings of appellate judges.[434] Perhaps it will never become a general principle of the common law in its own right.[435] However, what is readily imagined is that, at least in the area of human rights, it should gain an equivalency with standards used in other departments of the law, such as 'reasonable care' at common law and the duty to act 'conscientiously' in equity.[436]

The dominance of dignity in legal and philosophical contexts entails that some definition must be given, if only for the specific context in which it arises.[437] It is the diversity of uses to which dignity has been put that may, on one view, have contributed to the perception of ambiguity. A better view is that this diversity of use has provided different perspectives from which to draw meaning. Those perspectives can inform a conception in a constitutional context. In the problem for solution here, the conscientious vendor, there is potential for two views of dignity to clash: the religious and the secular. It is important then, that the definition of dignity to be employed is one that has taken both into account already before committing the final definition to a constitutional instrument.

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[425] *Die Würde des Menschen ist unantastbar. Sie zu schützen is Verpflichtung aller staatlichen Gewalt*. The English translation in the text is the author's.
[426] For a regulatory example in the United Kingdom, see *Eweida and ors v United Kingdom* [2013] ECHR 37.
[427] Barak, *Human Dignity* (n 8) ch 14.
[428] Ibid ch 15.
[429] Ibid ch 12.
[430] Ibid chs 5 and 6.
[431] Ibid ch 11. On the concept of 'dignitarian harm' in discrimination law in the United States, see Ravitch *Freedom's Edge* (n 396), Fukuyama, *Identity* (n 8) at 66, 107–8;
[432] *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218; *Clubb v Edwards; Preston v Avery* [2019] HCA 11.
[433] For example, the legislation in question in Clubb: *Public Health and Wellbeing Act 2008* (Vic) s 185A
[434] See e.g. Justice Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (The Sir Ninian Stephen Lecture, 29 April 2016) <*http://www.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj29apr2016.pdf*>; and Chief Justice Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (n 173).
[435] Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (n 434); Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (n 173).
[436] Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (n 434); Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (n 173).
[437] See, as examples, Barak, *Human Dignity* (n 8); Rosen, *Dignity* (n 8); Fukuyama, *Identity* (n 8); Hicks, *Dignity* (n 8).

2. Elements to be included in a definition

Since the conception of dignity is to be used as a constitutional principle, there are certain required elements for its definition under the spatial principles. Under spatial principle 3, human dignity must be constitutionally entrenched. The definition must, therefore, be precise and robust enough to fulfil its constitutional roles under the framework. Also, under principle 3, it must be a 'status' that is universal, innate, and inviolable. The concept of 'status' is distinct from a 'right' or a 'freedom'. 'Status' is descriptive of a set of particular legal conditions. In his discussion of dignity as a status, Jeremy Waldron observes[438] that in law, 'a status is a particular package of rights, powers, disabilities, duties, privileges, immunities, and liabilities accruing to a person by virtue of the condition or situation they are in'.[439]

To illustrate the concept of 'status' by example, Waldron refers to bankruptcy, infancy, royalty, being an alien, being a prisoner, being a member of the armed forces, and being married.[440] Each label connotes the settled legal conditions, placed into the 'package' and sitting below the label. In Hohfeldian terms, each 'package' is a 'bundle' of jural relations. They can be analysed to ascertain which rights, freedoms, and obligations accrue to individuals as a part of the status they enjoy.[441] The 'package' or 'bundle' comprising the status of human dignity is, ultimately, described by the bill of the rights that flow inherently from being human.

Principle 3 requires that the status of human dignity be the source of all guaranteed fundamental rights and freedoms and the organising principle for the spatial theoretical framework. Further, principle 3 requires that its constitutional role is to be acknowledged in all relevant constitutional, legislative, and procedural instruments to ensure that courts implement dignity precisely as it is intended by each instrument.

As posited by the spatial principles upon which the new spatial framework is to be built, all rights trace their normative and substantive ancestries to human dignity. Indeed, under principle 5, spatial theoretical doctrine requires that all fundamental rights and freedoms be understood as being related to one another through human dignity. That is an element of the centrality of dignity to the framework. Since there is to be no *a priori* precedence among rights and freedoms, dignity, in the event of any conflict, is able, as the normative parent of every right, to operate as the mediating principle to determine which right or freedom is to take precedence in the particular circumstance.

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[438] Waldron, 'Is Dignity the Foundation of Human Rights?' (n 180) 134. See also Waldron, *Dignity, Rank, & Rights* (n 8) 21–2 and 133–46.
[439] Waldron, *Dignity, Rank, & Rights* (n 8) 24.
[440] Ibid.
[441] Ibid 21–2.

Principle 6 requires that human dignity function as the organising principle to ensure that all rights and freedoms are fully implemented and enforced. Dignity must be, under the principles of the new proposed framework, the highest legal status possible. It must be enjoyed equally by all humans. As a status, it provides the metric by which outcomes over disputed rights can be weighed.

With these requirements from spatial principles in mind, two broad conceptions of human dignity are contrasted: the 'theological'; and the 'philosophical'. As to the theological use of dignity, the analysis undertaken here is confined to that of the Christian tradition except as context otherwise makes clear. There is a different use to which 'dignity' may be put in these respective contexts. This contrast will inform the form and content of the instrumental definition to be adopted by spatial theory. Thus, a constitutional spatial conception will be constructed with a definition that conforms with and satisfies spatial principles.

3. The theological conception of dignity

Any comprehensive historical theological account of dignity will be replete with references to dignity as a status, but contingent upon the rank and moral worthiness of the individual.[442] These historical conceptions cannot be reconciled with the UDHR reference in its preamble to 'the inherent dignity and of the equal and inalienable rights of all members of the human family'. Contingencies of rank and moral worthiness would detract from the universal and inherent conception for which the UDHR stands.

Theological claims regarding dignity have begun to appear more consistent with secular perspectives.[443] The spatial theoretical framework gravitates towards acceptance of those theological expressions, made in more recent times, that are shorn of such contingencies. They provide hope for a convergence of the theological use of the term dignity with that found in secular contexts such as Enlightenment philosophy and post-Second World War instruments like the UDHR, ICCPR, and constitutions drawn as part of the human rights project. Modern churches and other religious bodies acknowledge 'dignity' as the foundation of fundamental rights, especially religious freedom.[444]

The 1965 declaration on freedom of religion, made during the last phase of Second Vatican Council, *Dignitatis Humanae,*[445] for example, opens with the words: '[a] sense of the dignity of the

[442] See, for examples: Jeremy Waldron, 'Dignity and Rank' (n 410); Jeremy Waldron, *Dignity, Rank, & Rights* (n 8); Rosen, *Dignity* (n 8); McCrudden, *Understanding Human Dignity* (n 419); Remey Debes (ed), *Dignity: A History* (Oxford University Press, 2017).
[443] Waldron, *Dignity, Rank, & Rights* (n 8) *passim*.
[444] Ibid. See also John W O'Malley, *What Happened at Vatican II?* (Harvard University Press, 2008) ch 7.
[445] O'Malley, *What Happened at Vatican II?* (n 444) ch 7.

human person has been impressing itself more and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty'.[446]

The Russian Orthodox Church has echoed this sense of human dignity in its *Basic Teaching on Human Dignity, Freedom and Rights*,[447] declaring that 'human rights theory is based on human dignity as its fundamental notion'. Similarly, the World Council of Churches has affirmed that it 'works to defend human dignity by addressing human rights from an ethical and theological perspective'. The Islamic Network Group has likewise affirmed respect for human dignity in its *First Principles of Religion*, along with freedom of thought and expression, and respect for freedom of religion as fundamental to the religious beliefs of all major faiths.[448]

There is at least one religiously motivated invocation of dignity that expresses no theological concepts at all but seeks only to reiterate secular truths. 'Dignity' in its instrumental expression is celebrated in the 2018 *Punta Del Este Declaration on Human Dignity for Everyone Everywhere*. The *Declaration* was made to commemorate the seventieth anniversary of the *UDHR*.[449] It was co-sponsored and promoted by diplomat Ján Figeľ, Special Envoy for Promotion of Freedom of Religion outside the European Union,[450] and church-aligned religious liberty advocacy group the International Center for Law and Religion Studies.[451] A word of explanation is necessary in relation to the *Punta Del Este Declaration on Human Dignity*, the link to religion, and the Church of Jesus Christ of Latter-day Saints.' The declaration was an initiative of the International Center for Law and Religion Studies, which is a centre in the J Reuben Clark Law School at Brigham Young University. That university has the Church as its sponsor and controller. One of the major themes promoted by the centre is religious freedom. However, the centre arrived at a realisation that promotion of religious freedom is not likely to win universal positive response. However, the directors of the centre reasoned, 'human dignity' was a notion that could only win favour. Thus, to celebrate the 70th anniversary of the Universal Declaration on Human Rights, the brainchild of

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446 See the Holy See's website at: <*http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html*>.

447 The Russian Orthodox Church, Department for External Church Relations, 'Human Dignity as Religious and Ethical Category', *The Russian Orthodox Church* (Web Page, 2019) <*https://mospat.ru/en/documents/dignity-freedom-rights/i/*>.

448 See *First Principles of Religion: Human Dignity, Freedom of Expression, and Freedom of Religion* at ING's website at: <*https://ing.org/first-principles-religion-human-dignity-freedom-expression-freedom-religion/*>.

449 See website and the Declaration at: <*http://dignityforeveryone.org/*>.

450 European Commission, 'Special Envoy Ján Figeľ' (Press Release, European Commission, May 2018) <*https://ec.europa.eu/europeaid/special-envoy-jan-figel_en*>.

451 See The International Center for Law and Religion Studies at Brigham Young University website at: <*https://www.iclrs.org/*>.

the centre was the *Punta Del Este Declaration on Human Dignity.* Although the *Declaration* has, of itself, no legal force, its text is anxious to remind readers of the centrality of human dignity in the international human rights project, harking back repeatedly to the UDHR and, by inference, to the ICCPR and other instruments descending from the UDHR.

In the opinion of the Vatican Council expressed in *Dignitatis Humanae*,[452] modern theological thought seems to converge in significant ways with secular views on dignity. In the encyclical, then Pope Paul VI explained that 'contemporary efforts to secure human dignity through constitutional limits on the powers of government and protections of the rightful freedoms of persons and associations are "greatly in accord with truth and justice"'.'[453] Pope Paul thus, like other examples cited, appears to bring into alignment the theological and modern instrumental and constitutional formulations of the concept of dignity. It would seem, were one to confine attention to the pronouncements cited, that the traditional dignity of the past has been revised in light of the secular movements that have brought dignity to the fore. So, the question is why the secular and the theological cannot simply coexist and even be drawn upon interchangeably. The simple answer lies in the contestability of the basis for the theological conceptions. It is the one fundamental difference between the theological and secular that must unavoidably be taken into account.

The theological conception of the status of humankind is inextricably linked to the Christian doctrine commonly known as *imago dei*,[454] connected by scripture to the notion of fallen man and woman and the resulting doctrine: sinful fallen humankind was created in the image of God and is in need of redemption through Christ.[455] This is doctrine that, of course, in modern times, carries a number of other highly contestable claims, without any evidence by which they could be verified.[456] Objectively, the creation story could only ever be accepted as a belief rather than fact.[457]

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[452] Paul VI, *Dignitatis Humanae: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious* (1965), cited and amplified by Aroney (n 8) 26.

[453] Aroney (n 8) 26 notes 113–16.

[454] The phrase has its origins in a Latin term from the Vulgate version of the Bible at Genesis 1:2 literally meaning 'Image of God': 'God created man in his own image'. This expression is commonly regarded as being metaphysical and solely applicable to humans. to signify the symbolic connection between God and humanity.

[455] 1 Corinthians 15:22–26, at 22: 'For as in Adam all die, even so in Christ shall all be made alive. But every man in his own order: Christ the firstfruits; afterward they that are Christ's at his coming.' See also Genesis 9:6; Romans 1:23; 1 Corinthians 11:7; and James 3:9.

[456] Pew Research Center, 'Overview: The Conflict Between Religion and Evolution' (Web Page updated 3 February 2014) <*https://www.pewforum.org/2009/02/04/overview-the-conflict-between-religion-and-evolution/*>.

[457] David Masci, '5 Facts About Evolution and Religion', *Pew Research Center* (Webpage 30 October 2014) <*https://www.pewresearch.org/fact-tank/2014/10/30/5-facts-about-evolution-and-religion/*>. See also Stephen Jay Gould, *Rocks of Ages: Science and Religion in the Fullness of Life* (Ballantine Books, 2002) for the concept of 'non-overlapping magisteria' to characterise the relationship between science and faith in the scriptural accounts.

It is this contestability of the truth-claims that George Kateb identifies as a fundamental problem for acceptance of a theological conception of human dignity.

> If all the truth-claims [of the theological account] are refutable, the theologically based exploration of the idea of human dignity becomes comes not less difficult than the secular exploration, but impossible. It is better to refuse the temptation to claim, as some religious people do, that theology makes no truth-claims, and is instead an autonomous and self-enclosed language game. The trouble is that then these religious adherents slip back into basing speculation on what appear to be truth-claims in their several theologies, after all. Let us keep open the secular possibility of exploration, because if theology goes down, then in disappointment we might be moved to think that since there is no irrefutable theological system, there can be no idea of human dignity. We must be willing to think about human dignity with the assumption that it was not bestowed on us or imputed to us by some higher nonhuman human entity, whether divine, demonic, or angelic.[458]

Kateb correctly identifies contestability as the problem with the theological conception of human dignity as lying in the religious truth-claims. If those claims which underlie the theological conception weaken dignity rather than strengthen it, then the conception should be discarded in favour of a more readily accepted conception amenable to universal application. While it is true that 'adherence to a system of theology appears to remove many conceptual difficulties regarding human dignity', there can be no pretence that these claims do not matter. It is not feasible 'to refuse the temptation to claim, as some religious people do, that theology makes no truth-claims'.

Take the essential truth-claim that underlies the theological conception that humankind is created in the image of God.[459] At first glance, to imbue humanity with this divine spark would seem to resolve any question that dignity is enjoyed universally. But this truth-claim alone brings a series of difficulties and inherent ambiguities that would not arise in a secular conception. The assertion of creation brings with it the Edenic myth and the dogma of the fall of Man:[460] fallen men and women, born into sin, whose claim to dignity is dependent upon creation in the image of God.

Thus, at this threshold, the question arises: in what respect do humans enjoy the status of dignity? If one assumes the divine image to be that of the Judeo-Christian God, there is still a question as to which attributes of divinity are inherited as a part of human dignity. And then there are questions

[458] Kateb, *Human Dignity* (n 8) xi
[459] Above n 454.
[460] Above nn 454 and 455.

as to the nature of the dignity that survives expulsion from Eden after commission of the original sin.

The claim of creation is, at the least, contestable on cosmological[461] and palaeontological[462] evidence. The allied Christian claim that death entered the world through the fall of Adam[463] is not only refuted by the fossil record but brings with it a question of whether dignity can only be extended again to humankind on condition of acceptance of the Christian doctrine of atonement.[464]

It is not necessary to demonstrate that every truth-claim underpinning the theological conception is contestable. With the above difficulties arising as mere examples from threshold questions, it is clear, as Kateb claims, that 'the very refutability of theological claims … makes them all but impossible for the secularist adoption as a reliable account of dignity'. If human dignity is to be unquestionably innate, universal, unconditional, irrevocable, and enjoyed equally, a secular conception will need to stipulate such to be the nature of the status rather than to attempt to derive it from a debatable theological conception.

Any apparent alignment between modern conceptions of dignity and theological conceptions can thus never be complete because the truth-claims to which Kateb points[465] are ever-present in the background. The difference between the secular and the theological conceptions is, and will always remain, rooted in claims of divine revelation underpinning the theological.[466] This is evident from Pope Paul's emphasis on a 'responsible freedom', which is 'grounded on the dignity of the human person as known through the revealed word of God and by reason itself, and appropriate to our 'social nature''.[467]

Kateb's point of contestability can be illustrated by arguments made recently for an acceptance of the theological as the dominant dignity narrative. Of the historical overviews of dignity that have been undertaken,[468] one undertaken by Nicholas Aroney[469] makes clear the inextricable connection

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461 See, for example, Adolf Grünbaum, 'Creation as a Pseudo-Explanation in Current Physical Cosmology' (1991) 35(1/3) *Erkenntnis Orientated: Special Volume in Honour of Rudolf Carnap and Hans Reichenbach* 233.
462 John Rennie, '15 Answers to Creationist Nonsense: Opponents of Evolution Want to Make a Place for Creationism by Tearing Down Real Science, But Their Arguments Don't Hold Up', *Scientific American* (Web Page, 1 July 2002) <*https://www.scientificamerican.com/article/15-answers-to-creationist/*>.
463 Above n 456.
464 Ibid.
465 Kateb, *Human Dignity* (n 8) xi.
466 Above nn 452–9.
467 Ibid n 23.
468 Rosen, *Dignity* (n 8); Debes, *Dignity: A History* (n 442); Aroney (n 8). Scott Cutler Shershow, 'Human Dignity from Cicero to Kant' in *Deconstructing Dignity* (University of Chicago Press, 2013) ch 4; and Marián Palenčár, 'Some Remarks on the Concept and Intellectual History of Human Dignity' (2016) 26 *Human Affairs* 462.
469 Aroney (n 8).

of modern theological conceptions with Christian biblical doctrine.[470] Aroney, in his careful and comprehensive historical overview, provides a series of historical snapshots of 'dignity'. As he illustrates, in all of its principal iterations, 'human dignity' is linked historically but not necessarily conceptually. His survey covers the long and complex history of 'dignity', beginning with Homer's ancient Greek heroic conception, through Marcus Tullius Cicero's Stoic conception of duty,[471] and then through the Christian iterations of Gregory of Nyssa, Leo the Great, Bernard of Clairvaux, Thomas Aquinas, Martin Luther, John Calvin, and Johannes Althusius, before examining the philosophical thought of Immanuel Kant and Friedrich Nietzsche and ending with Pope Paul VI and Vatican II.[472]

In concluding that survey, Aroney expresses doubts regarding the durability of modern conceptions of dignity. Divorced as the secular conceptions are from God and the concept of human creation *imago dei*, he doubts that modern commitments to human dignity, as expressed, for example, in the UDHR, can survive the 'death of God' in modern Western cultures.[473] The 'dignity' upon which Aroney seeks to draw is its classical manifestation of the early Christian traditions, under which dignity had to be sustained by moral action. Unlike secular conceptions developed since the Enlightenment, the Christian conceptions are far more contingent in nature: they are amenable to being lost through unworthiness; best enjoyed in community; associated with social rank; and, ultimately, underwritten by creation in the image of God.[474]

It is on Pope Paul's conception that Aroney lights as being what he considers the most useful for the modern world and in comparison with which other (secular) versions of human dignity can be assessed for their worth.[475] Regarding modern and postmodern formulations of dignity, Aroney rejects them as fallen, corrupted, or 'hollowed' conceptions.[476] They fail, in his view, to reach the heights achieved in earlier traditional theological conceptions.[477] As to Pope Paul's apparently secular tones in His Holiness's observations on dignity, Aroney explains that the 'encyclical emphasised that this social nature of human beings gives rise to the formation of several social organisations, especially religious communities and families, alongside any other "social

[470] Cf *contra* Nussbaum, 'Kant and Stoic Cosmopolitanism' (n 87); Nussbaum, *The Cosmopolitan Tradition* (n 87) 64–96.
[471] Cf *contra* John Sellars, *Lessons in Stoicism* (Penguin Books, 2020) 58 and 74. See also Nussbaum, 'Kant and Stoic Cosmopolitanism' (n 87); and Nussbaum, *The Cosmopolitan Tradition* (n 87) 21–8, 70–96, 134 and 193–205.
[472] Above nn 452–4.
[473] Aroney 'The Rise and Fall of Human Dignity' (n 8) 38.
[474] Ibid 40.
[475] Ibid 26.
[476] Ibid 32.
[477] Ibid.

groups'".[478] This religious communitarian conception of dignity regards 'human dignity' less as an individual status and more as a principle to be called upon to protect the religious as a whole.

Indeed, while there appears from the encyclical to be some harmony in some aspects of modern dignity, as argued below, with the benefit of Aroney's analysis, similarities between theological conceptions and the secular must be regarded as superficial at best.[479] Such superficially apparent harmonies could not be relied upon in a conflict between a religious freedom claim and the commonly secular claim to equal treatment. While stated in universal terms, the reference 'especially religious communities and families, alongside any other "social groups"" and the predication upon the doctrine of human creation *imago dei* do nothing to widen its appeal as a secular concept. If this is correct, the theological conception to which Pope Paul and Aroney subscribe is not a conception well-suited to the resolution of disputes regarding rights in a constitutional setting, as in the case of the conscientious vendor.

The communitarianism that suffuses this theological conception carries many of the notions of rank and position that were hallmarks of the theological traditions.[480] The religious community, in solidarity, accepted the divine nature of human dignity and, indeed, preserved it. It is this loss of connection with both the community and the divine that appears to be behind Aroney's criticism of the modern individualistic conception as 'hollowed out', flattened, and atomised.[481] He perceives the undesirable individualism of secular conceptions to be driven by a Nietzschean self-will and, as such, inferior to those of his preference, deriving from the divine will.[482]

From the above discussion regarding theological conceptions of dignity, and from Aroney's analysis, it is quite clear that a theological conception of dignity would not be conformable with the spatial theory framework. Despite the long and complex odyssey of all of the conceptions, it is the theological view of dignity that attracts criticism by detractors of the utility of human dignity because of the inextricable link to contestable Judeo-Christian claims that are made in its support.[483]

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[478] Ibid 26.
[479] Ibid.
[480] Ibid 39–40
[481] Ibid 32–3.
[482] Ibid 36–7.
[483] See, for example, Steven Pinker, 'The Stupidity of Dignity', *The New Republic* (28 May 2008) <*https://newrepublic.com/article/64674/the-stupidity-dignity*>. In response, see Christopher Kaczor, 'The Importance of Dignity: A Reply to Steven Pinker', *Public Discourse* (31 January 2012) <*https://www.thepublicdiscourse.com/2012/01/4540/*> relying upon theological concepts. As to other misunderstandings of dignity as a 'right' or a 'status', see Conor O'Mahony, 'There Is No Such Thing as a Right to Dignity' (2012) 10(2) *International Journal of Constitutional Law* 551.

A theological definition of dignity could not be sufficiently precise or robust to fulfil the necessary constitutional roles under the framework. There continue to be iterations that are contingent and, as Aroney has shown, still have not been disavowed.[484] They therefore do not meet spatial criteria for a universal, innate, and inviolable status. Since dignity is to be the highest constitutional status possible enjoyed equally by all humans, a theological conception that can be diminished or even lost by conduct will not meet the criteria of spatial principles 3 and 5.

4. The philosophical conception of dignity: Kant

Kant represents a philosophical turning point in the evolution of the philosophical conception of dignity. His conception has had the greatest influence upon secular ideas of dignity.[485] It is true, as both Waldron and Aroney have both observed,[486] that many lawyers assume dignity to mean a derivatively Kantian understanding.[487] The post-Second World War human rights project installed a 'dignity' at its apex that was inspired by Kantian principle.[488]

Kant's conception of dignity derives from his categorical imperative.[489] From the imperative, concepts of universality, reciprocity, mutuality, and equality are found in his dignity.[490] In Kant's thought, the relational nature of human rights is clear.[491] It is also through Kant that we gain a perspective on how freedom and equality can be mediated through human dignity. The fundamental principle of the categorical imperative[492] enjoins all to treat each person always as an end in itself and never merely as a means.

Individuals, under the categorical imperative, must act as both lawmakers and subjects in an ideal moral commonwealth in which the members, as ends in themselves, have *dignity* rather than mere *price*.[493] There appears to be a possible play on words in the German, where *Würde* could connote either personal 'worth' or commercial 'value' in connection with what must be paid in the

[484] Aroney (n 8) 26–33.
[485] Waldron, *Dignity, Rank, & Rights* (n 8) 23–7.
[486] Aroney (n 8) 32 citing at note 151 Waldron, *Dignity, Rank, & Rights* (n 8) 27.
[487] Ibid.
[488] John Loughlin, 'Human Dignity: The Foundation of Human Rights and Religious Freedom' (2016) 19 *Memoria y Civilización* 313; EJ Eberle, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2012) 33 *Liverpool Law Review* 201.
[489] See summary under '7. The Autonomy Formula' in 'Kant's Moral Philosophy', *Stanford Encyclopedia of Philosophy* (Web Page, 23 February 2004, revised 7 July 2016) <*https://plato.stanford.edu/index.html*>.
[490] See summaries under '6. The Humanity Formula', '8. The Kingdom of Ends Formula', and '9. The Unity of the Formulas' in 'Kant's Moral Philosophy', *Stanford Encyclopedia of Philosophy* (n 489).
[491] See summaries listed at nn 489 and 490.
[492] Ibid.
[493] Ibid.

market (*Preis*). In contrast to market price and other values, Kant regards dignity as 'an unconditional and incomparable worth' that 'admits of no equivalent'.[494]

Kant employs the idea of *Würde*, which, while critical to his moral framework, is difficult to translate precisely. Convention holds that it is to be translated as 'dignity'[495] rather than 'worth',[496] although the true meaning has something of both Anglophone concepts. All persons, regardless of rank or social class, are endowed with an equal intrinsic worth[497] or dignity.[498] Moral worthiness, which must be earned by the individual, stands separately entirely from their human dignity.[499] Human dignity cannot be forfeited by misconduct. Indeed, Thomas Hill has used the expression 'human welfare and moral worth' to invite an unpacking of what is meant by 'dignity':[500] All persons, regardless of rank, have an equal intrinsic worth or dignity; human dignity is an innate worth or status that can neither be earned nor forfeited; it is a fundamental principle of reason and morality, the categorical imperative, that all humanity must be treated, never merely as a means, but always as an end in itself.[501]

Kant's conception is in stark contrast to the theological in a number of respects. A moral system that does not depend upon any system of religious belief for its integrity is self-evidently inconsistent with theological conceptions.[502] Kantian philosophy was a new departure in the development of moral system and conception dignity, independent of religious belief. Instead, the force of his moral system derives from reason and moral autonomy.[503] The notion of dignity for Kant carries with it no concept of fallen men and women, born into sin, whose claim to dignity is dependent upon creation in the image of God. Instead, dignity is an innate universal quality of the highest estimation.[504] Also inconsistent is the conception of dignity that does not depend upon the moral character of the individual.[505] And, indeed, it is the absence of God as a guarantor of dignity

[494] Hill, Jr, *Human Welfare and Moral Worth* (n 87).
[495] Waldron, *Dignity, Rank, & Rights* (n 8) 24; D Schroeder and AH Bani-Sadr (2017) 'Dignity in the West' in *Dignity in the 21st Century* (Springer, 2017).
[496] Waldron, *Dignity, Rank, & Rights* (n 8) 23–7.
[497] Ibid.
[498] Ibid.
[499] Ibid.
[500] Hill Jr, *Human Welfare and Moral Worth* (n 87) 11–95, 214–45, 326–8.
[501] Thomas E Hill 'Kantian Perspectives on the Rational Basis of Human Dignity' in M Düwell et al (eds) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014) 215.
[502] Aroney (n 8).
[503] Hill, Jr, *Human Welfare and Moral Worth* (n 87) 246-51.
[504] Ibid.
[505] Ibid.

and human rights, a point that Aroney considers to be a fatal flaw, that modern secular conceptions, starting with Kant,[506] hold to be a virtue rather than a weakness.

Despite Aroney's view, it is the Kantian unconditionality of dignity that has inspired the secular individualistic conception of dignity. That conception would, it seems, account for its successful inclusion as the centrepiece of the modern human rights project. Without Kant as a guiding influence on human dignity it is hard to imagine that human rights would have evolved to the current level of sophistication. If a theological conception had been the dominant view of dignity, it would be hard to imagine the same success.

5. From an instrumental conception of dignity towards a spatial definition of dignity

The UDHR was to represent a new departure in human rights, with the concept of dignity as its centrepiece.[507] Marcus Düwell, citing Michael Kirby, explains that 'dignity', as first used in the UDHR preamble, was the basis 'to design a new world order for the safety of humanity, the more equitable sharing of its wealth and the defence of fundamental rights'.[508] Düwell notes that 'the principal purpose of the UDHR was to put down a non-negotiable marker against the denial of human dignity. From the *Declaration* onwards, governments should not be permitted to say to any human being, "you do not count, you have no value as an individual".'[509]

As Sir Guy Green has observed:

> Principles … which directly or indirectly recognise and protect human dignity include: like cases must be treated alike; any curtailment of the freedom of an individual is prima facie unlawful unless justified by a positive law; a private person may do anything which is not prohibited or which does not infringe the rights of others; when it is making a decision affecting the interests of individuals a public authority is required to observe procedural fairness or natural justice and various presumptions of statutory interpretation designed to protect individual rights and freedoms.[510]

But for instrumental purposes, neither can Kant be simply adopted as *the* concept of dignity to be employed in the drafting of instruments that are to have constitutional and legal effect. As noted, the contestable nuances of theological concepts would prove problematic if applied to that

[506] Düwell et al, *The Cambridge Handbook of Human Dignity* (n 501) 2–3.
[507] Mary Ann Glendon *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House) 142–51.
[508] M Kirby. 'Health care and global justice' (2011) 7(3) *International Journal of Law in Context* 273 cited in Düwell et al, *The Cambridge Handbook of Human Dignity* (n 501) 2–3.
[509] Düwell et al, *The Cambridge Handbook of Human Dignity* (n 501) 3
[510] Sir Guy Green, 'Human Dignity and the Law', in J Malpas and N Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer, 2007) 151–6 cited in Düwell et al, *The Cambridge Handbook of Human Dignity* (n 501) 22.

purpose. But relating an instrumental conception of dignity to any philosophical position, Kantian or otherwise, would bring different difficulties into an instrument. Kantian thought continues to develop within its own philosophical discipline. There is no need in an instrument for any deep philosophical justification. It is enough to say that there is an internationally accepted standard that applies to all humans in their dealings with governments. 'Quite simply, humans have a dignity—a dignity that governments should always respect.'[511] Going beyond that simplicity with any philosophical justification has no part in the instrumental function of dignity. The philosophical is an entirely distinct area of discourse from the constitutional.

While, therefore, Kantian dignity has been enlisted as inspiration for the foundational principle in international human rights instruments, constitutions, and statutes,[512] that inspiration expires upon its constitutional or legal instantiation. Art I of the German Constitution is, for example, consistent with Kant's notion of *Würde*.[513] It is also the source from which all Anglophone concepts of dignity derive.[514] The German Constitution comprises constitutional spaces centred on dignity. But its irrevocable placement as the central principle of its Constitution derives its authority from national sovereignty rather than any Kantian philosophical justification. Although the Kantian influence may be apparent, once entrenched as a part of a constitution, the conception of dignity stands upon the strength of the constitutional instrument.

German constitutionalism in relation to dignity is evident from the decision of the German Constitutional Court (*Bundesverfassungsgericht*) in BVerfGE 87.[515] In that case, the Court considered the constitutional validity of a law that conferred power upon the German Air Force to use lethal force on innocent passengers in the interception of planes under the control of terrorists. The power to do so was confined to instances when it became operationally necessary, and with no feasible alternative, such as when terrorists had hijacked a civilian aircraft. If destruction of a civilian aircraft was necessary to prevent further harm, the *Bundestag* had determined that the cost in lives was appropriate and proportionate.

The Court disagreed, striking down the law for constitutional invalidity by reason of its inconsistency with Art I of the Constitution. Interpreting Art I, it held, without any need to derive authority from Kantian principle, that human dignity precluded such a law.

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511 Düwell et al, *The Cambridge Handbook of Human Dignity* (n 501) 3.
512 Hill, Jr, *Human Welfare and Moral Worth* (n 87) 125–128, 136.
513 See above (n 425).
514 Schroeder and Bani-Sadr, 'Dignity in the West' (n 495).
515 BVerfGE 87 (1992).

> Human dignity is not only the individual dignity of every person, but also the dignity of the human being as a species. Everybody possesses human dignity, regardless of [their] characteristics, achievements, or social status; those who cannot act in a meaningful way because of their physical or psychological condition also possess human dignity. It is not even forfeited by means of 'undignified' behaviour; it cannot be taken away from any human being.[516]

While dignity as conceived by Kant is compatible with instrumental use, it is neither designed nor appropriate for that use. Once embedded in an instrument, dignity needs no philosophical support.

Having now considered the theological conception of dignity, and contrasted it with the Kantian conception, it seems clear that neither the theological nor the Kantian conception could be adopted, without more, into spatial theory. Any definition that spatial theory would adopt would be an 'instrumental' version. It would exist *sui generis* within spatial theory as part of the framework. While it would be inspired by Kantian rather than theological notions of dignity, the utility of both expires upon installation within the instrument. But because of the contestable undergirding of the theological, that expiration is not as readily achievable with the theological notion as it is with the philosophical. Having stressed that philosophical notions will have expired at the point of incorporation into spatial theory and the constitutional and legislative instruments which the theory informs, a workable, robust, and comprehensive definition can now be formulated.

6. A definition

Taking account of the theological and philosophical accounts and the instrumental and constitutional roles that dignity has to fill, the following definition is proposed as one that implements the spatial principles:

> Human dignity is the innate, universal, inviolable constitutional and legal status of all human beings, by virtue of which, all human beings are entitled and are to enjoy all rights, freedoms, equalities, and privileges as are described in the ICCPR and under any domestic constitutional or legal instrument implementing that covenant.

As previously noted, under spatial principles, dignity is a status is to be acknowledged and respected, in all circumstances whatsoever and without exception, by all governments, governmental instrumentalities, and their agencies, and, by all other human beings and by all legal persons of any form.

[516] Ibid 209.

This definition of dignity and description of its purpose and effect serves as a constitutional and legislative template. The reason the definition has a reference to the ICCPR is that, while the concentration of this thesis has been upon that covenant, there are other human rights covenants to which Australia is a party and under an obligation to implement domestically.[517] The reference to the ICCPR is, therefore, at this stage exemplary rather than exhaustive.

Deriving from Art 1 of the German Constitution, (noted above at section 1 of Part A) , under spatial principles it is the duty of all governments, the respective arms of government, governmental instrumentalities, and their agencies to ensure that the dignity of every human being is protected from any infringement of their rights, freedoms, equalities, and privileges by the exercise of constitutional powers, legislation, executive action, and the courts' administration of appropriate judicial remedies.

The intention of the theory and its spatial principles is that dignity should be central in the bill of rights as a constitutional standard, and emblematically inserted into long titles and purpose sections of statutes; to be a reference point for regulatory provisions and subordinate legislation related to human rights; and to become the standard by which legislatures legislate and by which courts decide human rights disputes. Application of that standard of dignity would, of course, include the type of dispute for immediate consideration: the conflict between the right to equal treatment for those possessed of a protected attribute and the claimed right of religious vendors to refuse to deal by reason of that attribute.

'Instrumental' conceptions derive their force from the instruments themselves having been constitutionally and legally instantiated by the relevant sovereign. This includes all bills of rights, constitutions, and legislation. They carry the promise that the state will use its agencies to enforce rights that are adjudicated by a court of competent jurisdiction under them. While a philosophical version will rely upon reason, an instrumental version of dignity, if articulated as a part of a national constitution or bill of rights, derives its authority from the sovereignty of the instrument maker.[518]

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[517] Hilary Charlesworth et al, *No Country is an Island—Australian and International Law* (University of New South Wales Press, 2006) 68–71.

[518] Ibid. As to an implied nationhood power see *Davis v Commonwealth* (1988) 166 CLR 79. On sovereignty and its types, see also *Victoria v Commonwealth* (1975) 134 CLR 388 at 397 per Mason J (as his Honour then was); Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) 17 *Sydney Law Review* 177, 177–8; 181–2; 184–8; 192–3; 195; 200–1; and on parliamentary sovereignty under a written constitution, Goldsworthy, *The Sovereignty of Parliament* (n 82) 2–9. See also MJ Detmold, *Courts and Administrators: A Study in Jurisprudence* (Weidenfeld & Nicolson, 1989) 18–50, 157–72 and 204–7; Michael Detmold, 'The New Constitutional Law' (n 171) 248.

In other words, the authority to instantiate human dignity as the guiding principle for Australian human rights derives from Australian national sovereignty.[519]

The next Part examines ways in which this instantiation of a new constitutional spatial regime would make a difference in Australian constitutional architecture and practice.

Part B: Australian constitutional practice under a theory with human dignity at the centre

This Part takes the constitutional value of human dignity and examines the practical implications of the implementation of a theory with human dignity at the centre of it. Constitutional spatial theory proposes a new architecture that could be transformative in the national protection of human rights and freedoms, with dignity as the organising principle. By creating new constitutional spaces for individual human rights—including, of course, freedom of religion—it would empower the individual against governmental actors or other powerful groups that might otherwise think little of the rights and freedoms they infringe. It would adopt equality and liberty as principles to form part of the architecture.

Within the proposed framework, both equality and liberty would be balanced under the overarching organising principle of dignity to minimise conflict. The structural fabric comprises social goods that flow from a liberal secular system of human rights to which Green referred in the passages cited above.[520] They include justice, procedural fairness, privacy, security, social order, welfare, tolerance, and diversity.

From a foundation of dignity, the normative contents of the framework are drawn from international human rights instruments, principally the ICCPR, but with reference also to other international and foreign human rights regimes where they have demonstrated successes that are capable of emulation in Australia. The new regime would include expressions of guaranteed fundamental rights and freedoms relating to association, movement, speech, thought, conscientious and religious belief, and their manifestations.

Adopting the definition proposed would operate as an effective stamp of human dignity in all that a government does and all that courts do with parties' claims as they come for determination. The spatial theoretical conceptualisation of dignity, if implemented, would make a difference to human rights in three ways that are considered in the sections of this Part. First, a 'human dignity' project would reinvigorate focus upon human rights domestically. It would move the question from parliamentary sovereignty, which preoccupied previous debate on modelling, to a national

[519] Ibid.
[520] Green, 'Human Dignity and the Law' (n 510).

sovereignty underwritten by universal dignity. It would avoid the need for compromises in the manner in which human rights are protected in Australia. Those compromises include the proposed use of the so-called 'dialogue' model for a bill of rights and reliance upon the legislative scrutiny model established in 2011 by the *Human Rights (Parliamentary Scrutiny) Act.*[521] Secondly, it would overcome the problems of potential logical regress that result from ambiguous references to 'dignity'.

After consideration of dignity as the missing element in the Australian human rights project, there is the potential problem of logical regress. This can be overcome by avoiding ambiguous references to 'dignity'. I discuss the 'instrumental' use of the term dignity in the last part of the chapter. This lays the foundation for consideration of 'conscience' in Chapter 4 and how spatial theory approaches that question. As will be seen, the spatial approach to dignity provides a foundation by which the new framework can resolve the subject problem. It places the religiously informed conscience in its proper place. That place is in the constitutional space provided for religious freedom. One is free to hold and act upon conscientious beliefs and views. But one is not free to do so in such a way as to interfere with the rights of others. In other words, under spatial principles, there will rarely be a case where the right to discriminate based upon conscience is included among the rights and freedoms in that constitutional space.

1. Re-invigoration of the human rights project

'Human dignity' has never been a focus of previous human rights reform proposals in Australia. This presents an opportunity to reinvigorate interest in human rights and to leave behind some of the errors and wasted opportunities of the past and move beyond compromises that have hindered real instantiation of a robust human rights regime, such as the proposed use of the so-called 'dialogue' model for a bill of rights and reliance upon the legislative scrutiny model.

If the constitutional spatial reforms are to have any prospect of success, human dignity must be the focus and point of difference from other past failed attempts. The imagination of the nation must be captured to avoid repeating past squandered opportunities. As Jürgen Habermas has observed, the instantiation of the process of democratic legislation[522] demands that basic enforceable liberal and political rights be granted simultaneously.[523] The coincidence of democratic

[521] See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). See also Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' 2018) 41(1) *UNSW Law Journal* 40.
[522] Joseph Cardinal Ratzinger (Pope Benedict XVI) and Jürgen Habermas, *Dialectics of Secularism: On Reason and Religion* (Ignatius Press, 2007) 26.
[523] Ibid.

process and protection of human rights has occurred in every Western liberal democracy with the exception of Australia.

Notwithstanding the importance of religious freedom and other fundamental human rights, the challenge lies in ensuring that politicians and the electorate are not fatigued by proposed reforms that are not ultimately implemented. Australia has a history over the twentieth century of ill-fated religious freedom and human rights reforms, which have been recounted in detail elsewhere.[524] The challenge that confronts a government proposing change is epitomised in the first government proposal for a bill or charter of rights in 1983. Then Labor Government Attorney-General, Senator Gareth Evans, floated the proposal to his government colleagues. But he acknowledged the indifference and antipathy that Australians felt regarding human rights:

> No one should be under any illusion that a commitment to human rights is good politics in the sense of winning electoral hearts and minds … As a nation at large … we are monumentally indifferent if not positively hostile, to matters of civil liberty and law reform … Reform in this area will always be hard to sell, but decency and humanity demand that the effort be made.[525]

The proposal ultimately came to naught.[526]

Another opportunity came between 2008 and 2011, when a proposed reform through consolidation of existing federal human rights legislation[527] was the subject of inquiry and public consultation. Once again, the inquiry came to nothing in terms of a bill or charter of rights. In 2009, the Brennan Committee recommended federal legislation for a consolidated and comprehensive human rights Act.[528] In a break with the traditional lack of interest on the part of the Australian public, the recommendations were supported by an overwhelming number of submissions made to the consultation.[529] It seemed the time for fundamental rights and freedoms had arrived.

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524 Babie and Rochow, 'Feels Like Déjà Vu' (n 14).

525 Cited at Charlesworth et al, *No Country is an Island* (n 517) 70, note 6, from Gareth Evans, 'Democratic Socialism and Human Rights', in Keith Scott, *Gareth Evans* (Allen & Unwin, 1999).

526 Ibid.

527 See *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Australian Human Rights Commission Act 1986* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

528 Kirsty Magarey and Roy Jordan, 'Parliament and the Protection of Human Rights', *Parliament of Australia* (Web Page, last reviewed 12 October 2010) <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/briefingbook43p/humanrightsprotection>.

529 Elenie Poulos, 'Constructing the Problem of Religious Freedom: An Analysis of Australian Government Inquiries into Religious Freedom' (2019) 10(10) *Religions* 1, 11–13; Patrick Parkinson and Nicholas Aroney, 'Consolidation of Commonwealth Anti-Discrimination Laws Submission' January 2012 (Internet resource), *<http://webcache.googleusercontent.com/search?q=cache:jzn6A9c5oUMJ:www.aph.gov.au/DocumentStore.ashx%3Fid%3D21b0a6e4-8931-4bef-92bf-888dab57da34+&cd=6&hl=en&ct=clnk&gl=au>* 2–3, 7–8, 10–11.

But the Brennan Committee's approach to a bill of rights was flawed in three ways. First, there was a tacit acceptance of the parliamentary sovereignty arguments coming from those opposing a bill of rights.[530] Consequently, the Committee shied away from the argument raised in favour of any model that gave supremacy to the courts and the process of judicial review. Its modelling would ultimately deny the courts any adjudicative role in respect of human rights statutes.[531]

Secondly, it shied away completely from any constitutional entrenchment.[532] It regarded that as politically impossible to achieve by referendum under s 128 and did not consider any of the cooperative federalist possibilities discussed in Chapter 2.

Thirdly, and most importantly, despite its study of international human rights instruments that would be implemented by the proposed legislation, the Brennan Committee did not see the importance of dignity as the lodestar of human rights. Although it may have represented progress of a kind, the proposed charter of rights, or *Human Rights Act*, was likely to fail constitutionally by reason of the first flaw, the proposal of a federal dialogue model. Instead of courts having the power to strike down laws inconsistent with Australian human rights obligations, courts would, under the Brennan model, only be permitted to tell parliament that they had found such a breach.

This 'dialogue' aspect[533] of the proposed model betrays a mistrust in the capacity of courts to engage in judicial review. It ignores the history of the High Court in fulfilling that exact role in respect of s 51 of the Constitution.[534] If courts can adjudicate on the limits of constitutional space for the government by process of characterisation of laws under s 51 of the Constitution,[535] there is no reason why they could not do so with respect to enumerated rights and freedoms in the

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530 The Hon Catherine Branson QC 'The National Human Rights Consultation: Outcomes' 21 October 2009, Australian Human Rights Commission (Webpage) <*https://humanrights.gov.au/about/news/speeches/president-speech-national-human-rights-consultation-outcomes*>.

531 The Hon Michael McHugh AC, QC 'A Human Rights Act, the Courts and the Constitution: Presentation Given at the Australian Human Rights Commission', *Australian Human Rights Commission* (Web Page, 5 March 2009) <*https://humanrights.gov.au/our-work/human-rights-act-courts-and-constitution-hon-michael-mchugh-ac-qc-2009*>, 12–20, 32–7.

532 Kenneth J Arenson 'An Entrenched Bill of Rights: A Protection for The Rights of Minorities' (2011) 18 *James Cook University Law Review* 28; Rochow, 'Paying for Human Rights Before the Bill Comes' (n 63).

533 McHugh (n 531).

534 Sawer, *Australian Federalism in the Courts* (n 57) 52–151; Susan Kiefel, 'Standards of Review in Constitutional Review of Legislation' in Saunders and Stone, *The Oxford Handbook of the Australian Constitution* (n 81) 488. See also: *Amalgamated Society of Engineers v Adelaide Steamship Co.Ltd.* (1920) 28 CLR 129, [1920] HCA 54*; South Australia v Commonwealth* (1942) 65 CLR 373, [1942] HCA 14; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, [1982] HCA 27; *Commonwealth v Tasmania Commonwealth v Tasmania* (1983) 158 CLR 1, [1983] HCA 21; *New South Wales v Commonwealth; Western Australia v Commonwealth* (20060 229 CLR 1, [2006] HCA 52.

535 Ibid. See also Scott Stephenson, 'Rights Protection in Australia' in Saunders and Stone, *The Oxford Handbook of the Australian Constitution* (n 81) 905; Sawer, *Australian Federalism in the Courts* (n 57) 12–14.

constitutional space erected for rights of the governed.[536] Opting instead for what were effectively 'advisory opinions',[537] the Committee recommended adopting the 'dialogue' model.[538]

To justify this preference, a better explanation than parliamentary sovereignty would need to be found. From a spatial theory perspective, it is questionable because it creates yet another dimension in which government dominates, when the very notion of human rights requires a space in which the people are protected from government by the only agency capable of providing that protection, the courts.[539] Instead, the dialogue model turns the poacher into the gamekeeper.

This model was inapposite for the Australian federal constitutional framework for several reasons. The Australian judiciary, as part of its role in statutory interpretation, should, wherever it is appropriate to do so, interpret statutes in accordance with international human rights obligations, and by this means uphold Australian human rights.[540] The High Court has shown itself both willing and competent to adjudicate constitutional abstractions and draw boundaries around the sphere in which those abstractions perform their constitutional functions, as exemplified in its development of the doctrine of separation of powers[541] and its line of decisions defining the implied freedom of political communication.[542]

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[536] Ibid.

[537] *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

[538] McHugh 'A Human Rights Act, the Courts and the Constitution' (n 536), 12–20, 32–7.

[539] Ibid. See also Sawer, *Australian Federalism in the Courts* (n 57) 12–14.

[540] See, for example, *Minister of State for Immigration and Ethnic Affairs v Teoh* 1995) 183 CLR 273, [1995] HCA 20 in which by a majority of the Court held (Mason CJ, Deane and Toohey JJ; Gaudron J agreeing the appeal should be dismissed, but on the basis of a common law right; McHugh J dissenting) that the ratification of the *Convention on the Rights to the Child* was a positive statement by the Executive to the world and to the Australian community, that the Government and its agencies would not act contrary to the Convention. The then federal government acted to foreclose the fact of ratification as a creation of a legitimate expectation: Mark Jennings 'Practical Treaty Making The Relationship Between Treaties and Domestic Law' (internet material) *<https://web.archive.org/web/20091003124243/http://www.dfat.gov.au/treaties/workshops/treaties_global/jennings.html>*. See also *Australian Human Rights Commission Act 1986* (Cth) Schedules 1 -5 inclusive; Benedict Coxon 'Learning from Experience: Interpreting the Interpretive Provisions in Australian Human Rights Legislation (2020) 39 (2) *University of Queensland Law Journal* 253; Australian Human Rights Commission 'About Rights and Freedoms' (Australian Human Rights Website) *<https://humanrights.gov.au/our-work/rights-and-freedoms/about-rights-and-freedoms>;* Steven Rares 'Legality, rights and statutory interpretation' Paper at the 2013 AGS Administrative Law Conference Canberra, 20-21 June 2013 (Federal Court Website) *<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20130620>* [2]–[3]; [48]–[50]; [76]–[83]; [86]; Middleton, 'Statutory Interpretation: Mostly Common Sense?' (n 177); Kirby, 'Statutory Interpretation: The Meaning of Meaning' (n 177); Perram, 'Constitutional Principles and Coherence in Statutory Interpretation' (n 177).

[541] *New South Wales v Commonwealth* (1915) 20 CLR 54, [1915] HCA 17; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 43 [1918] HCA 56; *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, [1921] HCA 20; *Roche v Kronheimer* (1921) 29 CLR 329, [1921] HCA 25' *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* [1931] HCA 34; *Sykes v Cleary* [1992] (1992) 176 CLR 77HCA 60; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, [1996] HCA 24; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [2000] HCA 63.

[542] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 R 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112; *Coleman v Power* (2004) 209 ALR 182, 232-

Taking account of the early history of Chapter III, when it was found that advisory opinions were unconstitutional,[543] the notion of a court–Parliamentary dialogue strikes one as anomalous. Considering that these courts are within a federal structure under a written constitution, it becomes all the stranger. They are members of a separated arm of government. Their very independence from the political arms of government would reinforce the oddity of their entering into some form of advisory 'dialogue' with the federal Parliament. It seems the last of all possible models that would or should be adopted.

Thus, the principal argument against the Brennan Committee recommendation is that it is highly questionable as a matter of constitutional principle that Chapter III courts have any power to enter into such a 'dialogue'. Moreover, the process of 'dialogue' would have to evolve to achieve a vague tilt towards parliamentary sovereignty, which was, as Goldsworthy reminds us, not a concept ever fully accepted by the Australia framers.[544] Had they done so, they could never have framed a written federal constitution of the kind they did.[545] Courts are, instead of engaging in 'dialogue', expected to resolve the *lis* before them between the parties who are litigating. The notion that their principal audience in passing judgment is the parties is a rationale that underlies, in part, the decision in *Re Judiciary and Navigation Acts*,[546] when the High Court refused to advise Parliament of its opinion without an *inter partes* dispute. Courts are, instead, accustomed and equipped to the striking down of invalid laws[547] or applying administrative remedies to improper executive actions.[548] The 'dialogue model' could only be suitable, if at all, in unitary states like the United Kingdom, New Zealand, or the individual states of Australia. In the United Kingdom and New Zealand, there are no written constitutional prohibitions such as those that arise under the federal Australian Constitution.[549]

At the time the Brennan Committee finished its deliberations, insufficient attention had been given to the details of compatibility of the dialogue model with the Australian Constitution.[550] The

3 *McCloy v NSW* [2015] HCA 76; *Brown v State of Tasmania* [2017] HCA 43]; *Clubb v Edwards; Preston v Avery* [2019] HCA 11.

543 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

544 Goldsworthy, *The Sovereignty of Parliament* (n 82) 2–9.

545 McHugh, 'A Human Rights Act, the Courts and the Constitution' (n 538).

546 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257. See McHugh, 'A Human Rights Act, the Courts and the Constitution' (n 538) 53–4.

547 Murray Gleeson, 'Courts and the Rule of Law, The Rule of Law Series, Melbourne University, 7 November, 2001' (Speech on Website of the High Court of Australia) <*https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm*>

548 McHugh, 'A Human Rights Act, the Courts and the Constitution' (n 538).

549 Ibid.

550 Bruce Stone and Nicholas Barry 'Constitutional Design and Australian Exceptionalism in the Adoption of National Bills of Rights' (2014) 47(4) *Canadian Journal of Political Science* 767.

Committee had relied heavily upon the United Kingdom model with its emphasis on interpretive powers under its human rights legislation, with little power to make declarations of incompatibility.[551] Of course, as a unitary polity, the United Kingdom, with no written constitutional instrument, had nothing in its legal or constitutional structure that would in any way limit legislative power. Thus, British legislation is not reviewed for constitutional validity. In federal polities, like the United States and Australia, legislative Acts that exceed the grant of power conferred by the constitution are routinely struck down under the *Marbury v Madison* doctrine of judicial review.[552]

Despite constitutional experts having warned the Committee that the High Court's view of the separation of powers raised issues on how the interpretive power would likely be tightly circumscribed,[553] the Committee proceeded to propose the dialogue model. The argument here is that to justify this preference, a better explanation than parliamentary sovereignty would need to be found. The dialogue model turns the poacher into the gamekeeper and diminishes judicial power in the process.

The constitutional naiveté of the Brennan Committee proposal was never put to the test. Instead of adopting the recommendation of the Brennan Committee[554] and passing a comprehensive *Human Rights Act* that included the constitutionally flawed dialogue model,[555] Parliament passed the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This Act removes the courts from of the

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[551] McHugh, 'A Human Rights Act, the Courts and the Constitution' (n 538) 26–27.

[552] Gleeson, 'Courts and the Rule of Law' (n 547) at note 28, citing Marshall CJ in *Marbury v Madison* (n 379) at 177; 5 US 87 (1803) at 111: 'It is, emphatically, the province and duty of the judicial department to say what the law is.'

[553] Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 *Melbourne University Law Review* 285; George Williams, 'A Charter of Rights for Australia' (2008) 27 *Dissent* 10, 12, both cited in Kolodizner 'The Charter of Rights Debate: A Battle of the Models' (n 156) at 219, 222–30. See also Kolodizner's account, at 227, notes 37 and 38, of the Roundtable which included Sir Anthony Mason, the Hon Michael McHugh AC QC, The Hon Catherine Branson QC, Ms Pamela Tate SC, Associate Professor James Stellios, Associate Professor Anne Twomey, Associate Professor Kristen Walker, Professor George Williams, Professor Spencer Ifcak and Mr Bret Walker SC. See also AHRC, 'Constitution Poses No Obstacle to National Human Rights Act' (Media Release, 6 May 2009), <*http://www.hreoc.gov.au/about/media/media_releases/2009/ 32_09.html*>.
See also McHugh, 'A Human Rights Act, the Courts and the Constitution' (n 538), 14–15:

> I am afraid I am more pessimistic about the prospects of a dialogue model being upheld by the High Court than those who believe that it would be constitutional if enacted at the federal level. It would not surprise me if the High Court upheld legislation in the form of the dialogue model. There are some persuasive arguments in favour of the constitutionality of such a model. Conversely, it would not surprise me if the High Court held that so much of the dialogue model as required a federal court to make declarations of incompatibility and communicate them to the Attorney-General was invalid. Although it will be a close-run thing, I think that the better view is that the High Court will hold that that the incompatibility provisions of the legislation are invalid unless the High Court can be persuaded to adopt a more radical and functional approach to what is judicial power and what is a 'matter' for the purpose of Chapter 3 of the Constitution than it has done in the past.

[554] Frank Brennan et al, *National Human Rights Consultation Report* (Attorney-General's Department September 2009) 22–4, 227–340.

[555] *Momcilovic v The Queen* (2011) 245 CLR 1, [2011] HCA 34.

regime entirely. It establishes a parliamentary committee to review Bills for their compliance with international covenants to which Australia is a state party.[556] Despite successfully operating as a workable compromise on an actual human rights Act, it has some ongoing difficulties. The first is the threat of repeal by some conservative members of Parliament.[557] Secondly, it provides no remedy for executive actions that breach human rights. Thirdly, the regime creates no constitutional space for ordinary citizens capable of being reviewed by the courts.[558]

Doubts cast upon the Brennan model and its basis became clear in the High Court decision *Momcilovic v The Queen*.[559] One part of the argument in that case concerned the validity of the 'dialogue' requirement between the Supreme Court of Victoria and Parliament under s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[560] The case raised the state Parliament's power to require the Supreme Court to enter dialogue. Under the *Kable* doctrine relating to the separation of powers,[561] the Supreme Court is a Chapter III court that has conferred upon its federal judicial power as well as state judicial power. The question was, therefore, *inter alia*, whether, as a matter of institutional integrity, the Supreme Court could validly have such a function of dialogue conferred upon it.[562]

The Court provided observations regarding how the Victorian *Charter of Human Rights and Responsibilities Act 2006* operates. That the Court chose to deliver six separate sets of reasons has produced considerable doubt as to how a case might have been decided if that were the only question before the Court. There would be even greater uncertainty surrounding a federal statute adopting the same model. As a consequence, uncertainty still surrounds the application of the *Charter* in practice. While the Court did, by a narrow majority, hold that s 32 of the *Charter*, which conferred a declaratory power in relation to statutes, was valid, doubt persists regarding power to declare 'incompatibility' under s 36.

As to s 36, the matter was finely balanced. Chief Justice French, Bell, Crennan, and Kiefel JJ (as her Honour then was) considered that s 36 was valid. Justices Gummow, Hayne, and Heydon considered that s 36 was invalid. In their views, the section impermissibly impaired the institutional

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[556] Grenfell and Moulds 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (n 521).
[557] Rachel Baxendale, 'Human Rights Committee Should Be abolished, Liberal MPs Say', *The Australian* (7 August 2018)
<https://www.theaustralian.com.au/news/human-rights-committee-should-be-abolished-liberal-mps-say/news-story/97d35636570dbd4051f65646536af120>.
[558] There is no capacity for dispute resolution.
[559] *Momcilovic v The Queen* (2011) 245 CLR 1, [2011] HCA 34.
[560] The power to declare a law inconsistent with the Charter.
[561] Above n 31.
[562] In the result, the High Court allowed the appeal on grounds other than s 36 of the *Charter*.

integrity of the Supreme Court: Gummow J, with whom Hayne J agreed, held that the practical operation of s 36(2) was incompatible with the institutional integrity of the Supreme Court and thus invalid. Heydon J similarly regarded the section not to be valid and took the Supreme Court outside the constitutional conception of a 'court'.

Chief Justice French observed:

> As explained by this Court in a line of decisions beginning with *Kable*, the placement of the courts of the States in the integrated national judicial system created by Ch III of the Constitution constrains the range of functions which can be conferred upon those courts. They cannot be authorised or required to do things which substantially impair their institutional integrity and which are therefore incompatible with their role as repositories of federal jurisdiction. Legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the power of the Commonwealth. In particular, a State legislature cannot enact a law conferring upon a State court or a judge of a State court a nonjudicial function which is substantially incompatible with the judicial functions of that court.[563]

Justice Gummow made the following observations regarding s 36:

> The practical operation of s 36 as described above is incompatible with the institutional integrity of the Supreme Court and therefore the section is invalid. Sections 33 and 37 are integral to the operation of s 36 and are not saved by s 6(1) of the Victorian Interpretation Act. However, the balance of the Charter is not 'so bound up' with these provisions that one can fairly say that the former cannot stand without the continued operation of the latter. This is not a case where the balance of the Charter would operate differently by reason of the absence of the particular remedy created by s 36, or where the scheme of the Charter is such that none of its provisions are to operate unless all do.[564]

The Brennan Committee represents another squandered opportunity in the progress of Australian human rights. While momentum towards a bill of rights was arrested by the scrutiny legislation from 2017, circumstances have once again changed to open discussion on the subject.[565] Chief among those changed circumstances has been the anticipation of clashes over same-sex marriage. Conservative faith leaders have expressed concern about their freedom to publish their religious views in favour of monogamous heterosexual marriage and to condemn same-sex marriage.[566] It

[563] *Momcilovic v The Queen* (2011) 245 CLR 1, [2011] HCA 34, [93] per French CJ.
[564] Ibid [188]– [189], Gummow J
[565] Principally, same-sex marriage and the Expert Panel into Religious Freedom inquiry.
[566] See above (n 3).

is this set of circumstances that has brought to the fore the problem at the centre of this current study, the conflict arising from the position of the conscientious vendor.

If an emphasis were placed upon human dignity, and capturing the renewed interest in religious freedom, it would be possible to reinvigorate interest in a regime that addressed that problem and human rights generally in Australia. It would also elevate the human rights project domestically by moving the question from parliamentary sovereignty[567] to a national sovereignty[568] underwritten by universal dignity. It would avoid the need for compromises in the manner in which human rights are protected in Australia: the proposed use of the so-called 'dialogue' model for a bill of rights and reliance upon the legislative scrutiny model for which there is no accountability to the courts.

2. Overcoming the problems of potential logical regress that result from ambiguous references to 'dignity'

Ambiguity, an essential problem in the use of dignity as an overarching principle, is overcome by providing a definition for the purposes of spatial theory. Definition also overcomes the potential for confusion of dignity with the rights and freedoms that derive from it. Once it is clear that dignity is a status that has roles as a metric in the weighing of competing claims to rights and freedoms, the court or tribunal can then use it to weigh competing claims, allocate rights and freedoms to their appropriate constitutional spaces, and prescribe the appropriate boundaries for the exercise of rights. Even with a definition, commentators and actors are free to invoke dignity as they see fit to suit their own purposes. All that can be done is to be astutely aware that its use in any context needs to be critically examined.

Among the ways in which dignity may be invoked in modern political and constitutional contexts is what has been described as a flourish to embellish rhetoric, with no reference to any definition or any indication of substantive use. An example of such a use is in the Religious Discrimination Bill[569] where, in what can be described as a rhetorical flourish, the draft at sub-clause 3(2)(b)(2) provides that to give 'effect to the objects of [the] Act, regard is to be had to … the principle that every person is free and equal in dignity and rights'. It provides no guidance as to what version of dignity is intended or what is meant by 'regard is to be had to'.

An associated use is where dignity is invoked as a surrogate for religious liberty or some other right. An example of this is Daniel Darling's *The Dignity Revolution*,[570] which, while invoking the

[567] Goldsworthy, *The Sovereignty of Parliament* (n 82) 2–9.
[568] Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (n 518).
[569] *<https://www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-second-exposure-drafts>*.
[570] Above n 189 ch 1.

concept of dignity, is a Christian apologetic advocating use of 'dignity' in order to advance freedom of religion over equality rights.

3. The 'instrumental' use of dignity

'Dignity' may be used in a third, substantive way, as found in the discussion of its theological and philosophical applications. Even when used in this important way, however, regard must be had to the context in which it is invoked and the definition that is applicable. While context may be easily ascertained, definition may not be explicit. The High Court of Australia did not proffer a definition of 'dignity' in *Clubb.*[571] Nor did the German Constitutional Court[572] in *BVerfGE 87*[573] see a need to do so when applying Art 1 of the German federal Constitution. Despite that lack of definition, in both cases, the courts were engaging with what I term here an 'instrumental' use of dignity.

Neither court considered dignity as a philosophical or theological abstraction. The term 'dignity' was found, respectively, in a statute and a constitutional provision. Courts are required to engage with 'dignity' in a substantive way when it is present in an instrument, such as a statute or a provision of a constitution. The term must do its work. This substantive effect when placed in an instrument is different from when the notion of 'dignity' is invoked merely as a part of argument. In spatial theory, under the third spatial principle, the constitutional role is to be acknowledged in all relevant constitutional, legislative, and procedural instruments to ensure that courts implement dignity as it is intended by each instrument. The spatial definition of dignity and its placement in every relevant instrument is what is referred to as 'instrumental'.

It is in the instrumental use, under a bill of rights or a statute implementing it, or in another juridical sense that Hohfeldian theory has application. The court or tribunal is called upon, under the relevant instrument, to adjudicate between competing rights. The test for priority in any adjudication must, under the definition, be which outcome maximises dignity as an outcome for the parties and any person necessarily affected by their conduct. It is thus determining the jural relations between the parties under the auspices of dignity as defined by spatial theory. There is only one possible invocation of dignity and only one determination of the jural relations of the parties. The selection of outcomes is in the combinations that appear from Hohfeld's tables of jural opposites and jural correlatives.[574] In the example of *Masterpiece*,[575] weighed in the scales of

[571] *Clubb v Edwards; Preston v Avery* [2019] HCA 11.
[572] BVerfGE 87 (n 515).
[573] Ibid.
[574] Hohfeld (n 48) 36, 65.
[575] *Masterpiece Cakeshop* (n 24).

dignity as defined by spatial theory, Phillips will either have a right to refuse to deal in the supply of a cake or he will have no-right; and he will either have an immunity or a liability for his refusal to deal. Craig and Mullins will either have a power to compel Phillips to deal or they will have no-right to remain in the cakeshop after the refusal to deal. There are, of course, other permutations that may be employed. But because the concept of adjudication merges the decision of what dignity directs with what jural relations that the state will enforce, there is no possibility for conflation of rights with status and no argument that invites regress into continued consideration of dignity as it might apply to an exercise of conscience or religious liberty.

Part C. Conclusions and a solution to the subject problem with respect to the religiously informed conscience component

One part of the problem that needs to be resolved is the putative dominance of the religious conscience. If it were the case that the act of refusal by the religious vendor in exercise of conscience were to trump all other rights, then there could never be any dispute. Conscience would trump all and equality rights could never take priority. That the law does not recognise that to be the case is the very complaint that the expansionist makes.

Even if it were to remain contestable as to whether and when conscience should take priority, if conscience were to be the scale in which competing claims were to be weighed, the balancing process would be tipped in favour of the religious conscience. There would also be the logical problem of how a right, freedom of conscience, can be used to weigh competing rights. The difficulties in bias and logic are overcome by introducing a metric that stands proud of both of the rights to be weighed—which is the status of dignity, from which both competing rights derive their efficacy.

Placement of dignity as the essential and primary consideration displaces any contention that individual conscience might be, in any way, preeminent in disputes over religious freedom and equality rights. While conscience remains an important consideration and a part of the fundamental right described as Art 18 of the ICCPR, as contemplated by the terms of that article, there will be instances when the religious conscience needs to be subrogated to other rights and freedoms and other community interests. This chapter thus lays the foundation for the argument developed regarding conscience in Chapter 4—namely, that it is not unusual for individual conscience to be postponed to higher and more pressing communitarian interests.

This chapter has responded to the second of the three essential elements of the hypothesis posed in Chapter 1. It has demonstrated that the spatial framework can engage with a sufficiently robust

conception of dignity that could assist in the resolution of the conflict regarding a refusal to supply. It has examined various conceptions of human dignity and arrived at an instrumental definition that can become part of constitutional, legislative, and subordinated legislative regimes so that dignity becomes an indelible feature of the new human rights regime.

The spatial theoretical conception of dignity has the content necessary to perform its arbitral function among competing rights. Dignity, as a status and the source of human rights, has been distinguished from a 'right'. By its standard, the applicability of both the right and the freedom in question can be assessed. The chapter has shown that compromises made in the past on human rights will no longer be necessary once the spatial definition is adopted. It has avoided any confusion or conflation that might otherwise postpone the ultimate issue to be decided, namely, which right or freedom should prevail. It has done so by implementing Hohfeldian theory. Finally, the chapter has laid the foundation for the final hypothetical test regarding the religiously informed conscience, which is the subject of the next chapter.

In Chapter 4, I demonstrate that it is in keeping with principle and practice across a wide variety of examples for spatial theory to limit the use of conscience as a reason for disobedience. I posit, as part of the theory, that one is free to hold and act upon conscientious beliefs and views; but that one is *not* free to do so when it interferes with the rights of others. In other words, under spatial principles, there will rarely be a case where the right to discriminate based upon conscience is included among the rights and freedoms in that constitutional space. Dignity will not allow the individual case to overtake the communitarian benefit of obedience to the norm that delivers that benefit.

Chapter 4. Conscience in Constitutional Spatial Theory

Part A: Introduction

In *Employment Division v Smith*,[576] Scalia J observed that permitting claims based solely upon individual belief 'would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto [themselves]'.[577] This *dictum* could be taken as a statement of policy, exemplified time and again across the departments of the law and within the trades and the professions: when freedom of conscience is removed from a bundle of public rights, it is removed having weighed the public interest, that is consistent with human dignity, against the individual's freedom of conscience. Freedom of conscience may have led the conscientious vendor to refuse to deal, but it is the public interest that is consistent with human dignity and that thus prevails as the dominant interest.

[576] *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (1990).
[577] Ibid at 879.

In order to satisfy the last part of the hypothesis to be tested, this chapter addresses spatial theory and its treatment of the religiously informed conscience. In this chapter, I argue that spatial theory is able to satisfy the last part and therefore all of the hypothesis described in Chapter 1. If the expectation of the conscientious vendor is to be permitted to act on conscience in violation of the law, and to do so without penalty, then there is a heavy burden to be discharged in showing why that should be so. This raises an underlying question: whether doing as one's conscience admonishes, of itself, entails that anyone else, including in the present study a court or tribunal, owes any special duty of deference to that exercise of conscience.[578]

The submission is that it does not, based upon the survey of circumstances that I discuss in this chapter. While one is free to hold and act upon conscientious beliefs and views, one is *not* free to interfere with the fundamental rights and freedoms of others. The riposte that the vendor could make to my argument would be that the dignity of the conscientious vendor must be taken into account in the conflict of religious freedom and the right to equal treatment. That is true. But the comparative instrumental dignity being balanced must be understood. Instrumental dignity, by its nature, is both an individual and a communitarian conception.

In the scales of dignity, the opposing interests are not just one person's right to equal treatment and another's claimed right to discriminate in the refusal of supply. The first of those interests is communitarian. It is in everyone's interest, including that of the conscientious vendor, that all members of the community be treated equally. The conscientious claim is that of an individual; but it is one that falls within the ICCPR Art 18(3) formulation regarding manifestation: the freedom to manifest religion or belief may be limited if it is necessary to protect, among other things, the fundamental rights and freedoms of others.

In each of the examples that I consider in this chapter, when the particular community chooses the norm to be obeyed over individual conscientious objections, each relevant community has weighed the benefits of insisting upon absolute obedience. Whether it is the ideal of universal access to healthcare, justice, or overnight accommodation, the decision has been made that universality of the social good is better than permitting individual exceptions. In dignitarian terms, human dignity is better upheld by ensuring equality of treatment for all than permitting conscientious exceptions for some. As concluded at the close of the last chapter, dignity will not allow the individual case to overtake the communitarian benefit of obedience to the norm that delivers that benefit.

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[578] Steven Smith, 'The Tenuous Case for Conscience' (Research Paper No 26/2004, University of San Diego Public Law and Legal Theory Research Paper Series, 2004) <*http://digital.sandiego.edu/lwps_public/art26*> 1.

In this chapter, I argue, first, that, where there is a higher goal to be reached, there is no instance in which the individual's normative bundle of rights includes a conscientious refusal as claimed by the conscientious vendor. Secondly, I argue that when the religiously informed conscience is critically examined against the practice, principle, and policy found in the examples, there is no justification for discrimination by the conscientious vendor. The theory thus has a principled approach to the religiously informed conscience. However, as will be seen, that will rarely occur and only in one of three circumstances: a legislative exception within the equality law; a constitutional exception to the prohibition under the bill of rights and in keeping with the requirements of human dignity; and, if neither of the first two can be satisfied, if the conscientious vendor is prepared for the consequences of civil disobedience.

This chapter relies upon the argument I have developed in previous chapters: those chapters support constitutional spatial theory as accounting for the conflict that arises in the case of the conscientious vendor. The theory seeks to resolve such disputes by allocation of constitutional spaces to religious freedom and equality rights and through the medium of human dignity. Under spatial theory, that allocation should be sufficiently clearly made as to render dispute unnecessary. That, of course, is a counsel of perfection that can never be achieved. Nevertheless, as a clear policy position, it should have a chilling effect upon the desire to carve out new exceptions.

In the advocacy of the expansionist,[579] as discussed in Chapter 2, there persists an assumption that the religious conscience ought to be the subject of legislative exceptions or accommodations in order to privilege it over the right to equal treatment. That advocacy for law reform is to specific effect: that vendors be permitted to refuse to deal when their religiously informed conscience dictates that supply would assist or promote an institution, such as same-sex marriage, to which they object.[580] The expansionist position also seeks for religious freedom to be provided for in a standalone Act, dedicated to that freedom.[581] This is, of course, contrary to the position adopted in the spatial framework for a constitutional bill of rights. It also runs contrary to recommendations of the Expert Panel, which, in the Ruddock Report,[582] made plain that the preferable position is

[579] Deagon, 'Religious Schools, Religious Vendors' (n 2).
[580] Ruddock Report (n 1) 105–6
[581] Ibid.
[582] Ibid 14, 48–9. As examples, see: Australian Christian Lobby, Submission No 2012 to Standing Committee on Community Development, *Inquiry into Palliative Care* (21 June 2016) <https://www.parliament.tas.gov.au/ctee/house/Submissions/Submission%20No.%2012%20-%20Australian%20Christian%20Lobby.pdf>; Foster, 'Submission on Second Draft of Religious Discrimination Bill' (n 192). See also Deagon, 'Religious Schools, Religious Vendors' (n 2).

that religious freedom should be protected in the context of other fundamental rights and freedoms.[583]

This chapter contends, consistent with spatial principles, that while there is a place reserved to make a conscientious objection of the operation of equality laws, the places reserved will have their boundaries drawn by outcomes that maximise human dignity, both *inter partes* and in the wider community. What spatial theory holds is that such cases should be rare. Since the object of equality laws is to protect those consumers from dignitarian harm by prohibiting that form of discrimination, successful cases for the conscientious vendor should and would be limited. This is contrary to expansionism. However, it stands as a bulwark against contractionist trends by constitutionally allocating a space to religious freedom that conforms with the requirements of human dignity, a guarantee not on offer from contractionism and not achievable by expansionism.

For those rare cases where a new exception is sought, this chapter examines the manner in which the conscientious claim is considered under the theory from three perspectives. First is the forensic issue: how the facts of the case satisfy the terms and conditions of any expressly provided exception. Second is the constitutional: how the facts that would satisfy the terms of the bill of rights must do so taking into account the overarching requirement of human dignity. If dignity cannot be enhanced by the exception sought in the instant and like cases, the constitutional challenge will fail. Third is the consideration of policy. Spatial theory adopts a position that is in keeping with policy in other areas of the law and practice. It thus meets the anticipated expansionist complaint that the theory is inordinately harsh upon the religious conscientious objector. The examples provided in this chapter from various departments of the law and professional and trade practice dispel any such notion.

Constitutional spatial theory, as elaborated in Chapters 1 and 2, accounts for the conflict that arises in the case of the conscientious vendor. That account embraces the allocation of dedicated constitutional spaces to rights and freedoms. The content of each right or freedom is found by application of Hohfeldian theory on bundles of rights by which labels are bypassed and the actual content of a right or freedom is determined. By adopting Hohfeldian theory as a part of constitutional spatial theory, the important understanding that no right is absolute and no freedom unbounded is reached. Any expectation that a liberty, like freedom of religion, can continue to expand without constitutional restraint is rejected under spatial principles.

[583] Ruddock Report (n 1) 41.

By its framework—spatial principles, auditing of bundles of rights, the constitutional bill of rights, and the invocation of dignity—the theory seeks either to avoid disputes or, if they cannot be avoided, to resolve them in a clearly principled way. By allocating constitutional spaces to religious freedom, equality rights, and other fundamental rights, it provides defined boundaries by reference to which, through the medium of human dignity, disputes can be resolved when they do arise. Much like an encroachment dispute in property law, it seeks to reduce the margin of dispute, wherever possible, to a question of whether boundaries for allocated spaces have been exceeded and the rights of others encroached upon.

As was discussed in the last chapter, spatial theory framework adopts a robust instrumental definition of human dignity. That conception of human dignity is to guide legislation, governmental policy, and, most importantly for current purposes, the decisions of courts. No longer is the question one of statutory interpretation at large. Instead, exceptions will be read in the light of the preamble to the bill of rights, which places human dignity, as the generating status of all rights and freedoms, would sit at the apex of all human rights in Australia. As the organising principle for and foundation of all fundamental rights and freedoms within the spatial theory framework, dignity operates as the constitutional metric by which claimed rights and freedoms can be measured.

Under the spatial theory, the framework protects each individual's rights and freedoms conferred by a constitutional bill of rights. By operation of spatial principles and the constitutional bill of rights, the theory offers a far more workable scheme for maintenance of religious freedom against the creeping tide of contractionism than does the expansionist approach. Guided by clear principle, spatial theory avoids the need to call for amendments to cater for new categories of conscientious objection or for the courts to resolve ongoing interpretational disputes. By allocating known spaces, the theory sets the parameters by which all rights and freedoms can harmoniously coexist under the guiding principle of human dignity.

This chapter explains burdens that are to be discharged if conscience is to operate as an excuse not to obey the law or as a basis upon which to impeach the constitutionality of a law. Part B: examines questions of policy and principle relating to claims of conscience. The chapter then examines examples from different departments of the law where public policy, in order to achieve a social good, may operate to postpone individual conscience. Those examples are drawn from the law of contract, the law of property, and competition law. Next, the chapter considers examples from professional and trade standards in which achieving a social good may operate to postpone individual conscience: the Hippocratic Oath, the Innkeepers' Rule; and, finally, the barristers' cab-

rank rule. Based upon analogies drawn from this range of examples, the conclusion is that conscience, of itself, is not sufficient reason to permit an incursion upon the human rights of another. Unless considerations of human dignity otherwise dictate, the law ought to be obeyed and the equality rights of others respected.

1. A heavy burden

Were a position consistent with principle and policy *not* the case, any dignity achieved by equal treatment would be upset and no longer universal in its benefits; the rule of law would be wrested from Parliament and the courts; and compliance with statutory prohibitions would be placed in the hands of conscientious objectors. That is why, under spatial theory, there are only the three ways just mentioned in which conscientious objection to a generally applicable law can be demonstrated. Freedom of conscience is removed from a bundle of public rights by Parliament or by a constitutional instrument, particularly the bill of rights, only after having weighed the public interest in the balance of human dignity. To run contrary to that general position requires a remounting of the scales of human dignity and an assessment that human dignity requires that an exception be made. As to the first instance mentioned, if the statute itself prescribes the terms in which a conscientious objection is the basis for an exemption from the operation of the law in individual cases, then the case is clear if the conditions are satisfied on the evidence.

Once the framework is instantiated as the new regime for Australian human rights, that evidence must be strong and unequivocal and meet every condition that the statute and the bill of rights stipulate, with the overarching consideration remaining dignity. In the second instance mentioned, the statute can only be demonstrated to have a constitutional limit upon its valid operation if an enclave within constitutional space to accommodate that exceptional circumstance is justified by the constitutional metric of human dignity. That is, under the constitutional bill of rights, it must be demonstrated that conscientious objection is a part of the space allocated to religious freedom, and that human dignity is satisfied that the boundaries of allocated space need be redrawn. It is only then that the enclave is created in the law and the spaces allocated to the respective rights to provide for that additional space for religious freedom. Thirdly, of course, if neither of the first two exemptions from the law can be demonstrated, it remains open to the objector to engage in civil disobedience to the law and accept the penalty that the law prescribes. No more need be said about this last alternative, since it is a choice entirely of the objector, other than that the court will express its disapproval of such flouting of the dignity of others by the penalty it applies.

2. Practice, principle, and policy legitimise the constitutional spatial position

The starting position is the default position of spatial theory: one should obey the law. Instances that fall within statutory exceptions or that carve out a constitutional enclave remain possible, although nothing in the theory encourages the hope of doing so. To reiterate, borrowing again from the *dictum* of Scalia J quoted above, the general position of spatial theory is that it discourages any dualist nostrum. It rejects any notion that 'professed doctrines of religious belief [might be] superior to [equality laws]'. Practically speaking, then, for spatial theory and its new constitutional regime of human rights, the sentiment expressed in the Scalia J *dictum* should warn of an extremely heavy burden being cast upon the conscientious vendor.

As this chapter proceeds, I will demonstrate that, in practice, in principle, and from concrete examples in policy, it is legitimate for constitutional spatial theory to adopt a position that entails that any exceptions for conscientious objection should be rare. As will be seen, it is more commonplace than may be appreciated, particularly by the expansionist, that policy adopts a hard position on exceptions once it has pronounced a position in pursuit of a policy-based goal. Subordinating an individual's conscientious position to a wider, superior communitarian goal consistent with human dignity is, within the policy-based framework, preferable to making way for individual conscience that conflicts with the achievement of the communitarian goal.

Such goals naturally include, at the basic level, the promotion of equal treatment for all members of the community and the protection or promotion of dignity as the safeguard of all fundamental rights. But the dignitarian principle underlying this basic position seamlessly extends to such goals as universal access to medical treatment, access to justice, and the ability to obtain access to publicly available accommodation without respect to race, religion, or sexual preference. And in this last instance, the notion of 'accommodation' is broad and extends not only to hospitality but to any commercial ventures that open their doors to the public.

3. The strict approach of spatial theory

Given that exceptions to general rules that promote human dignity should be rare, spatial theory puts upon any claimant a requirement for strict proof in both the case of the statutorily provided exception and in the case of a claimed constitutional exception. No conscientious claimant should be surprised to find that, if spatial theory were to replace the current regime of human rights, consistent with spatial principles and the promotion of human dignity, there will be insistence upon strict compliance with every condition expressed in exceptions to the equality law; and strict proof of the facts necessary to justify a constitutional exception under principles of dignity.

From any perspective, the claim of the conscientious vendor is an extraordinary one. It therefore requires extraordinary justification. If an express exemption has been provided in the statute, there remains the matter of construction of the exemption. Whether it is construed broadly or narrowly[584] can, of course, alone determine the case. Even if an exemption were read broadly, the belief claims needed to satisfy it are notoriously hard to prove or disprove.[585] The requirement of spatial theory that such cases be strictly proved raises complex procedural and forensic questions. For any claim to be properly established, a plethora of questions must be answered: what presumptions are permitted or foreclosed;[586] whether any parts of the factual matrix are sufficiently notorious and uncontentious to be the subject of judicial notice;[587] how contentious facts are to be proved;[588] how the burdens of persuasion[589] and proof[590] are to be allocated and to what standard of proof; and how the requirements of human dignity are satisfied if the exemption is allowed.[591] Then there are still questions regarding degrees of sincerity in holding a belief to justify an exemption, if it is granted.

4. Factual and evidentiary considerations in the constitutional case

If there is no express exemption in a specific equality law, then under the spatial framework and its constitutional bill of rights, applying *Marbury v Madison*[592] principles of judicial review, the court has to determine the extent of valid operation of the statute and the boundaries of any enclave. Those facts that predicate the boundaries of its valid operation will also determine the extent of constitutional space allocated to religious freedom. Since human dignity is, within the framework, the determinant of constitutional spatial boundaries, it plays the constitutional role of the standard that has to be satisfied. Given the constitutional significance, there will be a *constitutional* standard,

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584 Contrast the dissent of Redlich JA with the majority reading of the relevant provisions in *Christian Youth Camps* (n 2) at [545] and [559].

585 As an illustration, see the religious vilification case *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 (Unreported, Member Higgins V-P, 22 December 2004); (2005) EOC ¶93-377 (digest); appeal allowed (2006) 15 VR 207.

586 This is complicated in, e.g., religious vilification cases in which civil and criminal prohibitions are combined; see Carolyn Evans 'Legal Aspects of The Protection of Religious Freedom in Australia' (Centre for Comparative Constitutional Studies, Melbourne Law School, June 2009) 50–5; Charles W Collier, 'The Improper Use of Presumptions in Recent Criminal Law Adjudication' (1986) 38 *Stanford Law Review* 423.

587 Neville Rochow, *Evidence, Judicial Notice and Party Comment: Principles for Ascertaining Facts Which Predicate Constitutional Validity* (Master of Laws Thesis, University of Adelaide 1987) 53–83.

588 That is, what evidence is admissible, in what form and on what standards. The question of competence of expert witnesses may also arise on matters of opinion regarding belief.

589 CR Williams, 'Burdens and Standards in Civil Litigation' (2003) 25(2) *Sydney Law Review* 165. For criminal matters, see: Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127, 31 July 2015) [11.1]– [11.18].

590 Williams, 'Burdens and Standards in Civil Litigation' (n 589).

591 *Christian Youth Camps* (n 2) per Redlich JA at [545] and [559] (dissent).

592 *Marbury v. Madison* (n 379).

human dignity, to which facts will need to be established. The decision on those 'predicative facts'[593] will have effect beyond the dispute. They must, therefore, be established as 'constitutional facts'.[594] The next section turns to a consideration of the forensic, principled, and policy challenges that properly confront any challenge to prohibitions against the type of discriminatory conduct that the conscientious vendor seeks to excuse. It then considers various aspects of policy and their impact upon the potential challenge.

Part B: Policy and principle

1. Policy and its influence

Matters of policy arise in considering whether it is appropriate to postpone the conscientious beliefs of the hypothetical vendor. The examples presented here demonstrate that it is a common social and legal phenomenon to defer all manner of rights in the pursuit of higher communitarian goals. They include 'national security',[595] 'public order',[596] 'public policy', 'competitive markets',[597] 'consumer welfare',[598] and 'administration of justice', among others.[599]

Claims for an exception are forensically difficult. Cases and commentators have dedicated too little consideration to by what process facts that inform such a challenge are to be proved. It is argued here that the process of proof is complicated and that as a matter of policy it ought to be so, both in respect of statutory exception and in constitutional validity cases.

Whether an exception to an equality statute is sought by way of satisfaction of the conditions of an express exemption for conscientious objection or as a constitutional exception to the valid operation, as a matter of policy, strict proof ought to be required of the facts that give rise to the exemption or exception. That means that every fact necessary for the conditions to satisfied would be required to be proved according to the applicable laws of evidence and to the requisite civil standard. Although normally the civil standard is proof on the balance of probabilities, that standard needs to be understood as one qualified by the seriousness of the contention.[600] Given the implications of a finding as a precedent in the first instance of a statutory exception as a

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[593] Rochow, *Evidence, Judicial Notice and Party Comment* (n 587) 84–113.
[594] Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970-1971) 4(1) *Federal Law Review* 65, at 66–9. See also *Fairfax v. Commissioner of Taxation* (1965) 114 C.L.R. 1, 6-7 per Kitto J.
[595] See for example *Australian Security Intelligence Organisation Act 1979* (Cth) ss 27B and 34AAA.
[596] *Public Order (Protection of Persons and Property) Act 1971* (Cth).
[597] *Competition and Consumer Act 2010* (Cth) ss 4E, 46(1) and 46A(2)(c).
[598] Ibid s 2.
[599] *Annika Smethurst and another v The Commissioner of Police and another* [2020] HCA 14 ('*Smethurst*'). See also *Australian Broadcasting Corporation v Kane (No. 2)* [2020] FCA 133.
[600] *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*') at 362, per Dixon J (as his Honour then was).

precedent,[601] or, in the second instance as a finding of constitutional invalidity, both common-law policy and spatial theory apply a stricter civil standard on the parties.[602]

2. Policy driving the standard of probative satisfaction: Briginshaw

The starting point on evidentiary standards of proof and the seriousness of a claim is the policy issue described in the *obiter dictum* of Dixon J (as his Honour then was)[603] in the High Court decision of *Briginshaw v Briginshaw*.[604]

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.[605]

While the decision in *Briginshaw v Briginshaw* confirmed that the standard of proof in all civil matters is proof on the balance of probabilities, the eponymous principle derived from the above cited *dictum* from Dixon J stands for the proposition that stronger, more persuasive evidence is required to satisfy that civil standard of proof when the factual proposition is either particularly serious or is unlikely to have occurred. Where the subject matter is serious, as in a case that seeks to place the conscientious belief of an actor above the general operation of the law, so too, commensurately is the requirement that stronger and more compelling evidence be required to establish the extraordinary claim. While typically invoked in cases of fraud or dishonesty, under spatial theory, consistent with the principle and policy of *Briginshaw*, should be equally applied in conscientious vendor cases.

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[601] *Horman v Bingham* [1972] VR 29; *National Trustees v Attorney-General (Vic.)* [1973] VR 610; *Davey v Harrow Corporation* [1958] 1 QB 60; Rochow, *Evidence, Judicial Notice and Party Comment* (n 587) 60–2.
[602] *Briginshaw* (n 600) and cases cited at n 608.
[603] *Briginshaw* (n 600) at 362, per Dixon J.
[604] Ibid 336.
[605] Ibid 362.

The *Briginshaw* principle is not only a principle of the common law of evidence but is also provided for in the uniform evidence law, which applies in all federal jurisdictions and those states that have enacted mirror legislation.[606] The provision, s 140(2) of the *Evidence Act 1995* (Cth) requires a court to be satisfied, first that a case has been proven on the balance of probabilities and then to take account of the nature of the of the proceeding and the gravity of the matters alleged:

> (1) In a civil proceeding, the court must find the case of a *party* proved if it is satisfied that the case has been proved on the balance of probabilities.
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
> (a) the nature of the cause of action or defence; and
> (b) the nature of the subject-matter of the proceeding; and
> (c) the gravity of the matters alleged.

The last proposition, captured in subsection (2)(c), provides for the widest possible operation of the *Briginshaw* principle. Commentary on the *Briginshaw* principle[607] draws attention to some qualifications to the principle in certain applications in the ordinary case.[608] They include anti-discrimination law and, therefore, both at common law and under s 140 (2), the case of the conscientious vendor.

Facts in their adversarial setting at trial fall into various categories. Different commentators describe various hierarchies of fact and allocate types of fact to different places in their respective hierarchies.[609] None of those differences in nomenclature or priority are relevant for current

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[606] New South Wales, Victoria, and Tasmania have adopted the uniform legislation with minor rearrangements of provisions that are not material here.

[607] Loretta de Plevitz, 'Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' *(2003) 27(2) Melbourne University Law Review 308*.

[608] Ibid. See also, cited in de Plevitz (n 607), *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449,* where, at ALR 449–50, Mason CJ, Brennan, Deane, and Gaudron JJ reviewed the relevant authorities and observed the following regarding the *Briginshaw* principle:

> The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'.*[20]* Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

[609] For examples of differing approaches see John Dyson Heydon, in *Cross on Evidence* (Butterworths, 6th ed, 2000) at [3010]; John Dyson Heydon 'Constitutional Facts' (2011) 23 *Upholding the Australian Constitution: The Samuel Griffith Society Proceedings* 85; Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (n 594) at 66–9; Rochow, *Evidence, Judicial Notice and Party Comment* (n 587) 13–15.

purposes. There is, on any view, a broad category of 'adjudicative facts',[610] which are those facts that are necessary to have been proven to provide the basis for an adjudication in a party's favour.[611] Those facts are relevant to one of the elements of the cause of action, the crime alleged, or the exception invoked. Within the class of adjudicative facts there are 'legislative facts', those upon which the applicability of statutory provisions relies.[612] Standing beside legislative facts are 'constitutional facts',[613] upon which the validity or ambit of valid operation of a statute will depend.[614] Because of their significance to the operation of the statute and the national constitutional law, constitutional facts stand outside of the adversarial quantum of facts to be proved. Parties bear no burden of proof in respect of constitutional facts.[615] Instead, as a matter of policy, it becomes the responsibility of the court itself to ascertain such facts to the level of satisfaction that the constitutional question requires. Ascertainment of constitutional facts is inextricably bound up in judicial notice.[616]

As to the level of satisfaction for facts judicially noticed, for ordinary adversarial facts the subject of judicial notice, the standard has been expressed variously as 'beyond contention' and even 'beyond reasonable doubt'.[617] Regarding *constitutional facts*, however, it is artificial to speak in terms of standard of proof, since it is a matter for the court as to its own satisfaction. However, given the context of the conscientious vendor, and the question being one of valid constitutional spaces for human rights that are presided over by the principle of human dignity, the court will be constitutionally required, under a constitutional bill of rights and pursuant to spatial principles, to be satisfied that the area of constitutional operation of the law in question be determined with reference to human dignity and how it is maximised in the community.

The conscientious vendor, in seeking exemption from an equality law, has, therefore, a forensic puzzle with which they must take great care. This complexity is not discussed in conscientious vendor cases like *Masterpiece*[618] or in the ministerial exception cases.[619] But, under the requirements of spatial theory, they become a substantial consideration.

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[610] Heydon 'Constitutional Facts' (n 609) 85–6.
[611] Ibid
[612] Rochow, *Evidence, Judicial Notice and Party Comment* (n 587) 84–113.
[613] *Breen v. Sneddon* (1961) 106 CLR 406, 411 per Dixon CJ.
[614] Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (n 594) at 66–9. See also *Fairfax v. Commissioner of Taxation* (1965) 114 CLR 1, 6–7 per Kitto J, cited by Brazil at 67.
[615] Ibid.
[616] Ibid at 69–77.
[617] Rochow, *Evidence, Judicial Notice and Party Comment* (n 587) 80.
[618] *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (1990).
[619] *Nunez v. Watchtower Bible & Tract Soc'y of N.Y., Inc*., 455 P.3d 829 (Mont. 2020); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 US 327, 327 (1986); *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012); *Our Lady of Guadalupe School v Agnes Morrissey-*

Under the framework, the conscientious vendor will have to accept that in respect of adjudicative facts and those legislative facts upon which they bear a burden, the facts will have to be proven to accord with the *Briginshaw* principle. As to the court ascertaining facts upon which constitutional validity depends, the standard the court will apply to satisfy itself will be one consonant with the constitutional principle of human dignity. Again, to recall the policy driving the relevant principles, as expressed by Scalia J in *Employment Division v Smith*,[620] 'the professed doctrines of religious belief [are not] superior to the law' and the court in deciding validity will not 'permit every citizen to become a law unto [themselves]'.[621]

3. Proving the all but unprovable

The difficulties in establishing the exceptional case do not end there. To provide an example, if it can be assumed for current purposes that the conscientious vendor is a Christian who professes a set of fundamental beliefs regarding heterosexual monogamous marriage, and that the goods or services relate to the celebration of a same-sex wedding, the number of matters of factual persuasion that lie ahead can be illustrated. There are at least four propositions, drawn from the sacred text relied upon by Christian conscientious objectors, the Bible, that challenge the efficacy of such a conscience claim.[622] On any Hohfeldian analysis, there would be threshold questions as to the rights in issue and their content. These would be debated on a *voir dire*[623] or at a similar discrete hearing before any weighing process could begin at the trial proper.

Take for instance the proposition for which the party opposing the conscientious objection of the vendor would argue. The opposing party would be anxious to establish that there is no injunction to discriminate in the Bible and several passages that enjoin the opposite.[624] The case theory adopted would involve showing that the vendor is acting inconsistently with the mandates of the Bible and, therefore, cannot be sincere in the belief that it is necessary for an exception to be found. Assuming that the usual reluctance of the courts to hear religious controversies could be overcome,[625] the issue still poses a Gordian knot to be unravelled because it is a seminal issue at trial.

Berru; *St. James School v Darryl Biel, as Personal Representative of the Estate of Kristen Biel* 591 U. S. ____ (2020) ('*Our Lady of Guadalupe School*').

[620] *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (1990).

[621] Ibid at 879.

[622] Neville Rochow QC, 'Is the Bar Uber-Sensitive? A Celebration of the Cab-Rank Rule' (South Australian Bar Association, August 2018).

[623] *Evidence Act 1995* (Cth) s 189.

[624] Rochow, 'Is the Bar Uber-Sensitive?' (n 622).

[625] Neil Foster 'Respecting the Dignity of Religious Organisations: When Is It Appropriate for Courts to Decide Religious Doctrine?' (2020) 47 *University of Western Australia Law Review* 175]

Even if it can be shown that nothing in the scripture mandates discrimination against a consumer with whose lifestyle the vendor disagrees because of its supposed sinful nature, that may not be dispositive of the dispute. The court needs to be persuaded that the beliefs are held sincerely and not as mere pretexts for acting unlawfully on a prejudice against the consumer as a particular class of 'sinner'.[626] Matters of sincerity regarding conscientious belief, especially religious belief, are notoriously difficult to establish or refute.[627] To refute the claim of the Christian conscientious vendor, lines of forensic attack on a claim of conscience, either in cross-examination or in submissions, could include the following.

1. Inconsistency 1: How a claimant of a right to discriminate does not find their conduct in conflict with biblical precedents and teaching:
    1.1. First precedent: Lot in Sodom, who dealt with the citizens of Sodom over a period of years despite his conscientious objection to their conduct.
    1.2. Second precedent: The Sermon on the Mount and teachings in going the extra mile, requiring not only dealing with those to whom one has a conscientious objection but to serve them beyond what is required by the law.
    1.3. Third precedent: Jesus and the payment of Roman taxation, rendering unto Caesar that which is Caesar's despite conscientious objection to payment of the tax.
2. Inconsistency 2: How a claimant of a right to discriminate is able to distinguish the inevitable analogies in the proposed reform with the Christian justification for discrimination and prejudice in racism, slavery and other biproducts of racial inequality.[628]
3. Inconsistency 3: How a claimant of a right to discriminate is able to distinguish the further inevitable analogy in the proposed reform with the now discredited 'separate but equal' doctrine, found in the Supreme Court of the United States decision of *Plessy v Ferguson* and overruled as a fallacy in *Brown v Board of Education of Topeka.*[629]

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[626] Deagon, 'Religious Schools, Religious Vendors' (n 2).
[627] Clarke, 'Conscientious Objection in Healthcare, Referral and the Military Analogy' (n 220). See also 'Conscientious Objectors In Their Own Words', *Imperial War Museum* (Web Page, n.d.) <*https://www.iwm.org.uk/history/conscientious-objectors-in-their-own-words*>; 'Conscientious Objection in Context', *The Men Who Said No* (Web Page, n.d.) <*https://menwhosaidno.org/context/context_tribunalsintro.html*>; Michael Cook, 'Are Tribunals the Solution to Disruptive Conscientious Objectors?', BioEdge (Web Page, 1 October 2016) <https://www.bioedge.org/bioethics/are-tribunals-the-solution-to-disruptive-conscientious-objectors/12026>; Department of the Parliamentary Library, 'Conscientious Objection to Military Service in Australia' (Research Note No. 2002–03/31, April 2003) <*https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/2E296%22*>.
[628] Genesis 9:18–27; Ephesians 6:5.
[629] 163 US 537 (1896). Overturned in *Brown v Board of Education of Topeka* 347 US 483 (1954).

These attacks could be multiplied and combined with several others, such as the injunction from the Sermon on the Mount: 'Do unto others as you would have them do unto you'; [630] acting contrary to the lesson in the parable of the Good Samaritan;[631] to cite but a few. There also arises the ethical problem of mutuality.[632] But this does nothing necessarily to bring the question to a clear conclusion. The problem for the party adopting this line of attack is that it is purely tactical. It is not aimed at getting to the truth of the conscientious vendor's belief, but merely at placing them in an embarrassing situation forensically. While it *may* be forensically persuasive in some cases, it does not *establish* insincerity. This would be particularly true if the conscientious objector is not well-versed in scriptural accounts. They may be relying upon teachings related in a church setting rather than upon their own actual biblical scholarship. Belief can still be genuine even if not logical. So, in fairness to both parties, boundaries must be differently drawn than be mere forensic contest.

In summary then, however it might be considered, the claim of the conscientious vendor is a difficult one to make. A court has several avenues open to it by which a claim for exemption could be refused. The reality is that if a claimant is put to strict proof, there is very little prospect of success. But there arises the question of whether that is a policy outcome that spatial theory regards as desirable. The balance of the chapter considers matters of policy and principle. Having examined those matters, the chapter argues that there is a narrow band in respect of which it should be possible for the claimant to obtain an exemption that is consistent with policy and principle.

4. Policy in relation to religion

As explained above, in relation to conscience, spatial theory upholds freedom of conscience except in those cases when to do so would defeat the achievement of a public goal that is consistent with human dignity. While policy is the driver of the spatial theoretical position which seeks to preserve religious freedom within its allocated spatial limits, it is also policy that drives contractionism. It is clear that expansionism is an all but forlorn hope for the preservation of religious freedom. The contention here is that if a positive system of preserving religious freedom, as offered by spatial theory, is not adopted, then policy will drive further contraction of the rights recognised as a part of religious freedom.

The following analysis considers the default position that religion has created for itself, followed by examples in the common law in which presumed individual rights have been overtaken by public

[630] Matthew 7:12. 'Therefore all things whatsoever ye would those men should do to you: do ye even so to them: for this is the law and the prophets' (KJV).
[631] Luke 10:25–37.
[632] See Nancy Sherman, *Making a Necessity of Virtue: Aristotle and Kant on Virtue* (Cambridge, 1997) 224–38; Dawn M Nothwehr, *Mutuality: A Formal Norm for Christian Social Ethics* (Wipf & Stock Publishers, 1998) 177 *et seq*.

policy. I provide three examples of the public interest which may have that effect: the administration of health, the facilitation of equal access to public accommodation, and access to justice.

5. Recommendation of the Royal Commission into Institutional Child Abuse.[633]

The first policy issue is whether the Church, as an institution, merits free rein on freedom without scrutiny. This policy issue is one that will have influence in determining what bundles of rights and freedoms should occupy the constitutional space allocated to religious freedom as the new regime is assembled under the framework. The issues examined are the types of matters on which contractionist governments would need to be persuaded in Australia.

A conflict arose between secular and the sectarian positions in relation to one of the recommendations from the Royal Commission into Institutional Child Abuse.[634] The Commission had received shocking evidence that members of clergy, including Catholic clergy, had been both aware of and involved in systemic child abuse over the course of decades.[635] Senior prelates were found to have covered up the guilty actions of perpetrators, a number of whom were moved only to have offended again.[636] After hearing evidence of such horrendous and organised child abuse in religious institutions, the Commission's report made recommendations for reform that would place the safety of children foremost in civil consideration. Among the recommendations was the following:

> Laws concerning mandatory reporting to child protection authorities *should not exempt persons in religious ministry from being required to report* knowledge or suspicions formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.[637]

Findings by the commission of systemic child abuse had appalled the entire community.[638] There was widespread support for reform. The public benefit intended by the recommendations reflected both community expectations and international human rights

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633 Royal Commission into Institutional Responses to Child Abuse, *Our Inquiry* (Web Page, n.d.) <*https://www.childabuseroyalcommission.gov.au/our-inquiry*>.

634 Ibid.

635 *Royal Commission into Institutional Responses to Child Abuse* (Final Report: Volume 1).

636 Ibid.

637 Ibid.

638 David Marr, 'The Child Abuse Commission Didn't Flinch. Can Australia Show the Same Courage?', *The Guardian* (online at 15 December 2017) <*https://www.theguardian.com/australia-news/commentisfree/2017/dec/15/the-child-abuse-commission-didnt-flinch-can-the-church-show-the-same-courage-david-marr*>; Eoin Blackwell, 'Archbishop Says Child Abuse Response Appalling, "Kind Of Criminal Negligence"', *Huffington Post* (online, 23 February 2017) <*https://www.huffingtonpost.com.au/2017/02/22/five-archbishops-to-face-child-abuse-royal-commission_a_21719768/*>.

norms for the protection of children.[639] Consistent with community expectation, federal and state governments agreed upon implementation of the recommendation.[640] It seemed beyond dispute that dignitarian weight must swing in favour of the welfare of the child. But the recommendation was not universally accepted.

Once implemented, however, it would create a conflict between the law and religious practices. This elicited two reactions. The first was one of civil disobedience[641]. Second was at least one argument that those receiving confessions could not be compelled to comply as a matter of constitutional and international law.[642]

The interpretation by some Catholic priests, for instance, was that obedience to the law would breach the confessional seal.[643] Despite the strong communal interest in the welfare of the child, the priests adopted the position of preferring to protect Catholic dogma from the requirements of the civil law.[644] While the case in favour of children would seem overwhelmingly unanswerable, they protested the compromise of religious confessional privilege and the breaking of the seal of confidence.[645]

Frank Brennan, academic lawyer and Jesuit priest, wrote that he would disobey the law and, instead, obey the law of the Church, even if the penalty were imprisonment.[646] Bishop Greg O'Kelly, then acting Archbishop of Adelaide, asserted that the proposed mandatory reporting law would not apply to the Catholic Church.[647] On 4 July 2018, 600 Catholic priests

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[639] Danny Tran and James Oaten, 'Melbourne Archbishop Commits to Protecting Confessional, as Pope Begs Forgiveness for Abuse', *ABC News* (online, 22 August 2018) <*https://www.abc.net.au/news/2018-08-22/melbourne-archbishop-commit-protect-confession-pope-beg-forgive/10149358*>.

[640] See Royal Commission into Institutional Responses to Child Abuse, *Our Inquiry* (n 633).

[641] Frank Brennan, 'Frank Brennan: Why I Will Break the Law Rather Than the Seal of Confession', *The Sydney Morning Herald* (online, 15 August 2017) <https://www.smh.com.au/opinion/frank-brennan-why-i-will-break-the-law-rather-than-the-seal-of-confession-20170815-gxw7it.html>:

> 'If the law is changed, abolishing the seal of the confessional, I will conscientiously refuse to comply with the law because in good faith I will be able to claim that it is a bad law which does nothing to protect children and which may take away the one possibility that a sex offender will repent and turn himself in, making the world that little bit safer for vulnerable children.'

[642] A Keith Thompson, 'The Persistence of Religious Privilege' in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Edward Elgar, 2018) 442.

[643] See Tran and Oaten, 'Melbourne Archbishop Commits to Protecting Confessional' (n 646).

[644] Ibid.

[645] See Brennan 'Why I Will Break the Law Rather Than the Seal of Confession' (n 641).

[646] See Tran and Oaten, 'Melbourne Archbishop Commits to Protecting Confessional' (n 639).

[647] Australian Associated Press, 'South Australia Catholic Church to Ignore Law on Reporting Confessions of Abuse', *The Guardian* (online, 15 June 2018) <https://www.theguardian.com/world/2018/jun/15/south-australia-catholic-church-to-ignore-law-on-reporting-confessions-of-abuse>:

> Acting Archbishop of the Adelaide Archdiocese, Bishop Greg Kelly [sic] is reported as saying, 'Politicians can change the law, but we can't change the nature of the confessional, which is a sacred encounter between a penitent and someone seeking forgiveness and a priest representing Christ …It doesn't affect us'.

announced they would defy any law that made reporting of child sex abuse mandatory.[648] They too would prefer criminal conviction and penalty to the religious consequences of excommunication and eternal damnation for any priest making the disclosure.[649] The sanctity of the confessional seal was placed above obedience to the law.[650]

The proposal has also been met by the argument that those receiving confessions could not be compelled to comply as a matter of constitutional and international law.[651] One commentator has argued that a change in the law to protect children would unacceptably infringe the constitutional right to religious liberty of clerics and churches.[652] The argument insists that the Commonwealth has no constitutional power to amend or *repeal* s 127 of its *Evidence Act*. That section provides for a conditional privilege to priest–penitent communications. It is urged that Art 18 of the ICCPR prevents the legislative action of repeal. The argument is a foreshadowing of a defence that might be made in the event of prosecution.

As a potential defence to the refusal to obey a law, the argument is flawed in several respects. First, it overlooks the proviso in Art 18 that freedom of religious expression, 'manifestation', is 'subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Next, the argument does not explain how the Commonwealth could have legislative power under s 51 of the Constitution to pass a law but then have no power to amend or repeal that same law. Thirdly, it overlooks that in international law, the rights of the child established by the *Convention on the Rights of the Child*[653] take precedence over those rights and freedoms conferred by the ICCPR. Finally, it overlooks that, as a dualist jurisdiction, the ICCPR does not form part of the domestic law until legislation is passed under s 51(xxix). Even if legislation were passed, it could not have the effect of preventing repeal of a law that had potentially socially repugnant effects.

The same argument then proceeds to an asserted empirical assumption that the change in law will avail nothing. Child abusers simply do not confess to the church leaders, it is asserted.[654] This

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[648] Tess Livingstone, '600 Priests Reject Law on Seal of Confession', *The Australian* (online, 4 July 2018) <https://www.theaustralian.com.au/national-affairs/state-politics/600-priests-reject-law-on-seal-of-confession/news-story/84de20ef2e64cdee4aa325a3c936958d?nk=4a15b2adff77a86919004daeb00eb052-1542504021> .

[649] Ibid.

[650] Gregory Zubacz, *The Seal of Confession and Canadian Law* (Wilson & Lafleur, 2009) 1–69.

[651] Thompson, 'The Persistence of Religious Privilege' (n 642).

[652] Ibid, 444–9, 456–8, 462–4. For another view on the Royal Commission, see Kate Gleeson, 'Exceptional Sexual Harms: The Catholic Church and Child Sexual Abuse Claims in Australia' (2018) 27(6) *Social and Legal Studies* 734.

[653] *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA Res 44/25 (entered into force 2 September 1990).

[654] Thompson, 'The Persistence of Religious Privilege' in Rex Ahdar (n 642) 454–5 and 462–4.

assertion runs contrary to the evidence of systemic cover-ups. The unsustainability of the assertion can also be demonstrated by United States cases where, invoking First Amendment rights and the separation of church and state principle, courts have permitted church doctrine and practice to prevail over obligations to report confessed child abuse: *Davis v. Church of Jesus Christ of Latter-Day Saints;*[655] *Rasmussen v. Bennett;*[656] *Alexis Nunez and Holly McGowan v Watchtower Bible and Tract Society of New York, Inc.; Christian Congregation of Jehovah's Witnesses;* and *Thompson Falls Congregation of Jehovah's Witnesses.*[657]

Ironically, in the result, the potential conflict should fall moot.[658] As matters developed, Pope Francis, in a decree, *Vos Estis Lux Mundi*,[659] said that local Church officials could not order those who report abuse to remain silent and that senior bishops should make provisions to prevent documents from being destroyed by subordinates if needed.[660] Further, it was decreed, clerics should follow local law on whether they are obliged to report alleged sexual abuse to civil authorities.[661] But for Papal intervention, the dualism of Australian Catholic priests would have placed their dogma ahead of child protection laws.

The clerical and the academic responses share a commonality that is important to understand in assessing what should be done about the religious conscience. Religious dualist philosophy holds that if a religious teaching is contradicted by a civil law, the religious teaching is to be obeyed and the civil law disobeyed. But that stands whatever may be the subject matter of the law. If the teaching runs contrary to a law that is in the interests of children, that will not cause believers to reassess obedience but, rather, to seek ways to disobey.

One positive that can be taken from the instance is the acceptance by the priests that they should be penalised. This was the third possibility considered in the introduction to this chapter. Of course, their resolve was hypothetical at the time it was expressed and moot in the face of *Vos*

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655 258 Mont 286 (Mont, 1993).

656 228 Mont 106 (Mont, 1987).

657 (Unreported, Supreme Court of the State of Montana, 2020).

658 'You Are the Light of the World'. See Apostolic Letter Issued Motu Proprio By The Supreme Pontiff Francis *Vos Estis Lux Mundi*, 7 May 2019 <http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html>.

659 Ibid.

660 Editorial, 'Pope Francis Orders Bishops to Report Sex Abuse, Allows Direct Complaints to Vatican' *ABC News* (online, 9 May 2019) <https://www.abc.net.au/news/2019-05-09/pope-issues-decree-ordering-bishops-to-report-sex-abuse/11099184>.

661 'You Are the Light of the World' (n 658). Article 19 of the Decree provides:

> Compliance with state laws
> These norms apply without prejudice to the rights and obligations established in each place by state laws, particularly those concerning any reporting obligations to the competent civil authorities.

Estis Lux Mundi,[662] and so never tested. In spatial theoretical terms, the opponents of the law would have, in conscience, preferred the protection of the church's interests in the form of its confessional and sacramental practices over the dignity of the child.

From a policymaker's point of view, this does not engender trust. Another example relates to the right of parents to exercise their religious liberty, when to do so would have lethal effect upon a child.[663] Jocelyn Maclure and Charles Taylor[664] refer to the Canadian Supreme Court decision, *B (R) v Christian Aid Society of Metropolitan Toronto*.[665] In that case, a premature baby of Jehovah's Witness parents was in a life-threatening condition that required treatment by blood transfusion. The parents, in obedience to Jehovah's Witness dogma, refused permission for the hospital to administer the treatment. The hospital disputed their right to refuse lifesaving treatment.

The Canadian Supreme Court held that the right of parents to refuse medical treatment for their children based on religious beliefs was *not* a liberty included in the Canadian *Charter of Rights and Freedoms*.[666] Instead, the Court upheld the importance of sustaining life and, thus, the rights of the child. Section 7 of the *Charter* provides that everyone 'has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. In spatial theoretical terms, the reasoning of the Supreme Court upheld the dignity of the child. The religious conscience was subordinated to the right to life of the child. There can be no clearer case in which the requirements of human dignity are satisfied than when life is preferred over a religiously informed conscientious belief.

6. Relevant principles that inform policy under spatial theory

The creation of exceptions for religious conscience is inevitably anti-communitarian. If the reforms in relation to religious vendors were to pass permitting conscientious objection, it would create a privileged subset of the community. The vendors would be permitted to disobey laws because their consciences are informed by a divine source not available to other members of the community. Laws of general application would not apply to those possessing a religiously informed conscience. The communal subset would be populated by those who

[662] Editorial, 'Pope Francis Orders Bishops to Report Sex Abuse, Allows Direct Complaints to Vatican' (n 660).
[663] *B (R) v Christian Aid Society of Metropolitan Toronto* [1995] 1 RCS 315.
[664] Maclure and Taylor, *Secularism and Freedom of Conscience* (n 133), 100–2.
[665] [1995] 1 RCS 315.
[666] Ibid.

owe loyalty to a divine power or higher principle rather than to secular authority.[667] This would run contrary to the communitarian philosophies of Sandel,[668] Reich,[669] Hohfeld,[670] and Singer.[671] No longer would there be a single community but, rather, multiple communities separated by the source through which the conscience is informed.

Hohfeld would argue that this type of conscientious claim to refuse to deal and to exclude as dictated by religious teaching misunderstands the nature of the rights involved. The question of conscience does not arise in relation to a duty to serve consumers. Singer explains the Hohfeldian perspective in terms of property rights.

> When we ask why a hotel claims the right to exclude a same-sex couple, the answer 'because I'm the owner' is non-responsive. From a property law standpoint—from a Hohfeldian standpoint—that answer only leads to another question: 'the owner *of what?*' Answering that question requires a judgment about the bundle of rights that is appropriate in the social context at hand. Because public accommodation owners have duties to serve the public, invocation of 'property rights' is insufficient—as is invocation of 'religious liberty.' There may be both religious liberties and property rights on both sides. Rather than asking why an owner should be forced to serve non-owners, we could just as easily ask why owners of public accommodation should be entitled to selectively ignore their obligations to serve the public.[672]

Any right or freedom, seen as a 'bundle' of rights,[673] comprises its fundamental components. Each 'bundle' comprises those component fundamental rights that are suited to the circumstances under consideration.[674] Under Hohfeldian theory, as accepted into spatial theory, and consistent with the definition of dignity developed under spatial principles, each bundle of claimed rights and freedoms is assessed for compatibility with other bundles of rights, and their respective placement in constitutional space.

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[667] For a proposed radical separation of those who believe in the superiority of divine revelation from other members of the community see Rod Dreher, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (Sentinel, 2017).
[668] Michael J Sandel, *Justice: What is the Right Thing to Do?* (Penguin Books, 2010).
[669] Robert Reich, *The Common Good* (Vintage, 2018).
[670] Hohfeld (n 48).
[671] Ibid.
[672] Singer, 'Religious Liberty & Public Accommodations' (n 52) 9. See also Zack Ford, 'Colorado Supreme Court Rejects Anti-Gay Baker's Claim of Religious Freedom,' *Think Progress* (online, 25 April 2016) <*http://thinkprogress.org/lgbt/2016/04/25/3772462/coloradosupreme-court-same-sex-cake-case/*> *7*; and Steve Benen, 'Kentucky's Kim Davis jailed, held in contempt', *MSNBC* (online, 3 September 2015) <*http://www.msnbc.com/rachel-maddow-show/kentuckys-kim-davis-jailed-held-contempt*>.
[673] Singer, 'Religious Liberty & Public Accommodations' (n 52). See also Finnis, 'Some Professional Fallacies About Rights' (n 49).
[674] Ibid.

From Berlin's perspective, religious liberty may be claimed as a freedom from governmental interference.[675] Hohfeld and Singer supplement Berlin's concept of freedom.[676] For Hohfeld and Singer, all rights and freedoms are relational.[677] Every right or a freedom has potential impact upon the rights and freedoms of others.[678] What spatial theory determines is whether the liberty claimed should or should not be the subject of government regulation, consistent with Singer's democratic freedom.[679] Unless consistent with democratic freedom, conscience cannot be invoked as a reason to be excused from obedience. Every law should be obeyed, even if it does not meet an individual's religious sensibilities. For every claimed liberty, regard must be had to the effect its exercise will have.

In Hohfeldian terms then, the reality is that the religious vendor, seeking to exclude or refuse to deal, is exercising a choice that, on proper analysis of the rights involved, the vendor is not free to make. In short, the coercive power of the state aligns with the rights that are actually possessed by the parties to the jural relations.[680] If there is no right, there is no power to refuse or exclude.

Singer explains again.

> 'Correlatives' signifies that these interests exist on opposing sides of a pair of persons involved in a legal relationship. If someone has a right, it exists with respect to someone else who has a duty. If someone has a privilege, it exists with respect to someone else who has no-right. If someone has a power, it exists with respect to someone else who has a liability. If someone has an immunity, it exists with respect to someone else who has a disability.
>
> A right can be enforced by a lawsuit against the person who has the correlative duty. A privilege negates that right and duty, and typically would be asserted as an affirmative defence in the lawsuit. A power is the capacity to create or change a legal relationship. For example, when someone makes an offer of a contract, that gives the offeree the power to create a contract by accepting the offer (or not). If the power to create the contract is exercised, then both parties have rights and duties with respect to each other. Courts have power, only if plaintiffs or prosecutors exercise their power to commence a lawsuit. Sovereign states are immune because courts lack power over them, in which case courts are said to have a disability with respect to sovereigns.

[675] Berlin, 'Two Concepts of Liberty' (n 75) 168–78.
[676] Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (n 225).
[677] Ibid.
[678] Ibid.
[679] Singer, *No Freedom Without Regulation* (n 76) 177–9.
[680] Ibid.

> If I 'own' property, it means that I have various rights with respect to the thing constituting my property--the 'bundle' of sticks or rights. I probably have the right to exclude and everyone else in the world has a correlative duty not to use my property. Some people may have a privilege, however, as to fly over it. I also have power with respect to my property because I can create rights in others, as by transferring some or all of the property to them, as by creating an easement, which gives the grantee certain rights vis-à-vis others and certain rights and privileges vis-à-vis me.[681]

With these principles in mind, it should come as no surprise that a claim of conscience does not automatically privilege actions done pursuant to that claim. Since human dignity is the foundation for all rights, limitations placed upon rights and freedoms must be expected to ensure that other rights and freedoms can be enjoyed consistently with dignitarian goals being pursued.

Conscience, as a justification for conduct, is, therefore, necessarily limited. Despite perceptions to the contrary, it is not unusual for rights and freedoms to be limited in the service of a greater communitarian good. There are instances where rights of property and contract have been the subject of limitations imposed in the public interest.[682] Among the examples considered here, the barristers' cab-rank rule is the *locus classicus* of a rule by which members of a profession are required to act for the greater good instead of acting on their own consciences.

Where there is some other greater 'social good' to be achieved, the law works to the enhancement of that good, even if in some cases that means the disappointment of individual rights and freedoms. 'Social good' may be expressed, according to the goal to be achieved, in terms of 'national security',[683] 'public order',[684] 'public policy', 'competitive markets',[685] 'consumer welfare',[686] and 'administration of justice'.[687] In the case of human rights, the good should be 'dignity'.[688] In each case, there is a balance to be struck between the liberty in question and the social good sought. Under spatial theory, that balance is struck in the scales of dignity.

The law is not chary in disappointing an individual's expectation of the rights they have received. No right is without boundaries. What follows is a series of instances in which the

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[681] Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (n 225) 986–7.
[682] Winfield, 'Public Policy in the English Common Law' (n 38).
[683] See e.g., *Australian Security Intelligence Organisation Act 1979* (Cth) ss 27B and 34AAA.
[684] *Public Order (Protection of Persons and Property) Act 1971* (Cth).
[685] *Competition and Consumer Act 2010* (Cth) ss 4E, 46(1) and 46A(2)(c).
[686] Ibid s 2.
[687] *Smethurst* (n 599). See also *Australian Broadcasting Corporation v Kane (No. 2)* [2020] FCA 133.
[688] *Clubb v Edwards*; *Preston v Avery* [2019] HCA 11.

law has done just that. In each instance either the Parliament or the courts have subordinated individual rights to the community interest.

In many areas of the law, policy has driven the removal or restriction of a right or freedom in exchange for community benefit. Freedom of contract, for instance, is one of the freedoms limited by legislation[689] and common-law notions of public policy.[690] The law prohibits inducement of a contract by conduct that is fraudulent,[691] misleading or deceptive,[692] or unconscionable.[693] Unfairly induced consumer contracts, entered between parties of unequal bargaining power, may, in equity and under statute, be set aside.[694] One cannot enter contracts to further illegal purposes.[695] There is no freedom to contract with enemy aliens.[696] Neither is there freedom to impose a restraint of trade upon a contracting party unless it is one that the law deems reasonable.[697] The common law imposes its limitations upon contract in the promotion of public policy or public interest.[698] Statutory limitations are imposed to promote consumer welfare.[699]

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[689] As examples only, see the *Fair Work Act 2009* (Cth) (employment contracts); the *Australian Consumer Law*, Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ('ACL') (consumer contracts); Part IV of the *Competition and Consumer Act 2010* (Cth) (anti-competitive contracts, arrangements or agreements); and *Independent Contractors Act 2006* (Cth) (protection of independent contractors from unfair terms).

[690] As an example, contracts in restraint of trade are presumed to be void and contrary to the public interest unless the beneficiary of restraint has demonstrated the restraint to have been reasonable. See discussion and authorities cited in Heydon, *The Restraint of Trade Doctrine* (n 165) 22–32, 147–87, 294; Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (n 165). See also *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535; *Attorney-General v The Adelaide Steamship Co Ltd* (1913) 18 CLR 30; *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146; *Buckley v Tutty* (1971) 125 CLR 353; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688; *Lindner v Murdock's Garage* (1950) 83 CLR 628; *Amoco Australia Pty Ltd v Rocca Bros Motor Co Engineering Pty Ltd* (1973) 133 CLR 288, 305-8 (Walsh J), 315-8 (Gibbs J, as he then was); *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242; *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd (*1987) 17 FCR 505; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126; *Hydron Pty Ltd v Harous* [2005] SASC 176; *Wallis Nominees (computing) Pty Ltd v Pickett* (2013) 45 VR 657; and *Just Group Ltd v Peck* (2016) 344 ALR 162.

[691] *Derry v Peek* (1889) 14 App Cas 337; *Phillips v Brooks Ltd* [1919] 2 KB 243. See also the discussion in *Miller & Associates v BMW Australia* (2010) 241 CLR 357, 364 as per French CJ and Kiefel J (as her Honour then was).

[692] ACL s 18(1) provides: 'A person must not in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' See also *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; *Miller & Associates v BMW Australia* (2010) 241 CLR 357; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; *Yorke v Lucas* (1985) 158 CLR 661; and *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

[693] ACL s 20(1) provides: 'A person must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time.' See *Blomley v Ryan* (1954) 99 CLR 362; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; and *Louth v Diprose* (1992) 175 CLR 621.

[694] ACL Part 2-3 (causes of action); and Part 5-2 (Remedies). Cf cases cited at nn 89 and 90.

9 *Everet v Williams* (1725) 2 *Pothier on Obligations* 3; 9 LQR 197 (the Highwaymen's Case); and *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm) and another* [2009] All ER 330.

[696] *Fibrosa SA v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; and *Hirsch v Zinc Corporation Ltd* (1917) 24 CLR 34. See also the *Trading with the Enemy Act 1939* (Cth).

[697] See Rochow, 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (n 165).

[698] *Wilkinson v Osborne* (1915) 21 CLR 89, 97 as per Isaacs J; and *Brooks v Burns Philp Trustee Co. Ltd* (1969) 121 CLR 432 at 451 as per Windeyer J. See also *Smethurst* (n 599).

[699] *Competition and Consumer Act 2010* (Cth) s 2. See also the Hilmer Report (n 411) 2–6.

In the law of real property, an estate in fee simple confers a bundle of rights upon titleholders that include, *inter alia*, freedom to enjoy, improve, and alienate land.[700] Owners of land are commonly perceived to be at liberty to do with their land as they see fit. This, of course, has never been true. As both Hohfeld[701] and Singer[702] have established, not all property rights are the same, even if they bear similar labels. There are and always have been limitations and prohibitions on each of the rights comprising real property title in fee simple. Title does not, for instance, confer freedom to encroach upon contiguous land.[703] Rights are strictly confined in space. Statutory prohibitions prevent development of the land in breach of planning or environmental considerations.[704] Rights are confined as to use of land. Each bundle of proprietary rights needs to be carefully interrogated to understand exactly what is included and what is not.

Outside of property law, there may be other restrictions that had not been contemplated in a simplistic approach to the notion of freedoms of exploitation and alienation of fee simple title. For instance, in competition law,[705] either under the essential facilities doctrine[706] or pursuant to an access regime,[707] both freedom of contract and use of land held in fee simple may be diminished or even lost. If land were to include an essential facility as an improvement,[708] such as a bridge, wharf, railway, airport, or other natural monopoly or critical 'bottleneck' infrastructure,[709] the owner may be required by law to enter contracts[710] and permit access to the facility on the land[711]

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[700] *Fejo v Northern Territory* (1998) 195 CLR 96, [43] (per Gleeson CJ and Gaudron, McHugh, Gummow, Hayne and Callinan JJ). Their Honours held that native title is extinguished by a grant in fee and 'for almost all practical purposes, the equivalent of full ownership of the land' is conferred and 'the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination.' Cf Kirby J at [100]. See also Theodore F T Plucknett, *A Concise History of the Common Law* (Liberty Fund, 6th ed, 2010) 558–9; Anthony Moore et al, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thompson Reuters, 6th ed, 2016) chapters 1 and 2, *passim*.

[701] Hohfeld (n 48).

[702] Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (n 225)

[703] *Encroachments Act 1994* (SA). See also *Hogarth v Karp* [2013] SASC 159.

[704] See e.g., *Planning, Development and Infrastructure Act 2016* (SA). There may also be competition considerations that affect the use of land if it contains an essential facility. See generally Robert Bork, *The Antitrust Paradox* (Basic Books, 1978) 50–89 and the discussion in the next section.

[705] Richard Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press, 1976) 18-22. See also *Queensland Wire Industries* (n 39) 192 (per Mason CJ and Wilson J), 202 (per Dawson J), 214 (per Toohey J); *Melway Publishing* (n 39); *Competition and Consumer Act 2010* (Cth) Pt IIIA; Vijay Kumar Singh, 'Applying 'Essential Facility Doctrine'—What's the Right Approach?' (2011) 1(B-151) *Competition Law Reports* <https://ssrn.com/abstract=2972139>. As to the criteria upon which access may be required, see *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

[706] *Competition and Consumer Act 2010* (Cth) Pt IIIA.

[707] Ibid.

[708] *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385; *Carter Holt Harvey Building Products Group Ltd v Commerce Commission (New Zealand)* [2004] UKPC 37; *Verizon v Trinko,* 540 US 398 (2004); *Aspen Skiing Co v Aspen Highlands Skiing Corp,* 472 US 585 (1985); and *Otter Tail Power Co v United States* 410 US 366 (1973); *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

[709] *Competition and Consumer Act 2010* (Cth) Pt IIIA.

[710] Ibid.

[711] Ibid.

on commercial terms[712] to which they might not otherwise have agreed. Contracts permitting access to the facility may be ones which the titleholder had not contemplated prior to acquisition.

Nevertheless, competition law will, in the case of an essential facility, have impact upon the extent of rights conferred by title. The titleholder may have preferred, for instance, to exploit the facility to the exclusion of all others and to enjoy monopoly rents.[713] Whatever the purpose for the land acquisition, if access preconditions are met[714] the law will require entry into contracts for access to the essential facility on the land. These limitations upon freedom of contract and the exploitation of land are imposed to minimise the anti-competitive effect of monopolisation of essential facilities.[715]

7. Rights relegated to the interests of the community

Freedom of movement and related freedoms relegated to community health and safety

What comes as a surprise to some is that while certain freedoms are enjoyed *de facto*, they do not exist *de jure*; their enjoyment is at the will of the government of the day.[716] They are, for the most part, enjoyed as parts of national tradition and social custom. But they are not constitutional freedoms. When those freedoms are put to the test, they evaporate. Each may be restricted or removed when government considers that there is a higher community interest at stake, such as public health.

Until recently, many assumed inviolable rights of movement and association. The freedoms sacrificed for a greater good are found in the all-of-government response to the COVID-19 pandemic. The breadth of powers conferred by the *Biosecurity Act 2015* (Cth) and cognate state and territory legislation has been breathtaking in its limitation upon freedoms of movement and association. In no other way could commercial activity have been so dramatically curtailed. Short-term economic and libertarian losses are presumed to be outweighed by the longer-term public health and egalitarian outcome[717]—one among many exchanges of a private good for a greater community good.

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[712] Cento Velijanovski, *Economic Principles of Law* (Cambridge University Press, 2007), 267; Gunnar Niels et al, *Economics for Competition Lawyers* (Oxford University Press, 2011) 132–4; Oliver Beige, 'Facebook and Monopoly Rents in the Time of the Middle Man Economy', *Medium* (Web Page, 16 February 2018) <https://medium.com/@oliverbeige/facebook-and-monopoly-rents-in-the-time-of-the-middleman-economy-5336fad3402f>.

[713] *Competition and Consumer Act 2010* (Cth) Pt IIIA.

[714] Ibid.

[715] Ibid.

[716] Evan and Read (n 7).

[717] Stefan David Baral, MD et al, 'The Public Health Responses to COVID-19: Balancing Precaution and Unintended Consequences' (2020) *Elsevier Public Health Emergency Collection* 12. See also Ramesh Thakur, 'Responding to Covid-19:

Freedom of the press and the administration of justice

Another example is freedom of the press. There was outrage among members of the press and public alike in June 2018 when search warrants were executed on the Australian Broadcasting Commission's Sydney offices in Ultimo and the home of journalist Annika Smethurst.[718] The spontaneity of that outrage showed how deeply it had been assumed, until then, that Australia, like the United States, enjoyed a freedom of the press; a freedom safe from interference by government agencies, including the police. If that supposed freedom were to be impinged upon, it would be further assumed that such actions could be judicially reviewed. Consistent with those expectations, that is precisely what the ABC argued in the Federal Court: that an inviolable freedom of the press existed in Australia. The ABC implored the Court to find a freedom analogous to the First Amendment free press clause. Public interest in such a freedom, it was argued, favoured a press that could investigate and inform the public, without disclosure of sources and free from government scrutiny. In *Australian Broadcasting Corporation v Kane (No 2),*[719] the Court upheld the search warrants. Justice Abraham held that none of the common law, statute, or implied constitutional freedoms provided an American-style freedom of the press. It was held that there was a greater interest in the integrity of criminal investigation than in freedom to inform the public.[720]

In parallel proceedings, *Smethurst v Commissioner of Police*,[721] the High Court[722] set aside the Smethurst warrant on technical grounds.[723] Though unnecessary to their reasons, the Court made passing reference to the public interest in the investigation and prosecution of crimes, or the enforcement of the criminal law more generally.[724] While it was a matter of balancing of interests, particularly in the injunction proceedings before the Court, it made clear that all things being equal the public interest in the enforcement of the criminal law would prevail.[725]

Freedom of religion

Freedom of religion in Australia was, until comparatively recently, also assumed. Until the 2017 debates over religious freedom, most Australians would have taken that freedom for

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Can We Save Lives and Preserve Our Quality of Life at the Same Time?', *Australian Strategic Policy Institute* (Web Page, 5 May 2020) <*https://www.aspistrategist.org.au/responding-to-covid-19-can-we-save-lives-and-preserve-our-quality-of-life-at-the-same-time/*>.

[718] *Smethurst* (n 599).

[719] [2020] FCA 133.

[720] [2020] FCA 133, [193].

[721] *Smethurst* (n 599).

[722] Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

[723] The Court ordered that the warrant be set aside because it misstated the law.

[724] [2020] HCA 14 at [101]– [103].

[725] Ibid.

granted. Many would not have realised that s 116 of the Constitution,[726] despite its appearance, provides no guarantee of freedom of religion.[727] Rather it acts as a prohibition on federal legislative power, placing no constraint whatsoever on the states. Moreover, many do not realise that there has never been a successful challenge to federal legislative power under s 116. Not until the debates surrounding same-sex marriage did the question of freedom to express a religious belief come into sharp relief. Since the exposure drafts of the federal religious anti-discrimination bills, the need for some form of protection has come into greater public awareness.[728] But what must be recognised in the consideration of religious freedom is that when that freedom is to discriminate, it comes at the expense of some person's or group's right to be treated equally.[729] Individual libertarian losses can be presumed to be outweighed by community egalitarian gains.[730]

8. Examples from professional and trade standards in which achieving a social good may operate to postpone individual conscience

The following examples—the Hippocratic Oath, the Innkeepers' Rule, and the Cab-Rank Rule—demonstrate what occurs when freedom of conscience is removed from the bundle of public rights, having weighed the public interest in the administration of health, accommodation, and justice against the individual's freedom of conscience. Without these professional and trade rules, the professional or trader may have been led by their conscientious convictions to refuse to deal. Each instance illustrates that it is the public interest that prevails as the dominant interest. These examples illustrate instances in which a profession, commercial group, or trade can decide to place public interest ahead of individual liberty. It seems clear that the law has not found it difficult to maintain neutrality in what otherwise might appear to be cases of conscience in order to achieve policy outcomes that have been adjudged worthwhile pursuing over the interests of the individual.

8.1. The Hippocratic Oath

[726] Section 116 provides:

> 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

[727] See Barker, *State and Religion* (n 64); Beck, *Religious Freedom and the Australian Constitution* (n 64). See also Alex Deagon and Benjamin Saunders, 'Principles, Pragmatism and Power: Another Look at the Historical Context of Section 116' (2020) 43(3) *Melbourne University Law Review* 1; and Alex Deagon, 'Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom' (2018) 46 *Federal Law Review* 113.

[728] See e.g., Anglican Church Diocese of Sydney, Submission No 178 (n 317).

[729] See e.g. *Our Lady Of Guadeloupe School* (n 626).

[730] Ibid.

The Hippocratic Oath is one of the oldest expressions of professional obligations. Its original form was written by Hippocrates of Kos, a Periclean-age *Greek physician*[731] regarded as the founding father of the modern medical profession.[732] There have been numerous iterations of the oath over the centuries. Medical associations of various countries have adopted versions of the oath for their local professions. Those iterations have in common the pre-eminence of service to patients as appears in the original text.[733]

A modern internationally accepted version of the Oath is contained in the World Medical Association *Declaration of Geneva*,[734] last updated in 2017.[735] In the modern version, medical practitioners pledge, *inter alia*, the dedication of their lives to the service of humanity. Among the particular pledges that practitioners make are the following:

> I WILL RESPECT the autonomy and dignity of my patient;
>
> I WILL MAINTAIN the utmost respect for human life;

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[731] Circa 460–370 BCE.

[732] C Yapijakis, 'Hippocrates of Kos, the Father of Clinical Medicine and Asclepiades of Bithynia, the Father of Molecular Medicine. Review' (2009) 23(4) *In Vivo* 507.

[733] 'I swear by Apollo Physician and Asclepius and Hygeia and Panacea and all the gods and goddesses, making them my witnesses, that I will fulfil according to my ability and judgment this oath and this covenant:
To hold him who has taught me this art as equal to my parents and to live my life in partnership with him, and if he is in need of money to give him a share of mine, and to regard his offspring as equal to my brothers in male lineage and to teach them this art—if they desire to learn it—without fee and covenant; to give a share of precepts and oral instruction and all the other learning to my sons and to the sons of him who has instructed me and to pupils who have signed the covenant and have taken an oath according to the medical law, but no one else.
I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice.
I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy. In purity and holiness, I will guard my life and my art.
I will not use the knife, not even on sufferers from stone, but will withdraw in favour of such men as are engaged in this work.
Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female and male persons, be they free or slaves.
What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.
If I fulfil this oath and do not violate it, may it be granted to me to enjoy life and art, being honoured with fame among all men for all time to come; if I transgress it and swear falsely, may the opposite of all this be my lot.' See <https://www.medicinenet.com/script/main/art.asp?articlekey=20909>.

[734] Adopted by the 2nd General Assembly of the World Medical Association, Geneva, Switzerland, September 1948 and amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968 and the 35th World Medical Assembly, Venice, Italy, October 1983 and the 46th WMA General Assembly, Stockholm, Sweden, September 1994 and editorially revised by the 170th WMA Council Session, Divonne-les-Bains, France, May 2005 and the 173rd WMA Council Session, Divonne-les-Bains, France, May 2006 and amended by the 68th WMA General Assembly, Chicago, United States, October 2017. See <https://www.wma.net/policies-post/wma-declaration-of-geneva/>

[735] Ibid.

> I WILL NOT PERMIT considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient; …
>
> I WILL PRACTISE my profession with conscience and dignity and in accordance with good medical practice;[736]

While some of today's medical practitioners may not perform an oath literally in those terms, the medical profession conducts itself in accordance with its tenor. For instance, in Australia, the Hippocratic principles are captured by the Australian Medical Association in *Good Medical Practice: A Code of Conduct for Doctors in Australia*.[737] In the United Kingdom, a modern form of Hippocratic Oath is at the centre of the values and principles set forth by the General Medical Council in *Good Medical Practice*.[738] An interesting application of the Oath's principles is where the American Association of Psychiatry and the Law has decided that performing a 'fitness to be executed' assessment on a death row inmate is *unethical*, under the 'do no harm' principle.[739] The person would be executed if they were determined to be psychologically fit.[740]

What is significant in each iteration, beginning with the *Declaration of Geneva*, is that the medical practitioner's conscience is redefined for the purposes of medical practice to exclude private beliefs and prejudices and, instead, to conduce to the objects of the profession. If the medical practitioner had fixed private beliefs regarding any of a patient's attributes, including their 'creed, ethnic origin, gender, nationality, political affiliation, race, [or] sexual orientation', they must be laid aside in order to treat them to the extent of the practitioner's medical skill and ability. The Oath opens another dimension in the conscience of the practitioner that is public rather than private. The demarcation between public and private morality effected by the Oath was described in these terms: 'If I were a doctor and they brought Hitler in with a bullet wound … I'd do my job and treat him. Maybe later, as a person, I'd kill him.'[741]

8.2. The Innkeepers' Rule

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[736] Ibid.
[737] Australian Medical Council, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (Report, July 2009).
[738] General Medical Council, *Good Medical Practice* (Report, 2013). See also Brian Hurwitz and Ruth Richardson, 'Swearing to Care: The Resurgence in Medical Oaths' (1997) 315(7123) *British Medical Journal* 1671; General Medical Council, *Confidentiality* (Report, 2009), each cited in Mary Harding, 'Ideals and the Hippocratic Oath', *Patient* (Web Page, 3 August 2015) <*https://patient.info/doctor/ideals-and-the-hippocratic-oath*>.
[739] Paul S Appelbaum, 'Coping with the Ethical Conundra of Forensic Psychiatry: A Tribute to Howard Zonana, MD' (2010) 38(4) *Journal of the American Academy of Psychiatry and the Law Online* 551–8 <*http://jaapl.org/content/38/4/551*>.
[740] Ibid.
[741] Mary Harding, 'Ideals and the Hippocratic Oath' (n 738).

The demarcation of public and private conscience is illustrated by Singer[742] in the 'Innkeepers' Rule'. The rule, based in English common law and embodied in various equality statutes,[743] requires those who run any 'public accommodation' to accept all prospective customers or guests. An 'accommodation' for the purpose of the rule reaches beyond actual inns and hotels and includes shopfront premises. In the *post-bellum* period in the United States, the rule was a forerunner of civil rights laws that ensured equality of treatment of all, regardless of their race.[744] This common law rule, discussed in the context of the thought of Joseph Singer and the application of Hohfeldian theory can be summarised simply, at least in the manner intended by Singer, reflecting the old English common law position:

> A keeper of public accommodation is under a duty to provide food and lodging to all travellers who pay a reasonable price for the same.

Generally, the rule can be regarded as an exception to the general rights of freedom of contract and exclude others from real property.

As with the operation of the planning, environmental, and competition laws, the Innkeepers' Rule disrupts the enjoyment of title; property rights are curtailed by each of these laws and freedom of contract is limited. Ownership, for the unwary, may not bring expected unlimited rights of use and exclusion. A simplistic view would regard planning, environmental, and competition laws as conflicting with rights of ownership. But such simplicity beguiles rather than informs. Singer, with reference to Hohfeld, suggests clearer ways in which to understand property rights, using the Innkeepers Rule to illustrate.[745]

Under that rule, at common law and in its statutory expressions, owners of public accommodation must make that accommodation available to all travellers. The 'innkeeper' is not permitted to turn any traveller away. Any prejudice that the innkeeper might harbour towards the traveller, based upon any characteristic, such as race, religion, gender, or sexuality, must be put aside. The objection to having a person possessing some characteristic on the property is relegated to the public duty of accommodating. The rule, thus, gives rise to what would appear to be conflict in two ways: the fundamental right of innkeepers to follow their conscientious or religious objections; and limitations upon the proprietary right to exclude others from entry.

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[742] See Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (n 225).
[743] See the history outlined for the Colorado equality law as the subject of the appeal in *Masterpiece Cakeshop* (n 24) 4–6, in the opinion of Kennedy J.
[744] Ibid. As to other contractual and tortious obligations and liabilities imposed upon innkeepers by the common law in relation guests and their chattels, see Plucknett, *A Concise History of the Common Law* (n 700) 480–1.
[745] 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (n 225).

Singer suggests that Hohfeld provided tools for analysis that have been overlooked. These tools, he argues, remove conflict at a fundamental level. Take first the problem of the apparent conflict with proprietary rights. Hohfeld and Singer see the problem in misunderstanding what rights were conferred.

> Hohfeld criticized the idea that all property is the same. Public accommodations, he noted, are under a historic legal obligation to serve the public … Owners of private homes have the right to exclude non-owners, but owners who devote their property to public accommodation purposes have waived part of their right to exclude. More than that, patrons not only have the privilege to enter the public accommodation but a power to compel the owner to serve them by providing services or goods. *The bundle of rights associated with the typical home is different from the bundle of rights associated with a public accommodation.*[746]

In his article,[747] Singer deals with the conflict between claims to religious liberty and to equal treatment in the *Masterpiece* case.[748] Singer and Hohfeld see the problem as not merely one of how to resolve conflicts, but how the conflicts should be conceptualised.[749] Building upon his use of the Innkeepers' Rule in the Hohfeldian criticism of the *Masterpiece* case, another example chosen by Singer to illustrate his point is religious liberty.

Singer explains how, on Hohfeld's analysis, and using his vocabulary, claims made, and the choices available in the area, may be more complex than otherwise appears.[750] It is Singer's contention that debates about the role of religious liberty in the context of 'public accommodations' would benefit from a clear understanding of this distinction.[751]

Normative questions will be easier to address if the various meanings of 'liberty' are distinguished.[752] What we see, then, is that freedoms, including freedom to act upon the religiously informed conscience, can, and indeed should, be limited. Each of the examples considered here is one where a right or freedom is restricted in the service of a greater good. Adopting a Hohfeldian approach to rights, we can see both proprietary rights and

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[746] Ibid 9. Emphasis added.
[747] Ibid.
[748] *Masterpiece Cakeshop* (n 24).
[749] Footnotes as in Singer's text spelling as in original:
Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913) [Hohfeld 1913]; Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710 (1916) [Hohfeld 1916].
[750] Footnotes as in Singer's text spelling as in original:
Hohfeld [1913] at 19 ('the tendency—and the fallacy—has been to treat the specific problem as if it were far less complex than it really is').
[751] Ibid at 2–3.
[752] Ibid.

fundamental rights and liberties as bundles. Each bundle is unique in its composition to its particular circumstances.

With the benefit of the insights of Hohfeld and Singer, we can look at apparent conflicts of rights and liberties in a different light. Rather than concentrating upon the conflict, we can audit the bundles of rights in question and examine what exactly was conferred and what was not. This leads inexorably to what has been termed a 'monist' evaluation of rights. The Hohfeldian analysis suggested here does not admit of a dual or parallel repository of rights that stands outside of those audited. A claim of religious liberty is to be interrogated for its true composition, as with any of the other rights considered so far. Upon proper interrogation, it will appear that religious freedom of conscience is not exceptional and ought not to be treated as such.

The composition of any bundle of rights, as found in constitutional space, is audited to ensure there is no encroachment upon other rights or freedoms and that those rights that comprise the bundle are consistent with human dignity as a communal outcome. Spatial theory, based on the examples given so far, holds that a return to a Hohfeldian audit of rights is necessary. And it should be taken the step further, as suggested. When claims of religious conscience are examined for their internal consistency and genuineness, the claims may not withstand scrutiny and will thus vanish as a source of conflict. What appears may be pure bigotry, cloaked under the claim of religious conscience. Such bigotry ought not to be protected. Along with racism and slavery, and other evils previously justified in the name of religion, it falls to be consigned to the scrap heap of history. The hope would be that when religious freedom is stripped of these anti-social and anti-egalitarian elements in its public manifestations, the good that it does in the public forum in rendering educational and health services, along with many other beneficent charitable activities, will be permitted to shine through.

With these matters in mind, it is possible to undertake a detailed examination of the cab-rank rule as it applies to the English and Australian Bars. From its history and application, what can be seen is that claims of conscience, including claims of religious conscience, can be properly subjugated to the service of a higher public good. In the case of the cab-rank rule, that higher public good is the administration of justice. By that rule, greater access to justice is guaranteed than would otherwise be the case.

Neither the Hippocratic Oath nor the cab-rank rule has the force of law that attends the Innkeepers' Rule. Both are professional standards, enforced by professional standards bodies. But in the case of the cab-rank rule, there may even be importance attached to the rule by the

legal profession due to both the subject matter and the type of client with which barristers are required to deal. If any professional were to have their conscience directly conflicted, a barrister would face that challenge regularly.

8.3. Barristers and the cab-rank rule

The cab-rank rule has been regarded as a defining feature of the English Bar since at least the seventeenth century. It is still embraced and implemented by the English and Australian Bars, and a number of other Bars around the world.[753] Its effect can be stated succinctly. Under the rule, a barrister is obliged to accept any brief for any client for which they are available and competent, provided their usual fee is paid. Among its purposes has always been to ensure that every person, party, or cause, however unpopular, could be represented, and to ameliorate criticism of barristers acting for them.

The rule has as one of its effects the prevention of the barrister identifying too closely with the client. It thus serves to support that essential element of the fearless practice of advocacy: independence of the Bar. To fulfil their duty to the court, it is essential that that there be independence from client, instructing solicitor, and public and political forces that might otherwise interfere with the proper administration of justice. Disinterestedness in the outcome of a case is a hallmark of the Bar: 'servants of all, yet of none'.[754] With the rule operating, courts know that barristers have not chosen their client. Rather, the client has chosen the barrister.

The Australian Bar holds the rule in the highest regard. Members of the Bar are generally proud of the rule and have shown willingness to fight for its retention.[755] With the tradition of provision of *pro bono* legal services, the rule is one of the important mechanisms for access to justice. To date, no reason has been seen to abandon the rule as the traditional ethical model for barristers. No better rule has been suggested to maintain the independence of counsel. Without the rule, the mode of the barrister's practice would have to be completely re-examined.

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[753] According to a study undertaken in support of the retention of the rule by Michael McLaren QC et al, 'The 'Cab Rank Rule': A Fresh View', *Bar Standards Board* (Web Page, 28 February 2012) <https://www.barstandardsboard.org.uk/media/1460590/bsb_- _cab_rank_rule_paper_28_2_13_v6__final_.pdf>. The countries in which members of the Bar operate under the rule are: Scotland; Northern Ireland; The Republic of Ireland; New Zealand; Australia (all States); India; South Africa; Hong Kong; Malaysia; Italy; Nigeria (in respect of criminal cases only); and Trinidad & Tobago (in respect of capital cases only).

[754] Ibid.

[755] Ibid.

There are limitations on the cab-rank rule. It cannot operate in its full rigour in legal professions where there is no separate branch of barristers to stand independently of solicitors.[756] Individual barristers may improperly invoke one of its exceptions as an excuse to refuse a brief. Even though the rule is imperfect, however, and although there are other means for granting access to justice,[757] it remains a bastion of the independent Bar. That independence is fostered because the client has the right to select counsel and counsel is under a duty to accept the brief. A barrister is thus at liberty to provide dispassionate advice to a client who has chosen counsel rather than to a client whom counsel has chosen. While the rule comes with a number of practical and ethical exceptions,[758] all are to the same effect: a barrister is professionally required to accept all briefs for which they are professionally qualified and available unless one of the conditions of refusal is satisfied. 'Good reasons' form the conditions and exceptions to the rule. They do *not* include that acting for a client or cause would run contrary to the conscience of the individual barrister.

The cab-rank rule does not operate in jurisdictions where there is no separate branch of barristers in the profession. While the rule is mentioned by name in North America, as Mason CJ has pointed out, its application is understood in a completely different way.[759] As it operates in the United Kingdom and Australia, the rule works very well. In Australia, barristers enjoy an immunity from suit for work done as counsel. One of the rationales for extending that immunity to barristers is that as a matter of policy, because of the cab-rank rule, there is no exception based in conscience and because of the coordinate duty to serve in the administration of justice a role upon which the courts can rely.

In *Giannarelli v Wraith,* Mason CJ explains the public policy.

> So, the barrister's immunity, if it is to be sustained, must rest on considerations of public policy. Of the various public policy factors which have been put forward to justify the immunity, only

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[756] Ibid.

[757] Ibid.

[758] Australian Bar Rules are based on the Australian Bar Association model rules. Reference here is to the *South Australian Bar Association Barristers' Conduct Rules* <http://www.teachinglegalethics.org/sites/default/files/lawyer_regulation/South%20Australia-BarristersRules01102010.pdf>.

[759] Mason CJ pointed this out in another context: the position of the Australian and UK Bars, as specialist advocate professions, are distinguishable from the United States and Canadian legal professions. After citing *Rondel v Worsley* [1967] UKHL 5; (1969) 1 AC 191, 240–4, 258–63, 277–9, 288–9 and *Saif Ali v Sydney Mitchell & Co* (1980) AC 198. On the question of advocate's immunity, His Honour said:

> The fact of advocacy in these jurisdictions is primarily the function of small independent bars distinguishes the situation there from that in the American states and consequently American authority (see, e.g., *Woodruff v. Tomlin* [1980] USCA6 176; (1980) 616 F 2d 924, at p 930) is not particularly relevant.

See also *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543, [7]. For an American perspective on the cab rank rule, see Abbe Smith, 'Defending the Unpopular Down-Under' (2006) 30 *Melbourne University Law Review* 495–553.

two warrant serious examination. The first relates to the peculiar nature of the barrister's responsibility when he appears for his client in litigation. The second arises from the adverse consequences for the administration of justice which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings.

The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest. So, in *Swinfen v Lord Chelmsford*[760] Pollock CB, after speaking of the discharge of counsel's duty as one in which the court and the public, as well as the client, had an interest said:[761]

> The conduct and control of the cause are necessarily left to counsel ... A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, counsel would perform their duties under the peril of an action by every disappointed and angry client.

In the result the Court of Exchequer concluded[762] 'that no action will allow against counsel for any act honestly done in the conduct or management of the cause'.[763]

Writing extracurially, Sir Anthony Mason, made the further observation:

> Unless the Bar dedicates itself to the ideal of public service, it forfeits its claim to treatment as a profession in the true sense of the term. Dedication to public service demands not only attainment of a high standard of professional skill but also faithful performance of duty to client and court and a willingness to make the professional service available to the public.[764]

For current purposes, discussion of the rule illustrates how conscience, including the religiously informed conscience, plays no role in the discharge of the public duties entrusted to barristers in the administration of justice. However objectionable the client, their attributes, or their cause may be in

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[760] [1860] Eng R 838; (1860) 5 H & N 890 (157 ER 1436).

[761] At 921; 1449 of ER.

[762] [1860] Eng R 838; (1860) 5 H & N 890 (157 ER 1436).

[763] *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543, [9]– [10]. His Honour also made the following observation at [7]:

> As Tindal C.J. observed as long ago as 1838 in (Lanphier v. Phipos [1839] Eng R 153; (1838) 8 Car & P 475, at p 479 [1839] Eng R 153; (173 ER 581, at p 58): 'Every person who enters into a learned profession undertakes to bring to the exercise of it reasonable degree of care and skill.' A barrister is not subject to such a general duty of care. The immunity of the barrister from liability in negligence to his client, at least in respect of court work, is supported by powerful authority, ancient and modern, in England, Scotland and Ireland: see *Rondel v. Worsley* [1967] UKHL 5; (1969) 1 AC 191, at pp 240-244, 258-263, 277-279, 288-289; *Saif Ali v. Sydney Mitchell & Co.* [1980] AC 198. The fact of advocacy in these jurisdictions is primarily the function of small independent bars distinguishes the situation there from that in the American states and consequently American authority (see, e.g., *Woodruff v. Tomlin* [1980] USCA6 176; (1980) 616 F 2d 924, 930) is not particularly relevant.

[764] Sir Anthony Mason, 'The Independence of the Bench' (1993) 10 *Australian Bar Review* 1, 9.

the public opinion or to the individual barrister, they are entitled to equal access to justice and the counsel of their choice. The cab-rank rule is a clear promoter of the universal dignity of the individual. Certainly, the dignity and conscience of the barrister may be compromised. But barristers have sacrificed their right to act upon their conscience in promotion of a greater cause. If conscience can be subjugated to an ethical rule in this way in the service of the achievement of professional goals, it is argued by analogy that it can be subordinated, by law, in order to promote fundamental rights and freedoms of those who would be adversely affected were conscience to take precedence. That includes the case of the conscientious vendor. And it includes the case where, if conscientious vendors were to discriminate, they would deny equal access to markets that have been rendered free of discrimination by equality laws.

To demonstrate the strength of the analogy, this section proceeds, first, with illustrations of obedience to the cab-rank rule in operation despite great personal cost. The examples are each of prominent barristers—John Adams, Thomas Erskine KC, Herbert Evatt KC and Robert Richter QC—accepting high-profile briefs that were either unpopular, contrary to their personal beliefs, or both. It then considers a rare case of disciplinary proceeding against an English barrister, Mark Mullins, who refused to act for a homosexual refugee on the basis that to do so would run contrary to his conscientiously held Christian beliefs. That defence was rejected.

Finally, in this section, it is recognised that artisans ought not to be held to the same standards as those in the medical and legal professions. Leaving aside the Innkeepers' Rule, if it were to be argued that the examples of the cab-rank rule are not adequate to their purpose, then there is another interrogation of the conscience that should be undertaken. A conscientious vendor should be required to show how his or her religious belief system is capable of supplying the conscientious right to discriminate at all, rather than their mere assertion being accepted.

The requirement of obedience to the law should, of itself, be enough to inform the conscientious vendor that the right to discriminate, if it ever existed, has been removed by the law and by dignitarian considerations. But if that were, upon a dualist view of the world, not enough, then the vendor still bears the burden of showing the provenance of the claimed right. If, as will be demonstrated, there are higher considerations than their own interests at play when they do not attempt to discriminate in the name of conscience, unless the burden on provenance is discharged, the scale will tip its balance against the vendor.

Adams

In 1770, John Adams, then practising at the colonial Boston Bar, was briefed to appear for British soldiers accused on five counts of murder. The murders were allegedly committed in the quelling

of a riot in March of that year. This was an unpopular cause in Boston, if ever there had been one. There could be no doubt that Adams' personal sympathies lay in direct opposition to British military occupation. Adams was at the time one of the leaders of the American independence movement. As a matter of conscience, born of deep anti-British sentiment, he had previously refused preferment for office within the colonial government.[765] Just a few years after the trial, he would become one of the American Founding Fathers. He was among the drafters and signers of the *Declaration of Independence,* an architect of the American Revolution, one of the drafters of the *Constitution of the United States*, first Vice-President, and second President of the newly formed United States.[766] If personal conscience were an issue in accepting a brief, Adams had ample reason not to act for the accused.

Instead, Adams accepted the brief because he considered 'no man in a free country should be denied the right to counsel and a fair trial … [and that] his duty was clear'.[767] This was so despite 'incurring a clamour and popular suspicions and prejudices' against him.[768] His performance at the trials was considered 'virtuoso' and resulted in the acquittal of six of the eight accused.[769] Those remaining two were convicted of manslaughter and suffered the penalty of having their thumbs branded.

In his address to the jury in the second trial, he captured the essence of why it is that a lawyer is able to set aside personal preferences when acting in unpopular causes: 'Facts are stubborn things and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.'[770]

Erskine KC

In post-Revolutionary War London, no cause could have been more unpopular than that of Thomas Paine's. He had been one of the architects and a leading philosophical light of the American Revolution. In 1792, Paine was committed to stand trial for seditious libel. His publication of Part II of the *Rights of Man* was the basis of the charge. Government sentiment was so strongly against Paine because of fears that his writings would incite revolution in England. His work had inspired the American Revolution and sowed the discord that led to the French Revolution. In *Rights of Man*, Paine promoted the right of the people to overthrow governments.

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[765] Attorney-General Jonathan Sewall had offered him the office of Advocate-General in the Court of Admiralty: see David McCullough, *John Adams* (Simon & Schuster, 2001) 64–5.

[766] See The White House, 'John Adams', *White House* (Web Page) <*https://www.whitehouse.gov/about-the-white-house/presidents/john-adams/*>; and Frank Freidal and Hugh Sidey, *The Presidents of the United States of America* (White House Historical Association, 2006).

[767] McCullough, *John Adams* (n 765) 66.

[768] Ibid.

[769] Ibid 66–8.

[770] Ibid 68.

While Prime Minister William Pitt may have agreed that such a right existed, he could not take risks in such uncertain times. Pitt's fear of riot compelled him to take action.[771]

In accepting the brief to appear for Paine, Thomas Erskine KC came under severe criticism from government ranks in accepting the brief. He was urged that acceptance of it might jeopardise his expected appointment as Lord Chancellor. The Prince of Wales threatened Erskine KC that he would be dismissed as the Prince's personal legal adviser if he did not decline the brief.[772] His response was, 'But I have been retained, and I will take it, by God.'[773]

By the time of trial, Paine had already fled to France. He was tried and, ultimately, convicted *in absentia*. Despite what may have seemed to Erskine KC a hopeless cause, and one for which he would have had no personal sympathy, he acted fearlessly in defence of Paine. In the course of the trial, Erskine KC made a clear statement of principle on the independence of counsel:

> I will for ever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will, or will not, stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the Judge; nay he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion in the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions…[774]

As to the 'calumnious clamour' raised against him, Erskine asked, 'For what? Only for not having shrunk from the discharge of a duty with no personal advantage, only a thousand difficulties.'[775]

Evatt KC

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[771] John Hostettler, *Thomas Erskine and Trial by Jury* (Waterside Press, 2010) 89–90. For an account of the significance of Paine's views in post-Revolutionary England, see Yuval Levin, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of the Right and Left* (Basic Books, 2014).
[772] Ibid 91–2.
[773] Ibid 91.
[774] Ibid 93.
[775] Ibid. There are numerous examples of barristers suspending judgment of their client in order to serve the administration of justice. Another example is S O Slade KC, who acted for the notorious William Joyce, 'Lord Haw Haw', the last person to hang for treason in England. See the discussion of this and other examples by Sir Sydney Kentridge QC, 'The Cab Rank Rule—A Response to the Report Commissioned by the Legal Services Board' (Report, 2013) <*https://www.barcouncil.org.uk/media/203452/sir_sydney_kentridge_crr_response.pdf*>. For the trial of Lord Haw Haw, see J W Hall (ed), *The Trial of William Joyce* (The Legal Classics Library, 1987).

Dr Herbert Evatt KC,[776] was a courageous advocate and exemplar of the cab-rank rule. In the 1920s, his Bar practice was reputed to be one of the largest in the country. Just prior to becoming Leader of the *Australian Labor Party* and *Leader of the Opposition*, he accepted a brief to advise and appear on behalf of the Waterside Workers Federation, which was among the plaintiffs in the *Communist Party Case*.[777] Despite Evatt KC's personal political antipathy to the Communist Party,[778] he accepted the brief. He endured attempts by the members of the then Menzies government in Parliament to smear him as a Communist sympathiser. The efforts to discredit him politically[779] were ironic and hypocritical. The smears that came from the government ignored Sir Robert Menzies' own statement while still at the Bar: 'a lawyer is never seen to better advantage than when representing a client against whom every man's hand is turned'.[780] Notwithstanding the reputational and political costs, at the hands of both the government and his own party, his commitment to put the best arguments before the Court on behalf of his client never faltered.[781] Despite the costs to him personally,[782] Evatt KC responded that he did not see his acceptance of the brief as 'a question of counsel's rights, but of counsel's duty'.[783] His defence in the public arena came in a letter from the Victorian Bar Committee. The letter, which was tabled in Parliament, stressed that 'a barrister is *not* entitled to refuse a brief merely because of the character of the cause or of the client, or because he does not share the ideals involved in the former or dislikes the latter'.

Robert Richter QC

Richter QC, a prominent criminal defence barrister, is known for taking on causes that are neither popular nor with which he would personally agree. Despite being a member of Melbourne's Jewish community, and coming from a family of Russian Jewish refugees, he nevertheless agreed to accept a brief to represent Konrad Kalejs, the alleged Nazi war criminal, in relation to his extradition.[784]

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[776] *PC, KStJ*, LLD, Attorney-General, Justice of the High Court of Australia, President of the United Nations General Assembly, Chief Justice of New South Wales.

[777] *Australian Communist Party v The Commonwealth* (1951) 83 CLR1. See Hon Chief Justice Bathurst, 'The Place of Lawyers in Politics' (Speech, Opening of Law Term Dinner, 31 January 2018), [28], 9. His Honour cited George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630, 648. In the High Court's reconsideration of the *Communist Party Case*, *Thomas v Mowbray* (2007) 233 CLR 307, counsel who acted for the plaintiff, Thomas, known as 'Jihad Jack', (R Merkel QC and S G E McLeish and K L Walker), would be unlikely to have agreed with their client's personal ideology.

[778] Kylie Tennant, *Evatt, Politics and Justice* (Angus & Robertson, 1970).

[779] Hon Chief Justice Bathurst, 'The Place of Lawyers in Politics' (Speech, Opening of Law Term Dinner, 31 January 2018).

[780] Ibid.

[781] See Tennant, *Evatt, Politics and Justice* (n 778).

[782] See Bathurst, 'The Place of Lawyers in Politics' (n 779)

[783] Ibid.

[784] Richter still felt compelled to represent Kalejs even after considerable objection from the Jewish community. Ultimately, he had to decline the brief on conflict of interest grounds unconnected with his client's Nazism and alleged war crimes.

Richter QC's involvement in that case has been regarded as a shining example of adherence to the cab-rank rule. In response to attempts to vilify the barristers who had taken on such an unpopular cause, Julian Burnside QC commented in support of Richter QC and other barristers accepting unpopular briefs.[785] Burnside QC's comments were in connection with the political backlash instigated by the Australian Labor Party against Victorian Greens candidate Brian Walters QC. Walters QC also represented Kalejs in the extradition proceedings. His political opponents labelled him 'anti-Semitic' for accepting the brief.[786] Burnside QC explained the ethical and professional positions in which Richter QC and Walters QC found themselves in accepting briefs for Kalejs.

> The cab-rank rule is fundamental to the independent bar. It exists to protect the community by ensuring that even unpopular clients can get representation in court.
>
> There are plenty of lawyers in the Labor Party. It is a shame to see the Labor campaign stoop so low as to mount a personal attack which, as they well know, has no foundation at all.
>
> …[I] would have taken it, even though I absolutely deplore the Holocaust and the things that Kalejs was alleged to have done.

More recently, Richter QC represented Cardinal Pell at the committal proceedings, trials and on appeal in relation to alleged child sex offences. The prosecution of the Cardinal divided public opinion, as did his successful appeal to the High Court against his conviction.[787] Richter QC had every personal reason to refuse to act for an accused Nazi and a Catholic cleric accused of child abuse. Despite the furore, Richter QC defended both clients with vigour.[788] He did not hesitate at any stage to do his professional duty.

Mullins

In contrast stands the case of Mark Mullins, a London barrister who refused a brief for conscientious reasons. There was no conflict of interest or other exception to the Bar rules.[789] Instead, Mullins, disapproving of his client's homosexual lifestyle, refused to act on instructions from his client.[790] Mullins, an erstwhile defender of the cab-rank rule, had previously been quoted

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[785] Royce Millar and Rafael Epstein, 'Outcry at Greens Smear', *The Age* (online, 1 November 2010) <*https://www.theage.com.au/national/victoria/outcry-at-greens-smear-20101031-178w6.html*>.
[786] Ibid.
[787] *Pell v The Queen* [2020] HCA 12.
[788] Melissa Davey, 'George Pell Committal: Tension, Theatre and Tedium in Courtroom 22', *The Guardian* (online, 30 March 2018) <https://www.theguardian.com/australia-news/2018/mar/31/george-pell-committal-tension-theatre-and-tedium-in-courtroom-22>.
[789] In either of which cases, he would not have breached the rule.
[790] James Mill, 'Barrister Who Refused to Represent Gay Client Reprimanded', *Daily Mail UK* (online, 26 July 2006) <*http://www.dailymail.co.uk/news/article-397625/Barrister-refused-represent-gay-client-reprimanded.html*>.

as saying: 'What kind of society will we become if we turn our backs on the most weak and vulnerable?'[791]

In the case the subject of complaint, Mullins had returned a brief to act for client, J, who had sought asylum in the United Kingdom.[792] J claimed that if he returned to his country of origin, he would face discrimination and persecution as a homosexual. He instructed Mullins to raise as a relevant factor his homosexual relationship formed in the United Kingdom. Mullins refused to use that as a reason why he should be permitted to remain. His refusal was attributable to his deeply held Christian beliefs. Mullins was also conscious of his reputation as regional chairman of the Lawyer's Christian Fellowship. His argument before the tribunal was that accepting J's instructions would have contradicted his Christian faith.

Rejecting that argument, the tribunal ruled that his refusal was in breach of the cab-rank rule. He had been, in the tribunal's assessment, obliged to provide J legal representation regardless of his own personal beliefs. Mullins was found guilty of professional misconduct, received a reprimand, and was also ordered to pay £1,000 towards the cost of the case.[793] J, with different representation, went on to win his application for asylum.[794]

In J's success with other counsel lies another anomaly in Mullins' case. By refusing to act, Mullins left it to other counsel to perform services that he considered immoral for him to perform.

The principle that emerges from the cab-rank rule is that while individual rights of freedom of conscience are important, they are not as important as the communitarian goals that can only be achieved by the profession of barristers if individual conscience is held in abeyance in order to promote the ability to retain the counsel of one's choice and to enhance the administration of justice. To achieve these desirable communitarian ends, Hohfeldian analysis shows that private conscientious objections are *not* among the bundle of rights that the barrister enjoys while performing their professional duties. It is a voluntary surrender because the barristers, in making that surrender,

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[791] Christian Medical Fellowship, 'Lawyers Christian Fellowship and Christian Doctors Welcome High Court Decision to Back Leslie Burke Case' (Press Release, 30 July 2004) <*https://www.cmf.org.uk/advocacy/pressrelease/?id=32*>.

[792] The Bar Standards Board website has not retained a record of the outcome of the complaint against Mullins, possibly because of time elapsed and possibly because it resulted in a reprimand: <*https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/past-findings-and-future-hearings/?__VIEWSTATE=%2FwEPDwUENTM4MWRka0a%2ByLzCE6HY48MjgcmXxXs0z5U%3D&ctl00%24ctl00%24ctl00%24Conten*>.

[793] Mill, 'Barrister Who Refused to Represent Gay Client Reprimanded' (n 790).

[794] Ibid.

understand freedom in its relational context and that in belonging to the community of that profession, the surrender is, as Michael Sandel describes it, the right thing to do.[795]

From a Hohfeldian perspective, in order to serve the interest of the administration of and access to justice, a barrister *must* have a *differently* comprised bundle of rights and obligations from other members of the community. That bundle does not include any dichotomy between private and public morality when discharging professional obligations in which the private conviction can be permitted to prevail. There is no reservation of a private conscientious position possible as a reason not to fulfil the higher purposes in the administration of justice and facilitating access to justice. The analysis urged by Hohfeld and Singer requires a careful auditing of precisely what rights, obligations, and freedoms are conferred in individual instances. For the barrister, that does not include any choice in the person for whom they act or the cause in which they are called upon to advocate.

From the examples given, the public policy principles that underpin the cab-rank rule seem obvious. So, too, is their relative importance in comparison to the conscience of the individual barrister. But the validity of the position of the conscientious vendor is far from obvious once scrutinised. As with the Hippocratic Oath and the Innkeepers Rule, the cab-rank rule is an instance of freedom of conscience being removed from a bundle of public rights, weighing the public interest in choice of counsel and the administration of justice against the individual's freedom of conscience. Freedom of conscience may have led them to refusal to accept the brief. But it is the public interest in access to counsel and to justice that has prevailed as the dominant interest.

What also emerges from consideration of the cab-rank rule, and from each of the other examples considered, is that conscience is not the trump card that it may be thought to be by an expansionist. Freedom does not occur in a vacuum. And no right or freedom in unfettered. As Hohfeld would consider it, any freedom to act according to individual conscience must be examined for its place in a bundle of legally enforceable rights—rights to which the state will lend its coercive force in order for it to be upheld. The examples also demonstrate that all freedoms are relational. Religious freedom, and especially the assumed right of the conscientious vendor to discriminate, must be placed in its context as only one of a number of rights and freedoms.

9. The content of the right to disobey an equality law

The cab-rank rule, the Hippocratic Oath, the Innkeepers' Rule, and other normative constraints upon freedom of conscience demonstrate the need to weigh private rights in the scales of human dignity. In each of the examples given, dignity can be seen to assist public policy. No public policy

[795] Sandel, *Justice: What is the Right Thing to Do?* (n 668)

that is inconsistent with human dignity could stand under the spatial theoretical framework. It is only when a right or freedom has been considered against the backdrop of dignity that it can, when necessary, be permitted it to take precedence over private conscience.

That invites the question of when it is open to the conscientious vendor or any other conscientious objector to refuse to obey a law that mandates equal treatment. If a bill of rights were adopted in Australia, the most obvious route to a comprehensive human right regime would be to adopt, *mutatis mutandis*, the ICCPR under the external affairs power.[796] By following that path, dignity would be instantiated as the organising principle in Australian human rights[797] and clarity would emerge as to the rights of the conscientious objector claims that would be successful under the new human rights regime and the spatial theoretical framework and its principles.

As is now familiar, Art 18 of the ICCPR provides relevantly as follows:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his [sic] religion or belief in worship, observance, practice and teaching…
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

It is clear from the preamble that individuals have 'duties to other individuals and to the community to which [the individual] belongs' and that every individual is under a responsibility to strive for the promotion and observance of the rights' that are recognised and provided for in the ICCPR. So, the conscientious vendor will have the difficulties discussed throughout this chapter in escaping obedience to a law in the name of the religious freedom recognised in Art 18(1) because of the conditions in Art 18(3). There is no protection from the operation of an equality law because it is readily characterised as a measure that is "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

However, the proviso in Art 18(3) cannot apply to religious or conscientious manifestations that promote the enjoyment of rights and freedoms in others. The most obvious case is a circumstance where the goods or services to be supplied by the conscientious vendor have as their use or purpose

[796] Australian Constitution s 51(xxix).
[797] ICCPR (n 16) preamble.

the deprivation of the 'fundamental rights and freedoms of others' or where a refusal to supply would promote 'public safety, order, health, or morals'.

Article 6(1) of the ICCPR relevantly provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [their] life.

It follows, then, that if an objection were to the supply of goods or services that were to be used in the killing of another human, such as in wartime, or for the provision of medical services that were for the abortion of a foetus, for euthanasia, or, it could be extrapolated, for the infliction of seriously life-threatening injuries, the conscientious vendor could refuse supply under the framework. It may be argued no moral questions arise; that abortion is not the killing or harming of another human being and that prior to birth the foetus enjoys no human rights. But that characterisation is not objective. Under the preamble and Art 18 (1), it is the conscientious belief of the supplier that matters. And in such an instance, if Art 18 is to have appropriate work to do under the framework, conscientious objection to participation in any of the activities referred to must be possible. If the necessary facts are proved, an enclave could be carved out to enlarge the constitutional space of religious freedom to accommodate such a serious issue, under which a law has been passed requiring participation of all in the provision of lethal or physically harmful services.

However, while this type of conscientious objection is one that spatial theory would accommodate, the result that can be achieved will depend upon what is meant in the relevant law and in conscience by 'participate'. At this point, practical considerations come into play. While no one should be forced to act contrary to their conscience when life and death is the question at stake, neither can their individual conscience on the issue be the basis for ceasing the practice of legal procedures to which they object.

In *Greater Glasgow Health Board v Doogan*,[798] the United Kingdom Supreme Court considered the conscientious position of two midwives, Doogan and Wood. Both held senior positions as midwives, in which capacity they supervised labour wards for their employer, the Greater Glasgow Health Board. The conditions of their employment changed when an increasing number of terminations of pregnancies started to be carried out in their wards. They felt, as faithful Catholics, that they could not in good conscience 'participate'—which to them included an inability in conscience to delegate, supervise or support staff—in the treatment of patients undergoing abortions.

[798] [2014] UKSC.

The Supreme Court construed the provisions allowing for conscientious objection in s 4 of the *Abortion Act 1967* (UK) very carefully. On that careful construction, the Court could not accept a reading of s 4 of the Act that expanded 'participation' beyond actual physical participation in the procedure. Doogan and Wood could not expect to be exempted from the management roles for which they were employed or expect the Board to rearrange its organisation to accommodate their conscientious beliefs.

On the issue of conscience, Lady Hale, with whom Lord Wilson, Lord Reed, Lord Hughes, and Lord Hodge agreed, made the following observation on the conscience issue:

> Whatever the outcome of the objectors' stance, it is a feature of conscience clauses generally within the health care profession that the conscientious objector be under an obligation to refer the case to a professional who does not share that objection. This is a necessary corollary of the professional's duty of care towards the patient. Once she has assumed care of the patient, she needs a good reason for failing to provide that care. But when conscientious objection is the reason, another health care professional should be found who does not share the objection.[799]

In spatial theoretical terms, Lady Hale would be heard to say that while dignity excuses physical participation, it cannot leave those undergoing procedures without care. That means that conscience cannot be fully accommodated because dignity requires that all receive the medical care they seek. Dignity functioned obversely in *B (R) v Christian Aid Society of Metropolitan Toronto.*[800] In that case, while the beliefs of the Jehovah's Witness parents could be respected regarding blood transfusions, the manifestation of that belief could not be permitted to extend to refusing a necessary lifesaving transfusion to their infant child. Even when dignity operates to permit an individual's objection to a mandate or prohibition, that permission cannot affect the rights of freedoms of others beyond the extent that is strictly necessary.

Conclusion

The special position of the religiously informed conscience as claimed by the conscientious vendor is out of keeping with the position of conscience under the Hippocratic Oath, the Innkeepers' Rule, and the cab-rank rule. When there is a conscientious objection to dealing with a particular class of person, each of these professional and trade rules requires a transaction on equal terms, as in dealing with any other person. Conscientious objection to a particular person or class of person is also out of keeping with the various departments of the law considered. There is no principled basis in contract or property law that would place the contracting party or property owner,

[799] Ibid at [40].
[800] [1995] 1 RCS 315.

possessed of a religiously informed conscience, in any different position than anyone else when the law either mandates or prohibits a dealing.

In this chapter, I have demonstrated why there should be a heavy burden to be discharged by the vendor to show why strict compliance with the relevant equality law ought not be required. Doing as one's conscience admonishes, without more justification, will not be permitted under spatial principles or under the framework. Thus, by argument invoking a broad set of analogies, I have argued in this chapter that spatial theory is able to satisfy the last part of the hypothesis. It deals appropriately with the vexed question of conscience. The examples that I have used in the chapter in support of the argument make good on the *dictum* from Scalia J in *Employment Division v Smith*, cited at the introduction of this chapter: permitting claims based solely upon individual belief would make a professed religious belief superior to the law.

Rather than the constitution and the laws of the land passed under it, to permit conscience to rule in the manner that some expansionists seek, would have the effect of permitting every citizen to become a law unto themselves. In the same way that it is not included in the bundles of the doctor, innkeeper or lawyer, the right to discriminate is *not* included in the bundle of rights comprising the religious freedom of the conscientious vendor.

The argument has refuted the assumption that underpins the argument of the conscientious vendor: doing as one's conscience admonishes, of itself, does not entail that anyone else, including a court or tribunal, owes any special duty of deference to that exercise of conscience.[801] I submit that the theory satisfies the last part of the hypothesis: if the expectation of the conscientious vendor is to be permitted to act on conscience and discriminate in violation of the law, and to do so without penalty, then there is a heavy burden to be discharged as to why that should be so. Spatial theory insists upon that. Its framework posits the spatial principles that are consistent with that position.

The theory, thus, has a principled approach to the religiously informed conscience. Expression of conscience by discrimination against a person who has been guaranteed equal treatment will rarely prevail over that fundamental right to equality; and in those rare cases, then in only one of the three circumstances mentioned: a legislative exception; a constitutional exception; or civil disobedience.

If the theory and framework were instantiated as the human rights law of Australia, the constitutional space for guaranteed religious freedom would not include a right, on the basis of

[801] Smith, 'The Tenuous Case for Conscience' (n 578).

conscience, to encroach upon the fundamental rights and freedoms of others. As these principles become known and understood, the potential for conflicts would diminish dramatically. Once the first cases to test the robustness of the boundaries of the respective constitutional spaces, and the operation of human dignity, the losses would have a chilling effect upon such cases.

Chapter 5. Conclusions

Part A: Introduction

This thesis has tested whether 'constitutional spatial theory' can solve an apparently insoluble problem in the Australian human rights regime. The problem arises when a vendor of goods or services conscientiously refuses supply to consumers because of characteristics that are protected under anti-discrimination laws. Testing that hypothesis involved three stages, in chapters 2, 3, and 4: space, dignity, and conscience. Based upon the analysis presented in those chapters, this thesis concludes that 'constitutional spatial theory' is a viable reform to be pursued as a replacement regime for Australian human rights protection. Religious freedom would not include the right to discriminate in abrogation of the rights of others, but the rights and freedoms that form that freedom would be guaranteed under a bill of rights in a constitutional space that would be safe from legislative interference.

The theory has been tested in relation to a very practical situation: the case of the conscientious. vendor. Refusal of supply is a practical problem. Spatial theory proffers a practical solution. In all but the most exceptional case, an equality law must be obeyed and conscientious objections put to one side. Thus, while the discussion has been theoretical, it is theory ready to be put into practice. What is more, spatial theory has displayed its practicality at the political level. There are acknowledged political hurdles to an entrenched bill of rights. The practical answer is to give the Australian public an opportunity to live, for a period before constitutional entrenchment, under a bill of rights and as a part of a society in which human dignity is paramount and respect for the rights of others the norm.

The success of the practical experiment will depend upon the quality of political response on two critical threshold issues. Constitutional spatial theory cannot deliver on its promise unless, first, the conception of dignity that it puts forward is fully embraced as the organising principle of the new regime. The second threshold issue is the preparedness to adopt the ICCPR as the template for Australian human rights. As has been argued, all rights and freedoms are interrelated and descend from human dignity as the status of all humans. Unless all rights granted by the ICCPR

are implemented domestically, the theory cannot function to deliver the solution to the problem in the ways discussed. Domestic implementation of the entire covenant would overcome the constitutional doubts that attend the current exposure draft of the Religious Discrimination Bill.

Implementation is guided by the spatial principles set forth in Chapter 2. This chapter concludes the thesis with a discussion of how each of the six elemental principles would be implemented in practice.

Part A: Conclusions

1. Conclusions from Chapter 2 and Principle 1

The thesis advances a concept of 'constitutional space', and defines that as the sphere or space created by a constitution for the functions of government to be performed and where individual rights and freedoms are preserved and protected. The idea of constitutional space is as old as government itself but has been known by different names. Geoffrey Sawer describes the creation of Australian constitutional spaces at federation in terms of five 'tasks': first, creation of the institutions of Commonwealth and state government; secondly, the allocation of governmental powers between the Commonwealth and the states; thirdly, the interrelations between Commonwealth and state constitutions and laws; fourthly, the interrelations between Commonwealth and states as entities and between their governments; and, fifthly, to provide for amendment of the Constitution.[802] But, as Sawer notes,[803] there was a sixth matter that some might have expected to have received more attention: the protection of the rights and liberties of individual citizens against all governments.[804] And one liberty among those not to have received adequate attention was the subject of the present study, religious liberty.

It became clear from early decisions of the newly established High Court that s 116 was a federal legislative prohibition and not a guarantor of individual rights.[805] Protection of religious freedom of conscientious expression in the public domain posed a challenge early in the federation and continues to do so. The classical instance of religious conscientious objection is against conscripted military service.[806] Despite Australian participation in the Boer War, the First and Second World Wars, the Korean War, the Vietnam War, and most recently wars waged in the Gulf region and Afghanistan, no principle of law emerged on how conscience is to be regarded constitutionally. In

[802] Sawer, *Australian Federalism in the Courts* (n 57) 8–14.
[803] Ibid.
[818] Barak, *Human Dignity* (n 8).
[805] For example, *Krygger v Williams* (1912) 15 CLR 366.
[806] Sarre, 'The First World War and Conscientious Objection in Australia' (n 220).

the absence of a bill of rights, conscientious objection has been left to the provisions of the particular statute.

The same has been true for other areas in which religious objections might be expected, such as participation in abortion or euthanasia by medical practitioners or by vendors refusing supply to same-sex marriage.[807] If there is no exemption provided for in the particular statute, there is no generally operating right to object conscientiously.

Thus arises the challenge in the immediate study. To find a way in which to permit manifestation of religious freedom, involving discrimination, without its coming at the cost of, among other things, 'the fundamental rights and freedoms of others'[808] is an apparently impossible task. To date, there is no satisfactory critique or viable theory that provides a principled answer to the problem in the case of the religious conscientious vendor who manifests their right to religious freedom by discrimination against those entitled to be free of discrimination.[809]

It is for obvious reasons, then, as discussed in Chapter 2, that the conflict with equality rights has made the right to freedom of thought, conscience, and religion controversial. It continues to be the subject of increasing numbers of cases in many jurisdictions. Farrah Raza[810] and, separately, Carolyn Evans and Cate Read[811] have argued there is a need for, first, limits upon religious freedom and, secondly, principled clarity on the extent of those limitations. Evans and Read have contrasted this need for limits upon religious freedom with the opposing position, which they label 'expansionism'.[812]

'Expansionism', as seen in Chapter 2, seeks the widest expanse of space possible and a correspondingly wide protection for religious freedom. From an expansionist perspective, compromise on any issue of religious conscience is effective capitulation. As Julian Rivers has pointed out,[813] discrimination is inherent as a feature of religion. To secure the religious freedom to discriminate, Australian legislatures have placed strong reliance upon legislative formulae that grant religious exemptions and exceptions from specific equality laws. These formulae, commonly referred to as 'balancing clauses',[814] have become an increasingly difficult mechanism for legislatures to invoke satisfactorily.

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[807] Foster, 'Freedom of Religion and Balancing Clauses' (n 2); Deagon, 'Religious Schools, Religious Vendors' (n 2).
[808] ICCPR (n 16) Art 18 (3).
[809] Ruddock Report (n 1); Deagon, 'Religious Schools, Religious Vendors' (n 2).
[810] Raza, 'Limitations to the Right to Religious Freedom' (n 134)
[811] Evans and Read, 'Religious Freedom as an Element of the Human Rights Framework' (n 7)
[812] Ibid.
[813] Rivers, 'Is Religious Freedom Under Threat from British Equality Laws?' (n 34).
[814] Foster, 'Freedom of Religion and Balancing Clauses' (n 2).

As Rivers has again correctly pointed out, there are two reasons why continued reliance on balancing clauses is an unsatisfactory legislative strategy: the increase quantity of protected attributes; and the change in the quality of what is to be protected. First, the lists of protected attributes have expanded from early laws aimed at equality of treatment with regard to sex and race[815] to include other protected attributes. They include, as examples, sexual preferences,[816] fluidity of gender, marital status, age, ethnicity, and physical ability. This expansion of protected attributes has become particularly important with the legal recognition of same-sex marriage and the recognition of transgenderism as a protected category.

Secondly, the additional types of protected attributes have been increasingly nuanced and complex. In the cases of same-sex marriage and transgenderism, recognition is not merely a matter of recognising an innate characteristic. Equality laws represent the legitimation of a lifestyle that had not previously attracted constitutional or statutory protection. Complexity and nuance surrounding gender issues were illustrated in the Unites States Supreme Court decision on the employment rights of a person transitioning from one gender to another in *Bostock v Clayton County*.[817] In some cases, the protected attribute itself may be resistant to precise definition. Such resistance to definition can be seen when religious belief is in issue. As seen in the *Scientology* case,[818] and earlier High Court decisions, 'religion' eludes definition. As the *Scientology* case illustrated, at best, what can be achieved is a set of guides by which to determine whether the system of beliefs has a religious quality.

By contrasting three reform possibilities with spatial theory, Chapter 2 argued that the theory presented the most viable solution to the problem of the religious vendor's conscience. No better solution could be found, the chapter concluded, in the common law, statutory reform, or federal legislation utilising s 109 of the federal Constitution to exercise paramount force over state equality laws. In her survey of approaches taken across jurisdictions, Raza has shown that, while courts have adopted different approaches to limitations to religious claims in order to resolve conflicts, no preeminent approach emerges as the solution to the problem.[819]

Alex Deagon, an advocate for expansionist legislative reform,[820] persists with a formulaic exemption model of reform that allows commercial vendors to discriminate. His expansionist

[831] Rivers, 'Is Religious Freedom Under Threat from British Equality Laws?' (n 34).
[832] Ibid.
[817] *Bostock v. Clayton County* 590 U.S. ___ (2020)
[818] *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120.
[819] Raza, 'Limitations to the Right to Religious Freedom' (n 134).
[820] Deagon, 'Religious Schools, Religious Vendors' (n 2).

argument has logical and ethical force.[821] On the grounds of consistency, he argues that it is both unfair and illogical that exemptions be granted to large-scale vendors without yet more exemptions being granted to smaller ones. Until the advent of legalised same-sex marriage,[822] religious vendors were not required to wrestle with their consciences in supplying goods and services to an expansion of the institution of marriage with which they disagreed.[823]

Legislative policy has two mutually exclusive alternatives. Either legislation keeps pace with exemptions to match each new protected attribute or lifestyle; or, instead, exemption as a statutory model is abandoned altogether.[824] A policy direction has to be chosen. And, unless another pathway is found, religious freedom is limited and must yield to expanding equality rights. This contractionist all-or-nothing policy is unacceptable in principle. The exemption model cannot be abandoned to leave a void.

Viewed through the lens of 'constitutional space', the problem of restricting religious freedom can be dealt with in ways that are consistent with Art 18(3) of the ICCPR. When a discriminatory action is inconsistent with the rights and freedoms of others, it can be determined, on Hohfeldian principles, whether the 'right' to discriminate in the circumstances actually exists within the constitutional space allocated to religious freedom.[825] When an asserted conscientious 'right' to discriminate is claimed in circumstances that frustrate the achievement of a higher communitarian goal, it can, again Hohfeldian principles, be determined whether the 'right' to discriminate in the circumstances actually exists within the allocated constitutional space where such a right, if it existed, would reside.

By this type of analysis and constitutional entrenchment, religious freedom can be preserved and protected. It can be concluded then, in relation to the arguments in Chapter 2, and in relation to the first of the spatial principles, that spatial theory offers the best opportunity for religious freedom to be preserved. But that freedom is the democratic freedom of which Joseph Singer has written.[826] It is limited by regulation to its allocated sphere of operation. The alternative is for the continued existence of religious freedom to depend upon constant advocacy with parliamentary and law reform bodies, seeking more and more exemptions. That alternative is more likely to

[821] Ibid.
[822] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), passed 7 December 2017.
[823] Ruddock Report (n 1) 48–9; Deagon, 'Religious Schools, Religious Vendors' (n 2).
[824] Rivers, 'Is Religious Freedom Under Threat from British Equality Laws?' (n 34); Rochow, 'Towards a Constitutional Spatial Theory' (n 7).
[825] Rochow, 'Towards a Constitutional Spatial Theory' (n 7).
[826] Singer, *No Freedom Without Regulation* (n 76).

become a path of erosion and diminution of the freedoms that currently fall within religious freedom.

2. Conclusions from Chapter 3; Principles 2, 3, and 4

From Chapter 3 it can be concluded, as Principles 2 and 3 teach, that, first, there must be a framework under which constitutional spaces are organised and, secondly, under that framework human dignity must be constitutionally instantiated as the organising principle for a system of human rights that is descended from that status of dignity. Human dignity is defined in Chapter 3 for the purposes of constitutional spatial theory as:

1. a universal, innate, and inviolable status;
2. the source of all guaranteed fundamental rights and freedoms; and
3. the organising principle for the spatial theoretical framework.

Its constitutional role should be acknowledged in all relevant constitutional, legislative, and procedural instruments to ensure that courts implement dignity as it is intended by each instrument. In other words, it is to be the 'stamp' placed upon every instrument that touches upon the rights and liberties of all Australians.

Other prerequisites under Principle 4 for the implementation of spatial theory are, naturally, in place under existing constitutional arrangements. There is an existing constitutional arrangement that provides for the framework with spaces for government, divided among the legislative, executive, and judicial branches. As both Sawer and Jeffrey Goldsworthy have observed, as a federation, governmental powers were allocated among the entities constituting the federated nation. Australia has a separated, apolitical, and independent judiciary that is capable of acting as guarantor of fundamental rights and freedoms. It is capable of operating without interference from the executive and legislative arms and jealously guards the separation of powers. The judiciary functions well under valid legislative and procedural machinery. If there were to be a constitutionally entrenched bill of rights guaranteeing fundamental rights and freedoms implementing the framework, everything points to a judiciary fully enabled to perform its role as guarantor. The only missing ingredient is a bill of rights derived from the status of human dignity.

It must be accepted that no government is likely to undertake the scale of reform suggested here on the basis of religious freedom alone. Unless spatial theory has the capacity to resolve more than conflicts between religious vendors and their discriminated consumers, it is unlikely to excite sufficient interest for reform. But the theory does propose more than the solution of one problem. The hallmark of the proposed reform is human dignity. This is the central attraction of spatial

theory as a reform measure. And dignity is the attraction for any government to re-engage with human rights through the theory.

First, the theory instantiates human dignity as the organising principle for human rights nationally. Secondly, under the rubric of dignity it brings a standard set of rights and freedoms to all of Australia. Thirdly, by its use of intergovernmental agreements it offers the ability to enter into a national experiment with human rights to end debate as to whether a bill of rights would improve community welfare in Australia. Fourthly, by legislation and subordinate legislation, there would be a single coordinated national scheme by which alleged human rights abuses could be mediated and adjudicated according to international standards that have been domestically incorporated into national law and procedural mechanisms. The theory places human dignity in its theoretical context as a constitutional value and in relation to Hohfeldian theory. It avoids the problems of superficial invocation of dignity which can either diminish the esteem in which the status is to be held. With the benefit of Hohfeldian theory, there are analytical and allocative goals that human dignity is to achieve in resolving conflicts.

The spatial theoretical conceptualisation of dignity, if implemented, would make a difference to human rights in at least three ways.

First, the enthronement of human dignity would give a reason to reinvigorate the human rights project domestically by moving the question from one of parliamentary sovereignty to one of national sovereignty underwritten by universal dignity. It would thus avoid the need for compromises in the manner in which human rights are protected in Australia. Two such compromises are proposed in the use of the so-called 'dialogue' model for a bill of rights and reliance upon the legislative scrutiny model.

Secondly, it would overcome the problems of potential logical regress that result from ambiguous references to 'dignity'.

Thirdly, it would lay a foundation for a solution to the subject problem with respect to the religiously informed conscience component.

3. Chapter 4: Principles 5 and 6

Chapter 4 deals with the vexed issue of the religiously informed conscience by asserting that religious freedom, and therefore the religious conscience, have their necessary limitations. Spatial theory is clear that conscience cannot predominate in conflicts between religious liberty and equality rights. It is dignity, properly understood according to the spatial definition, that is the predominant factor in resolving such disputes, The last two spatial principles, which are properly

regarded as doctrines that spatial theory posits, lay the foundations for the conclusion that dignity predominates and that conscience must take its place according to what is the dignified outcome of the dispute.

There are three tenets of the first of the doctrines. First, all fundamental rights and freedoms are related to one another through human dignity. This entails the second tenet that there is no *a priori* precedence among rights and freedoms. It also entails the third tenet that in the event of any conflict between any other human right or freedoms expressed in the bill of rights, human dignity operates as the mediating principle to determine which right or freedom is to take precedence in that given circumstance.

The second of the doctrines is relevant to the treatment of conscience. It provides a more robust form of religious freedom than ever previously enjoyed in Australia. However, consistent with the theory, it is a limited freedom and not one that is expandable by reference to the conscience of the particular individual. It is limited by known and established principles. Moreover, it upholds the civil constitution and laws made under it as the single standard. It is by constitutional principle that every right or freedom has its limitation within its own space. No right or freedom has a metaphysical codicil that permits its expansion at the will or conscience of its possessor.

Spatial theory is, thus, a rejection of the dualism that underlies both expansionism and arguments for the pre-eminence of the religious conscience. This rejection flows from six tenets of the second doctrine of the theory. First, constitutional spatial theory only recognises the state's power and authority to govern, under the constitution and in accordance with principles of human dignity. The second tenet is that under the constitution, and laws passed validly under it, each individual is immune from the interference of the state under the bill of rights. Any attempt that runs contrary to the bill of rights is to that extent constitutionally invalid or *ultra vires*. Thirdly, similarly, each individual is immune from the interference from any other person and is entitled to the coercive power of the state to protect against any such interference. The fourth tenet is critical in the creation of a conflict with expansionism and dualism. It provides the default position that under spatial theory all constitutionally valid laws must be obeyed. The fifth tenet provides for a concession to conscience, and not only the religiously informed conscience. It provides that the only exceptions to the requirement that valid laws must be obeyed are in those cases where, in accordance with principles of human dignity, a court or tribunal with jurisdiction has recognised exceptional circumstances excusing obedience. There should be minimal reason for disobedience in advance of such a ruling because the level of seriousness, involving life or death, would be generally capable of anticipation.

The sixth and last tenet of the doctrine sets forth the operation of the doctrine under the principle of human dignity, within the designated constitutional space. The sixth tenet is the set of preconditions for the doctrine to operate. Installation of constitutional spaces with human dignity as their organising principle and that fully implement each of the spatial principles is to occur:

1. validly utilising existing constitutional mechanisms;
2. over such a period as may be necessary to ensure that the content and boundaries of each space created implements human dignity as the status of all persons within the subject jurisdiction and accords them with all rights and freedoms that derive from that status;
3. ensuring during the period of implementation that each right and freedom is enforceable through the courts by remedies appropriate to ensuring those rights and freedoms are known and respected throughout the jurisdiction; and
4. after such a period, by taking such steps as are constitutionally necessary to entrench the constitutional spaces for human rights and freedoms so that they are entrenched and cannot be amended, repealed or varied by any arm of government or any other agency.

Part C: Conclusion

This thesis commenced with a proposed solution to the particular problem in the Australian human rights regime that arises between the right to equal treatment and a claimed religious liberty when a religious vendor refuses to deal because of a conscientious objection. It is a circumstance in which consumers, by no fault of their own, are confronted with a refusal of equal treatment because, often by chance, the vendor has become aware of activity or lifestyle choices that offend the vendor's religiously informed conscience. The thesis treats the instance when vendors of goods or services claim to manifest their religious conscientious beliefs by refusing supply because of the personal characteristics or attributes of the consumer that are protected from unequal treatment by anti-discrimination laws.

Anti-discrimination laws have changed the default position in the common law of contract and property from a law in which, in general, the contracting party or property owner is at liberty to deal with whom the contracting party chooses and, regarding property, as the property owner sees fit. The right of a supplier or a property owner to 'discriminate' has been removed and replaced with a duty to deal. But, as the thesis has pointed out, that is not an unusual circumstance in either common law or statute. If the law deems the transaction economically exceptional or restricted in public policy, both common law and statute have developed sets of exceptions to the default

position. And one of those exceptions is the requirement under anti-discrimination and equality laws to deal equally with persons possessed of protected characteristics. But this exception is unusual in that refusals to deal in such cases raise issues of religious liberty and conscience. 'Discrimination', it is claimed, is justified by the religious conscience. Thus arises the conflict where one side of the jural relation claims that supply is required by the legal guarantee of equal treatment and the other side claims that conscience supervenes so that supply is not required. On both sides of the conflict, it could also be claimed that the human dignity of the actor will be offended if the other claim prevails. Thus, the thesis set out to solve an apparently insoluble problem that does not admit of an economic or policy solution.

The response to the hypothesis proposed by which to test whether the new theory, constitutional spatial theory is that it is possible to resolve the problem of conflict of conscience and equality through the replacement of the existing Australian human rights regime with a new theoretical constitutional framework that features human dignity as its organising principle.

The thesis has answered each of the three essential elements of the hypothesis. First, the theoretical framework of constitutional space can address the problem. Secondly, the framework engages a robust conception of dignity to resolve the conflict regarding supply. Thirdly, the framework can address the claim that refusal of supply is based in the religiously informed conscience.

I have produced a novel system for dealing with human rights in Australia and resolving the conflict identified in respect of religious freedom:

1. The first test of the hypothesis has been satisfied: a theory has been formulated.
2. The second test of the hypothesis has been met because the theory embraces human dignity as a part of its resolution to the problem.
3. The third test of the hypothesis has been satisfied with a theory that embraces human dignity, to provide, first, a constitutional space for religious freedom and, secondly, a durable solution to the problem without any need for the ongoing creation of exceptions and *ad hoc* exemptions to equality laws in order to accommodate conscience.

The thesis has thus presented the framework proposed. Human dignity would be enshrined as the dominant and guiding principle with rights guaranteed by a constitutionally entrenched bill of rights, and the creation of a new constitutional space for religious freedom. The clash of discrimination and equality would be finally resolved by the invocation of the Hohfeldian rights theory.

So, I argue, in conclusion that introducing a concept of 'constitutional space' would provide the missing principled rationale for limitation of religious freedom without regressively denying and rolling back exemptions. It would break the current mendicant cycle of advocacy, begging for a place for religious freedom in the broken paradigm of exemptions. Instead, there would be a fixed space that is knowable and workable into the future.

Schedule

Statement of the Six Spatial Principles

1. First, the theory relies upon the concept of 'constitutional space': a sphere or 'space' created by a constitution for the functions of government to be performed and where individual rights and freedoms are preserved and protected.
2. Secondly is a framework under which constitutional spaces are organised.
3. Thirdly, under the framework, human dignity must be constitutionally instantiated as:
   a. a universal, innate, and inviolable status;
   b. the source of all guaranteed fundamental rights and freedoms; and
   c. the organising principle for the spatial theoretical framework.

   Its constitutional role is to be acknowledged in all relevant constitutional, legislative, and procedural instruments to ensure that courts implement dignity as it is intended by each instrument.
4. There must be a constitutional arrangement that provides for the framework to have the following spaces for:
   a. government, divided among the legislative, executive, and judicial branches, and, in the case of a federation, that allocates powers among the entities constituting the federated nation; and
   b. a constitutionally entrenched bill of rights guaranteeing fundamental rights and freedoms;
   c. a separated, apolitical, and independent judiciary to act as the guarantor of fundamental rights and freedoms, free from all external influences, including from the legislative and executive branches of government;
   d. valid legislative and procedural machinery implementing the framework to enable the judiciary to perform its role as guarantor.
5. Fifthly, there is the constitutional doctrine of spatial theory, which provides:
   a. all fundamental rights and freedoms are related to one another through human dignity;
   b. there is no *a priori* precedence among rights and freedoms; and
   c. in the event of any conflict between any of the human rights and freedoms expressed in the bill of rights, human dignity is to operate as the mediating principle to determine which right or freedom, limited to that given circumstance, is to take precedence.
6. Sixthly, there is the constitutional doctrine of spatial theory that:
   a. only recognises the state's power and authority to govern provided the power and authority are validly exercised pursuant to the provisions of the constitution and in accordance with principles of human dignity;

b. under which the individual is immune from the interference of the state only to the extent of any right or freedom conferred by the bill of rights and that any such attempted interference is to that extent constitutionally invalid or *ultra vires*;
c. under which the individual is immune from the interference from the state only to the extent of any right or freedom conferred by the bill of rights from any other person and is entitled to the coercive power of the state to protect against any such interference;
d. provides the default position under spatial theory that all constitutionally valid laws must be obeyed;
e. provides that the only exceptions to the requirement that valid laws must be obeyed are in those cases where, in accordance with principles of human dignity, a court or tribunal with jurisdiction has recognised exceptional circumstances excusing obedience; and
f. under which the installation of all constitutional spaces with human dignity as their organising principle and that fully implement each of the spatial principles is to occur:
    i. validly utilising existing constitutional mechanisms;
    ii. over such a period as may be necessary to ensure that the content and boundaries of each space created implements human dignity as the status of all persons within the subject jurisdiction and accords them with all rights and freedoms that derive from that status;
    iii. ensuring during the period of implementation that each right and freedom is enforceable through the courts by remedies appropriate to ensuring those rights and freedoms are known and respected throughout the jurisdiction; and
    iv. after such a period, by taking such steps as are constitutionally necessary to entrench the constitutional spaces for human rights and freedoms so that they entrenched and cannot be amended, repealed, or varied by any arm of government or any other agency.

Bibliography

A Articles/Books/Reports

Adams, Tim, 'Artificial intelligence: 'We're like children playing with a bomb'", *The Guardian* (online, 12 June 2018) <https://www.theguardian.com/technology/2016/jun/12/nick-bostrom-artificial-intelligence-machine>

Agarwal, Monty, *Enslavement, Persisting through our Political Economy* (Cambridge Scholarly Publishing, 2018)

Agrawal, Ajay et al, *Prediction Machines: The Simple Economics of Artificial Intelligence* (Harvard Business Review Press, 2018)

Ahdar, Rex, 'Exemptions for Religion or Conscience under the Canopy of the Rule of Law' (2017) 5 *Journal of Law, Religion and State* 185

Ahdar, Rex, and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013)

Alidadi, Katayoun, 'Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment?' (2012) 37(6) *European Law Review* 693

Allan, James, 'A Humean Take on Religious Freedom', in Robert Forsyth and Peter Kurti (eds), *Forgotten Freedom No More: Protecting Religious Liberty in Australia* (Connor Court, 2020)

Allan, TRS, *Constitutional Justice—A Theory of the Rule of Law* (Oxford University Press, 2001)

Anderson, Elizabeth, *Private Government—How Employers Rule Our Lives (And Why We Don't Talk About It)* (Princeton University Press, 2017)

Anderson, Kurt, *Fantasyland: How America Went Haywire—A 500 Year History* (Ebury Press, 2017)

Appelbaum, Paul S, 'Coping with the Ethical Conundra of Forensic Psychiatry: A Tribute to Howard Zonana, MD' (2010) 38(4) *Journal of the American Academy of Psychiatry and the Law Online* 551–8 <http://jaapl.org/content/38/4/551>

Appleby, Gabrielle et al, *Australian Public Law* (Oxford University Press, 2nd ed, 2014)

Arendt, Hannah, *Lectures on Kant's Political Philosophy* (University of Chicago Press, 1992)

——— *On Revolution* (Penguin Books, 2006)

——— *The Human Condition* (University of Chicago Press, 2nd ed, 1998)

Aroney, Nicholas, 'Can Australian Law Better Protect Freedom of Religion?' (2019) 93(9) *Australian Law Journal* 708

——— 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153

——— 'The Rise and Fall of Human Dignity' (2020) *Brigham Young University Law Review* (forthcoming) <https://ssrn.com/abstract=3661016>

——— and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' (2020) 47(1) *University of Western Australia Law Review* 42

Asimov, Isaac, 'The Three Laws', *Compute! Magazine* (online, November 1981) <https://archive.org/stream/1981-11-compute-magazine/Compute_Issue_018_1981_Nov#page/n19/mode/2up>

Aslan, Reza, *God—A Human History of Religion* (Corgi Books, 2018)

Australian Associated Press, 'South Australia Catholic Church to Ignore Law on Reporting Confessions of Abuse', *The Guardian* (online, 15 June 2018) <https://www.theguardian.com/world/2018/jun/15/south-australia-catholic-church-to-ignore-law-on-reporting-confessions-of-abuse>

Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, 2019) <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

Australian Government, *Australian Government Response to the Religious Freedom Review* (December 2018) <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>

Australian Human Rights Commission, *War and Peace: The Anzac Spirit and Human Rights* (Seminar Paper, 2015) <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_ANZAC_SeminarPapers_2015.pdf>

——— *Artificial Intelligence: Governance and Leadership* (2019) <https://tech.humanrights.gov.au/sites/default/files/2019-02/AHRC_WEF_AI_WhitePaper2019.pdf>

Australian Law Reform Commission, *Background Paper: Inquiry into Religious Exemptions in Anti-discrimination Legislation* (Report, 2019) <https://www.alrc.gov.au/wp-content/uploads/2019/08/background_paper_religious_freedom_inquiry-1.pdf>

——— 'Traditional Rights and Freedoms—Encroachments by Commonwealth Laws' (ALRC Interim Report 127, 2015)

Australian Medical Council, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (Report, July 2009)

Babie, Paul, and Joshua Neoh, 'A Statement on Inclusive Law and Religion' (2018) 39 *Adelaide Law Review* 203

Babie, Paul, and Megan Lawson, 'The Law of Marriage Equality in Australia: The Shortest Distance Between Two Points?' (2017) 3 *Interface Theology* 1 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>

Babie, Paul, and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012)

Babie, Paul, and Rick Sarre (eds), *Religion Matters: The Contemporary Relevance of Religion* (Springer Nature, 2020)

Babie, Paul, Joshua Neoh, James Krumery-Quinn and Chong Tsang, *Religion and Law in Australia* (Wolters Kluwer, 2015)

Babie, Paul T, Neville G Rochow and Brett G Scharffs, 'Creating and Conserving Constitutional Space', in Paul T Babie, Neville G Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020)

Bakan, Joel, *The Corporation—The Pathological of Pursuit of Profit and Power* (Constable, 2005)

Bannister, Judith et al, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015)

Baradaran-Robison, Shima, Brett Scharffs, and Elizabeth Sewell, 'Religious Monopolies and the Commodification of Religion' (2005) 32(4) *Pepperdine Law Review* <https://digitalcommons.pepperdine.edu/plr/vol32/iss4/6/>

Barak, Aharon, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015)

Baral, Stefan David et al, 'The Public Health Responses to COVID-19: Balancing Precaution and Unintended Consequences' (2020) *Elsevier Public Health Emergency Collection* 12

Barker, Eileen (ed), *The Centrality of Religion in Social Life: Essays in Honour of James A. Beckford* (Routledge, 2008)

Barker, Renae, 'Freedom of Religion Without a Bill of Rights: Australia's Peculiar Approach to Tackling Freedom of Religion and Other Human Rights Issues', in Paul T Babie, Neville Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar 2020)

Barker, Renae, *State and Religion: The Australian Story* (Routledge, 2019)

Barrat, James, *Our Final Invention: Artificial Intelligence and the End of the Human Era* (Thomas Dunne Books, 2013)

Baskerville, Stephen, 'The New Politics of Sex' (2018) 9(1) *Western Australian Jurist* 57

Baskerville, Stephen, 'The Sexual Agenda and Religious Freedom: Challenges in the Western world' (2011) 4(2) *International Journal for Religious Freedom* 91

Baxendale, Rachel, 'Human rights committee should be abolished, Liberal MPs say', *The Australian* (online, 7 August 2018) < *https://www.theaustralian.com.au/news/human-rights-committee-should-be-abolished-liberal-mps-say/news-story/97d35636570dbd4051f65646536af120* >

Baxt, Robert, 'Insights into the Commission: Views of a Former Chairman', in Ray Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, 2000)

Bazerman, Max H., and Ann E. Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do about It* (Princeton University Press 2011)

Beaton-Wells, Caron, *Proof of Antitrust Markets in Australia* (Federation Press, 2003)

Beaudoin, Jaral-A and Errol Mendes (eds), *Canadian Charter of Rights and Freedoms* (Carswell Thompson Professional Publishing, 2006)

Beck, Luke, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018)

Beck, Luke, 'The Case Against Improper Purpose as a Touchstone for Invalidity Under Section 116 of the Australian Constitution' (2016) 44(3) *Federal Law Review* 505

Beck, Luke, 'Higgins' Argument for Section 116 of the Constitution' (2013) 41 (3) *Federal Law Review* 393;

Beck, Luke, 'The Constitutional Prohibition on Imposing Religious Observances' (2017) 41(2) *Melbourne University Law Review* 593

Beduschi, Ana, 'Technology Dominates Our Lives—That's Why We Should Teach Human Rights Law to Software Engineers', *The Conversation* (online, 26 September 2018) <https://theconversation.com/technology-dominates-our-lives-thats-why-we-should-teach-human-rights-law-to-software-engineers-102530?utm>

Benen, Steve, 'Kentucky's Kim Davis Jailed, Held in Contempt', *MSNBC* (online, 3 September 2015) <http://www.msnbc.com/rachel-maddow-show/kentuckys-kim-davis-jailed-held-contempt>

Bennett, B and T Carney, 'Law, Ethics and Pandemic Preparedness: The Importance of Cross-jurisdictional and Cross-cultural Perspectives' (2010) 34(2) *Australian and New Zealand Journal of Public Health* 106

Benson, Iain, 'Civic Virtues and the Politics of "Full Drift Ahead"' (May 2017) Centre for Independent Studies, CIS Occasional Paper 155 <https://www.cis.org.au/app/uploads/2017/06/op155.pdf>

Benson, Iain, 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities' (2011) 21 *Emory International Law Review* 111

Benson, Iain T, "Getting Religion and Belief Wrong by Definition: A Response to Sullivan and Hurd', in Iain T Benson, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius?* (Connor Court, 2019)

Benson, Iain T, 'What Can Be Learned from the Experiences of Various Societies in Dealing with their Principal Trouble Spots?', in Mary Ann Glendon and Hans F Zacher (eds), *Universal Rights in a World of Diversity: The Case of Religious Freedom* (Pontifical Academy of Social Sciences, 2012)

Benson, Iain T, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius?* (Connor Court, 2019)

Berlin, Isaiah, 'Two Concepts of Liberty', in Henry Hardy (ed), *Liberty* (Oxford University Press, 2016)

Blackwell, Eoin, 'Archbishop Says Child Abuse Response Appalling, 'Kind of Criminal Negligence', *Huffington Post* (online, 23 February 2017) <https://www.huffingtonpost.com.au/2017/02/22/five-archbishops-to-face-child-abuse-royal-commission_a_21719768/>

Bloom, Harold, *The American Religion—The Emergence of the Post-Christian Nation* (Simon & Schuster, 1992)

Bloom Jr, Lackland H, *Do Great Cases Make Bad Law?* (Oxford University Press, 2014)

Blore, Kent, 'Lindsay v The Queen: Homicide and The Ordinary Person at The Juncture of Race and Sexuality' (2018) 39 *Adelaide Law Review* 160

Bork, Robert, *The Antitrust Paradox* (Basic Books, 1978)

Bostrom, Nick, *Superintelligence: Paths Dangers, Strategies*, (Oxford University Press, 2014)

Bowman, Matthew, *Christian: The Politics of a Word in America* (Harvard University Press, 2018)

Brandeis, Louis D, 'The Curse of Bigness', in *Miscellaneous Papers of Louis D Brandeis*, ed Osmond K Fraenkel and Clarence M Lewis (Kennikat Press, 1965)

Wu, Timothy, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018)

Brandis George, 'The Debate We Didn't Have to Have: The Proposal for an Australian Bill of Rights', in Leeser, Julian, and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009)

Brazil, Patrick 'The Ascertainment of Facts in Australian Constitutional Cases' (1970-1971) 4(1) *Federal Law Review* 65

Brennan, Frank, 'An Australian Convert from a Constitutional Bill of Rights' (1996) 7 *Public Law Review* 132

——— 'Frank Brennan: Why I Will Break the Law Rather Than the Seal of Confession', *The Sydney Morning Herald* (online, 15 August 2017) <https://www.smh.com.au/opinion/frank-brennan-why-i-will-break-the-law-rather-than-the-seal-of-confession-20170815-gxw7it.html>

——— 'Opinion: Do We Need Laws to Protect Religious Freedom in Australia?', *Australian Broadcasting Corporation* (online, 20 February 2020) <https://www.abc.net.au/religion/frank-brennan-do-we-need-new-laws-to-protect-religious-freedom/11984926>

——— 'Thirty Years On, Do We Need a Bill of Rights?' (1996) 18 *Adelaide Law Review* 123

——— and Michael Casey, 'Nine Questions about Religious Freedom', in Frank Brennan, MA Casey, and Greg Craven (eds), *Chalice of Liberty—Protecting Religious Freedom in Australia* (Connor Court, 2018)

——— et al, National Human Rights Consultation Report (Attorney-General's Department September 2009)

Brooks, Joanna, 'Explaining Polygamy and Its History in the Mormon Church', *The Conversation* (online, 18 August 2017) <https://theconversation.com/explaining-polygamy-and-its-history-in-the-mormon-church-81384>

Brown, Clarence, 'Introduction: Zamyatin and the Persian Rooster', in Yevgeny Zamyatin, *We* (trans. Clarence Brown, Penguin Group, 1992)

Burston, Jane, 'Four Technological Innovations That Can Help Reduce Urban Carbon Emissions', *Horizons Smart Cities* (online, 6 June 2016) <https://www.citymetric.com/horizons/four-technological-innovations-can-help-reduce-urban-carbon-emissions-2103>

Burton, Tom, 'National Cabinet Creates a New Federal Model', *Financial Review* (online, 18 March 2020) <https://www.afr.com/politics/federal/national-cabinet-creates-a-new-federal-model-20200318-p54bar>

Bussey, Barry W, 'Courts Have No Business Reviewing Religious Decisions', *National Post* (online, 9 November 2017) <https://nationalpost.com/opinion/courts-have-no-business-reviewing-religious-decisions>

Byrnes, Andrew et al 'Bill of Rights in Australia: History, Politics and Law' (2009) 15(1) *Australian Journal of Human Rights* 175

Chace, Callum, *The Economic Singularity: Artificial Intelligence and the Death of Capitalism* (The Three Cs, 2016)

Charlesworth, Hilary et al, *No Country is an Island: Australia and International Law* (University of New South Wales Press, 2006)

——— 'The Australian Reluctance About Rights' (1993) 31(1) *Osgoode Hall Law Journal* 208

Chemerinsky, Erwin, and Howard Gillman, *The Religion Clauses: The Case for Separating Church and State* (Oxford University Press, 2020)

Cherniss, Joshua L and Steven B Smith (eds), *The Cambridge Companion to Isaiah Berlin* (Cambridge University Press, 2018)

Chernow, Ron, *Titan—The Life of John D. Rockefeller, Sr* (Random House, Inc. 1998)

Cholbi, Michael, *Understanding Kant's Ethics* (Cambridge University Press, 2016)

Chui, Michael, James Manyika, and Mehdi Miremadi, 'Where Machines Could Replace Humans—And Where They Can't (Yet)' *McKinsey Quarterly* (online, July 2016) <https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/where-machines-could-replace-humans-and-where-they-cant-yet>

Clark, Elizabeth A, and Brett Scharffs, *Religion and Law in the USA* (Wolters Kluwer, 2016)

Clarke, Steven, 'Conscientious Objection in Healthcare, Referral and the Military Analogy' (2017) 43 *Journal of Medical Ethics* 218.

Coleman, Paul, *Censored: How European 'Hate Speech' Laws are Threatening Freedom of Speech* (Kairos Publications, 2nd ed, 2016)

Collier, Charles W, 'The Improper Use of Presumptions in Recent Criminal Law Adjudication' (1986) 38 *Stanford Law Review* 423

Collings, Justin, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951–2001* (Oxford University Press, 2015)

Compton, Todd, *In Sacred Loneliness: The Plural Wives of Joseph Smith* (Signature Books, 1997)

Cooke, Lord Robin, *Turning Points in the Common Law (The Hamlyn Lectures)* (Sweet & Maxwell, 1997)

Coorey, Phillip, 'Philip Ruddock to take steam out of same-sex marriage debate', *Australian Financial Review* (online, 22 November 2017) *<https://www.afr.com/politics/philip-ruddock-to-take-steam-out-of-samesex-marriage-debate-20171122-gzq9j7>*

Copenhaver, Brian, 'Dignity, Vile Bodies, and Nakedness: Giovanni Pico and Gianozzo Manetti', in Remy Debes (ed), *Dignity: A History* (Oxford University Press, 2017)

Corbin, Arthur L, 'Jural Relations and Their Classification' (1920–1921) 30 *Yale Law Journal* 226

Crawford, James, *Brownlie's Principles of International Law* (Oxford University Press, 8th ed, 2012)

Creighton, Adam, 'Let's Hope the Economic Train Crash Is Worth It', *The Australian* (online, 7 May 2020) <https://www.theaustralian.com.au/commentary/coronavirus-lets-hope-the-economic-train-crash-is-worth-it/news-story/6a1c4bcf7f35a38c1b035802a12cbe21>

Creveld, Martin van, *Equality: The Impossible Quest* (Castalia House, 2015)

Davey, Melissa, 'George Pell Committal: Tension, Theatre and Tedium in Courtroom 22', *The Guardian* (online, 30 March 2018) <https://www.theguardian.com/australia-news/2018/mar/31/george-pell-committal-tension-theatre-and-tedium-in-courtroom-22>

Deagon, Alex, 'Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom' (2018) 46 *Federal Law Review* 113

——— 'Religious Schools, Religious Vendors and Refusing Services after Ruddock: Diversity or Discrimination' (2019) 93 *Australian Law Journal* 766.

——— 'The Symbolic Significance of God in the Australian Constitution', *talkabout* (Blog post, 30 November 2020) <https://talkabout.iclrs.org/2020/11/30/symbolic-significance-of-god-in-the-australian-constitution/>

——— and Benjamin Saunders, 'Principles, Pragmatism and Power: Another Look at the Historical Context of Section 116' (2020) 43(3) *Melbourne University Law Review* 1

Debes, Remy (ed), *Dignity: A History* (Oxford University Press, 2017)

de la Fuente, Oscar Perez, 'Reasonable Accommodation Based on Religious Beliefs or Practices: A Comparative Perspective Between the American, Canadian and European Approaches' (2018) 10 *Age of Human Rights Journal* 85

della Mirandola, Giovanni Pico, *Oration on the Dignity of Man*, tr A Robert Caponigri (Gateway Editions, 1984)

Detmold, MJ, *Courts and Administrators: A Study in Jurisprudence* (Weidenfeld & Nicolson, 1989)

——— 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228

Devine, Miranda, 'Doctor Risks His Career after Refusing Abortion Referral', *Herald Sun* (online, 5 October 2013) <https://www.heraldsun.com.au/news/opinion/doctor-risks-his-career-after-refusing-abortion-referral/s-story/a37067e66ed4f8d9a07ec9cb6fd28cf5>

Dicey, AV, *Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan 1979)

Dixon, Rosalind, 'An Australian (Partial) Bill of Rights' (2016) 14(1) *International Journal of Constitutional Law* 80

——— (ed), *Australian Constitutional Values* (Hart, 2018)

Dixon, Sir Owen, *Jesting Pilate: And Other Papers and Addresses* (Law Book Company, 1965)

Domingos, Pedro, *The Master Algorithm* (Penguin Random House, 2015)

Dreher, Rod, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (Sentinel, 2017)

Durham, Jr, W Cole, 'Religious Freedom in a Worldwide Setting: Comparative Reflections' (2012) Pontifical Academy of Social Sciences, *Acta* 17 <*www.pass.va/content/dam/scienzesociali/pdf/acta17/acta17-durham.pdf*>

——— and Donlu Thayer, *Religion and Equality: Law in Conflict* (Routledge, 2016)

Durkin, Erin, 'Elizabeth Warren Unveils Bold New Plan to Reshape American Capitalism' *The Guardian* (online, 16 August 2018) <https://www.theguardian.com/us-news/2018/aug/15/elizabeth-warren-accountable-capitalism-act-richest-companies>

Dutton, Tim, 'An Overview of National AI Strategies', *Medium* (online, 28 June 2018) <*https://medium.com/politics-ai/an-overview-of-national-ai-strategies-2a70ec6edfd*>

Düwell, Marcus, et al (eds), *Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014)

Dworkin, Ronald, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta Law Review* 324

——— *Law's Empire* (Fontana Press, 1986)

——— *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000)

———*Taking Rights Seriously* (Harvard University Press, 1977)

Dwoskin, Elizabeth, 'Facebook Content Moderator Says She Got PTSD While Reviewing Images', *The Sydney Morning Herald* (online, 25 September 2018) <https://www.smh.com.au/business/workplace/facebook-content-moderator-says-she-got-ptsd-while-reviewing-images-20180925-p505sg.html>

Easterbrook, Frank H, and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1996)

Eberle, Edward J, *Dignity and Liberty—Constitutional Visions in Germany and the United States* (Praeger, 2002)

——— 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2012) 33 *Liverpool Law Review* 201.

Editorial, 'Anti-discrimination Complaint 'An Attempt to Silence' the Church over Same-sex Marriage, Hobart Archbishop Says', *Australian Broadcasting Corporation News* (online, 28 September 2015) <https://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>

Editorial, *Catholic Weekly* (online, 7 May 2016) <https://www.catholicweekly.com.au/anti-discrimination-proceedings-dropped-but-archbishop-porteous-disappointed/>

Editorial, 'Former Catholic Archbishop Philip Wilson Wins Appeal, Has Conviction Overturned', *The Sydney Morning Herald* (online, 6 December 2018) <https://www.smh.com.au/national/nsw/former-catholic-archbishop-philip-wilson-wins-appeal-has-conviction-overturned-20181206-p50knr.html>

Editorial, 'Israel Folau: News, Commentary and Analysis Surrounding the Controversial rugby Player', *The Australian* (online, 7 May 2020) <https://www.theaustralian.com.au/topics/israel-folau>

Editorial, 'Pope Francis Orders Bishops to Report Sex Abuse, Allows Direct Complaints to Vatican' *ABC News* (online, 9 May 2019) *https://www.abc.net.au/news/2019-05-09/pope-issues-decree-ordering-bishops-to-report-sex-abuse/11099184*

Editorial, 'Rugby Australia and Israel Folau Settle Legal Dispute over Sacking', *Australian Broadcasting Corporation* (online, 5 December 2019) <https://www.abc.net.au/news/2019-12-04/rugby-australia-israel-folau-mediation-settlement/11765866>

Eire, Carlos M. N., *Reformations: The Early Modern World, 1450–1650* (Yale University Press, 2016)

Ellis, Evelyn, and Phillipa Watson, *EU Anti-Discrimination Law* (Oxford University Press, 2nd ed, 2012)

Erbsen, Allan, 'Constitutional Spaces' (2011) 95 *Minnesota Law Review* 1168

Eubanks, Virginia, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*, (Macmillan, 2018)

European Court of Human Rights, *Guide to Article 9: Freedom of Thought, Conscience and Religion* (Council of Europe, 2015)

Evans, Carolyn, 'Legal Aspects of The Protection of Religious Freedom in Australia' (Centre for Comparative Constitutional Studies, Melbourne Law School, June 2009).

——— *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012)

——— and Cate Read, 'Religious Freedom as an Element of the Human Rights Framework' in Paul T Babie, Neville Rochow QC and Brett G Scharffs (eds), *Freedom of Religion or Belief Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020)

Evans, Gareth (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann Educational Australia, 1977)

Fea, John, *Was America Founded as a Christian Nation? A Historical Introduction* (Westminster John Knox Press, rev ed, 2016)

Fels, Allan, 'Watersheds, Minefields and the Role of the Commission', in Ray Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, 2000)

Ferguson, Niall, *The Ascent of Money: A Financial History of the World* (Penguin Group, 2008)

——— *Empire: How Britain Made the Modern World* (Penguin Group, 2003)

Ferguson, Richard, 'Michaelia Cash rules out broad, 'constitutionally barred' religious freedoms law' *The Australian* (2 September 2021) <https://www.theaustralian.com.au/nation/michaelia-cash-rules-out-broad-constitutionally-barred-religious-freedoms-law/news-story/db1ad0952e53bc5f3ed927af414b2c24>

Finlay, Lorraine, Joshua Forrester, and Augusto Zimmermann, 'Does Australia Need a Religious Freedom Act?', in Iain T Benson, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius?* (Connor Court, 2019)

Finnis, John, 'Some Professorial Fallacies About Rights' (1971) *Adelaide Law Review* 377

Fitzgerald, Frances, *The Evangelicals: The Struggle to Shape America* (Simon & Schuster, 2017)

Fitzsimmons, Caitlin, "'I Knew It Was Going to Be Offensive": Israel Folau Stands by Social Media Posts', *The Sydney Morning Herald* (online, 19 October 2019) <https://www.smh.com.au/national/nsw/i-knew-it-was-going-to-be-offensive-israel-folau-stands-by-social-media-posts-20191019-p5328r.html>

Fletcher, George, 'Human Dignity as a Constitutional Value' (1984) 22 *University of Western Ontario Law Review* 178

Flikschuh, Katrin, *Freedom—Contemporary Liberal Perspectives* (Polity Press, 2007)

Ford, Zack, 'Colorado Supreme Court Rejects Anti-Gay Baker's Claim of Religious Freedom,' *Think Progress* (online, 25 April 2016) <http://thinkprogress.org/lgbt/2016/04/25/3772462/coloradosupreme-court-same-sex-cake-case/. 7>

Forsyth, Robert, 'Freedom of Religion: The New Context and a Real Threat', in Iain T Benson, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius?* (Connor Court, 2019)

Foster, Neil, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5(3) *Oxford Journal of Law and Religion* 385

——— 'Respecting the Dignity of Religious Organisations: When is it Appropriate for Courts to Decide Religious Doctrine?' (2020) 47 *University of Western Australia Law Review* 175

Frankopan, Peter, 'Global Britain was built as a narco-empire', *The Spectator* (online, 4 August 2018) <https://www.spectator.co.uk/2018/08/global-britain-was-built-as-a-narco-empire/>

Freidal, Frank and Hugh Sidey, *The Presidents of the United States of America* (White House Historical Association, 2006)

Friedman, Milton, *Capitalism and Freedom* (University of Chicago Press, 1962)

Fukuyama, Francis, *Identity: The Demand for Dignity and the Politics of Resentment* (Profile Books, 2018)

——— *The End of History and the Last Man* (Free Press, 1992)

Gageler, Steven, 'Deference' (2015) 22 *Australian Journal of Administrative Law* 151

Galloway, Scott, *The Four—The Hidden DNA of Amazon, Apple, Google and Facebook* (Bantam Press, 2017)

Galston, William A, *Anti-Pluralism: The Populist Threat to Liberal Democracy (Politics and Culture)* (Yale University Press, 2018)

Gatti, Hilary, *Giordano Bruno and Renaissance Science* (Cornell University Press, 1999)

Gaze, Beth, and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017)

General Medical Council, *Good Medical Practice* (Report, 2013)

——— *Confidentiality* (Report, 2009)

George, Robert P, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (ISI books, 2013)

Gibbs, Sir Harry, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1

Gibson, Matthew, 'The God Dilution? Religion, Discrimination and The Case for Reasonable Accommodation' (2013) 72(3) *Cambridge Law Journal* 578

Ginsburg, Tom and Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar, 2011)

Gleeson Justin, T, *Constituting Law: Legal Argument and Social Values* (The Federation Press, 2011)

Gleeson, Kate, 'Exceptional Sexual Harms: The Catholic Church and Child Sexual Abuse Claims in Australia' (2017) 27(6) *Social and Legal Studies* 734

Glendon, Mary Ann, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002)

Goldsworthy, Jeffrey, 'Constitutional Interpretation: Originalism' (2009) 4 *Philosophy Compass* 682

——— 'Interpreting the Constitution in its Second Century' (2000) 24(3) *Melbourne University Law Review* 677

——— *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999)

Goodwin, Sam, '"They're Not Allowed": NRL Rocked by Religious Vaccination Controversy', *Yahoo Sport Australia* (online, 7 May 2020) <https://au.sports.yahoo.com/nrl-2020-canberra-players-refuse-flu-shot-religious-grounds-214150496.html>

Gould, Stephen Jay *Rocks of Ages: Science and Religion in the Fullness of Life* (Ballantine Books, 2002)

Grattan, Michelle, 'Religious Discrimination Legislation Would Hit Big Companies Harder than Small Business', *The Conversation* (online, 29 August 2019) <https://theconversation.com/religious-discrimination-legislation-would-hit-big-companies-harder-than-small-business-122623>

Gray, John, *Seven Types of Atheism* (Allen Lane, 2018)

Grayling, AC, *The God Argument—The Case Against Religion and for Humanism* (Bloomsbury, 2013)

——— *Toward the Light of Liberty: The Struggle for Freedom and Rights That Made the Modern Western World* (Walker and Company, 2007)

Greenfield, Kent, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, 2010)

Greig, DW and JLR Davis, *The Law of Contract* (Law Book Company, 1987)

Grenfell, Laura and Sarah Moulds 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *University of New South Wales Law Journal* 40

Griffin, James, *On Human Rights* (Oxford University Press, 2013)

Griffiths, Elizabeth, 'The "Reasonable Accommodation" of Religion: Is This a Better Way of Advancing Equality in Cases of Religious Discrimination?' (2016) 16 *International Journal of Discrimination and the Law* 161

Grigg, Brendan, 'Fundamental Concepts for Australian Real Property Law: Tenure, Estates, Possession and Adverse Possession', in Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge, 2016)

Guest, K, The Elusive Promise of Equality: Analysing the Limits of the *Sex Discrimination Act 1984* (Research Paper No 16/1998, Department of the Parliamentary Library, 1998–1999)

Gunkel, David J, *The Machine Question—Critical Perspectives on AI, Robots, and Ethics* (MIT Press, 2017)

Guyer, Paul, *Kant on Freedom, Law and Happiness* (Cambridge University Press, 2000)

Guynn, Jessica, 'Facebook Wants to Save Your Face. Should You Say Yes to Facial Recognition?', *USA TODAY* (online, 19 April 2018) <https://www.usatoday.com/story/tech/news/2018/04/19/facebook-growing-use-facial-recognition-raises-privacy-concerns/526937002/>

Hall, J W (ed), *The Trial of William Joyce* (The Legal Classics Library, 1987)

Hanrahan, Catherine, 'Data Shows Coronavirus Can Only Be Controlled If 8 Out of 10 Australians Stay Home', *Australian Broadcasting Corporation Story Lab* (online, 25 March 2020) <https://www.abc.net.au/news/2020-03-25/coronavirus-covid-19-modelling-stay-home-chart/12084144>

Harari, Yuval Noah, *Homo Deus—A Brief History of Tomorrow*, (Harvill Secker, 2014)

——— *Sapiens—A Brief History or Humankind* (Penguin, Random House UK, 2011)

——— 'Why Technology Favors Tyranny', *The Atlantic* (online October 2018) <https://www.theatlantic.com/magazine/archive/2018/10/yuval-noah-harari-technology-tyranny/568330/>

Harkins, III, Malcolm J, 'The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System' (2014) 7 *Saint Louis University Journal of Health Law & Policy* 201

Harrison, Joel, 'Religious Liberty and the Ruddock Review: Negotiating Competing Claims in a Plural Society', *ABC Religion & Ethics* (online, 7 November 2018) <https://www.abc.net.au/religion/religious-liberty-and-the-ruddock-review/10473684>

——— 'The Problem and the Promise of Religious Liberty', in Paul T Babie, Neville Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020)

Hart, HLA, *The Concept of Law* (Oxford University Press, 1961)

Hassan, Steven, *Freedom of Mind: Helping Loved Ones Leave Controlling People, Cults, and Beliefs* (Freedom of Mind Press, 2012)

Hasson, Kevin Seamus, *Believers, Thinkers, and Founders: How We Came to be One Nation Under God* (Image, 2016)

——— *The Right to be Wrong: The Enduring War Over Religion in America* (Encounter Books 2005)

Heilbron, J L, *Galileo* (Oxford University Press, 2010)

Henderson, Caspar, 'Superintelligence by Nick Bostrom and a Rough Ride to the Future by James Lovelock—Review' *The Guardian* (online, 17 July 2014) <https://www.theguardian.com/books/2014/jul/17/superintelligence-nick-brostrom-rough-ride-future-james-lovelock-review>

Henderson, Gerard, 'Royal Commission Denies George Pell Legal Justice' *The Australian* (online, 16 May 2020) <https://www.theaustralian.com.au/inquirer/royal-commission-denies-george-pell-legal-justice/news-story/e9c47ace1f8b6ea8a0ad3fa0dd025038>

Heskett, James, 'Is It Time to Break Up Amazon, Apple, Facebook, or Google?' *Harvard Business School—Working Knowledge* (online, 6 December 2017) <https://hbswk.hbs.edu/item/is-it-time-to-break-up-amazon-apple-facebook-or-google?cid=wk-rss>

John Dyson Heydon 'Constitutional Facts' in (2011) 23 *Upholding the Australian Constitution: The* Samuel Griffith Society *Proceedings* 85

——— *Cross on Evidence* (Butterworths, 6th ed, 2000)

——— *The Restraint of Trade Doctrine* (Lexis Nexus Butterworths, 3rd ed, 2008)

Hicks, Donna, *Dignity: Its Essential Role in Resolving Conflict* (Yale University Press, 2011)

Hill, Christopher, *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the 17th Century* (Martin Secker & Warburg, 1958; reprinted St Martin's, 1997)

Hill, Jr, Thomas E, *Human Welfare and Moral Worth: Kantian Perspectives* (Oxford University Press, 2002)

——— 'Kantian Perspectives on the Rational Basis of Human Dignity', in M Düwell et al (eds) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014)

Hilmer, Frederick et al, *National Competition Policy: Report of the Independent Committee of Inquiry* (Australian Government Publishing Service, 1993)

Hinn, Costi W, *God, Greed, and the (Prosperity) Gospel* (Zondervan, 2019)

——— and Anthony G Wood, *Defining Deception—Freeing the Church from the Mystical-Miracle Movement* (Southern California Seminary Press, 2018)

Hinton, Martin and John M Williams (eds), *The Crown: Essays on Its Manifestation, Power and Accountability* (University of Adelaide Press, 2018)

Hitchens, Christopher, *God is not Great* (Atlantic Books, 2007)

Hjelmgarrd, Kim, 'Nuclear War, Extreme Weather Top List of 2018 Global Threats' *The Sydney Morning Herald* (online, 18 January 2018) <https://www.smh.com.au/world/nuclear-war-extreme-weather-top-list-of-2018-global-threats-20180118-h0k0ce.html>

Hodges, Andrew, *Alan Turing: The Enigma* (Vintage, 2012)

Hoffmann, Tammy, and Paul Glasziou, 'COVID-19: We Need a Plan B', *InDaily* (online, 22 April 2020) <https://indaily.com.au/opinion/2020/04/22/covid-19-we-need-a-plan-b/>

Hogg, Peter W, *Constitutional Law of Canada* (Thomson Carswell, 2005)

Hohfeld, Wesley Newcomb, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916) 26 *Yale Law Journal* 710

——— 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16

Holyoake, George Jacob, *English Secularism: A Confession of Belief* (Open Court Publishing, 1896)

Hostettler, John, *Thomas Erskine and Trial by Jury* (Waterside Press, 2010)

Houlgate, Laurence, *Understanding Immanuel Kant: The Smart Student's Guide to Grounding for the Metaphysics of Morals* (Independently Published, 2018)

Howe, Joanne and Suzanne Le Mire, 'Medical Referral for Abortion and Freedom of Conscience in Australian Law' (2019) *Journal of Law and Religion* 85

Hume, Mike, *Trigger Warning—Is the Fear of Being Offensive Killing Free Speech?* (Williams Collins, 2015)

Hunt, Lynn, *Inventing Human Rights: A History* (W Norton, 2007)

Hurd, Elizabeth Shakman, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press, 2015)

Hurwitz, Brian and Ruth Richardson, 'Swearing to Care: The Resurgence in Medical Oaths' (1997) *British Medical Journal*

Inglis, Tom, *Moral Monopoly—The Rise and Fall of the Catholic Church in Modern Ireland* (University College Dublin Press, 2nd ed, 1998)

Irving, Helen, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999)

Jericho, Greg, 'What Australia Can Already See of the Economic Damage of Coronavirus is Scary Indeed', *The Guardian* (online, 23 April 2020) <https://www.theguardian.com/business/grogonomics/2020/apr/23/what-australia-can-already-see-of-the-economic-damage-of-coronavirus-is-scary-indeed>

Jeter Hansen, Amy, 'Artificial Intelligence in Medicine—Predicting Patient Outcomes and Beyond', *Scope, Stanford Medicine* (online, 8 May 2018) <https://scopeblog.stanford.edu/2018/05/08/artificial-intelligence-in-medicine-predicting-patient-outcomes-and-beyond/>

Jones, Timothy W, 'Royal Commission Recommends Sweeping Reforms for Catholic Church to End Child Abuse', *The Conversation* (online, 15 December 2017) <https://theconversation.com/royal-commission-recommends-sweeping-reforms-for-catholic-church-to-end-child-abuse-89141>

Kaczor, Christopher, 'The Importance of Dignity: A Reply to Steven Pinker', *Public Discourse* (31 January 2012) <https://www.thepublicdiscourse.com/2012/01/4540/>

Kain, John et al, 'Australia's National Competition Policy' (Brief, Parliamentary Library, June 2001, updated 3 June 2003) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief>

Kant, Immanuel, *Critique of Judgment,* tr Werner S Pluhar (Hackett Publishing Company, 1987)

——— *Critique of Practical Reason: Revised Edition*, tr Mary Gregor (Cambridge University Press, 2015)

——— *Groundwork of the Metaphysics of Morals,* tr Mary Gregor and Jens Timmerman (eds) (Cambridge University Press, 2014)

Karlik, Michael, 'Colorado Supreme Court Recognizes Same-sex Marriages Existed Prior to 2015 U.S. Legalization' *The Gazette* (online, 11 January 2021, updated 9 February 2021) <https://gazette.com/colorado_politics/colorado-supreme-court-recognizes-same-sex-marriages-existed-prior-to-2015-u-s-legalization/article_79e4d866-8688-52c0-8011-60888a3a2773.html>

Kateb, George, *Human Dignity* (Harvard University Press, 2011)

Keay, John, *The Honourable Company—A History of The East India Company* (Harper Collins Publishers 1991)

——— *India, A History: From the Earliest Civilisations to the Boom of the Twenty-First Century* (Harper Press, 2010)

Kelsen, Hans, *Pure Theory of Law*, tr Max Knight (University of California Press, 1967)

Kemsley, Jyllian, 'Air Pollution and Climate Change Top the WHO's List of 10 Threats to Global Health in 2019', *Chemical and Engineering News* (online, 19 January 2019) <https://cen.acs.org/policy/global-health/Air-pollution-climate-change-top/97/i3>

Kentridge, Sir Sydney, 'The Cab Rank Rule—A Response to the Report Commissioned by the Legal Services Board' (Report, 2013)

Kirby, Michael, 'Arguments for An Australian Charter of Rights', *Constitutional Education Fund of Australia* (Blog post, September 2009) <https://www.michaelkirby.com.au/images/stories/speeches/2000s/2009%2B/2398.Cefa_-_Blog_-_Arguments_For_Aust.Charter_Of_Rights.pdf>

——— 'Bill of Rights in Australia: History, Politics and Law'. in Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon (eds), *Bills of Rights in Australia* (University of New South Wales Press, 2009)

——— 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1

Kislowicz, Howard, Richard Haigh, and Adrienne Ng, 'Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom' (2011) 48(3) *Alberta Law Review* 679

Kocourek, Albert, 'Plurality of Advantage and Disadvantage in Jural Relations' (1920) 19(1) *Michigan Law Review* 47

Kolakowski, Leszek, *Main Currents of Marxism*, tr P S Falla (W Norton & Company, 2008)

Kolodizner, Irina, 'The Charter of Rights Debate: A Battle of the Models' (2009) *16 Australian International Law Journal* 219

Koyzis, David T, *Political Visions & Illusions: A Survey and Christian Critique of Contemporary Ideologies* (IVP Academic, 2003)

Koziol, Michael, 'Scott Morrison pledges Religious Discrimination Act but Delays Protections for Gay Students' *The Sydney Morning Herald* (online, 13 December 2018) <https://www.smh.com.au/politics/federal/scott-morrison-pledges-religious-discrimination-act-but-delays-protections-for-gay-students-20181213-p50lyh.html>

Kroll, Andy, 'Meet the Megadonor Behind the LGBTQ Rights Movement', *Rolling Stone* (online, 23 June 2017) <https://www.rollingstone.com/politics/features/meet-tim-gill-megadonor-behind-lgbtq-rights-movement-wins-w489213>

Kruse, Kevin M, *One Nation Under God: How Corporate America Invented Christian America* (Basic Books, 2015)

Kuntz, Thilo, 'German Corporate Law in the 20th Century' in Harwell Wells (ed), *Research Handbook on the History of Corporate and Company Law* (Edward Elgar, 2017)

Kurti, Peter, 'The Forgotten Freedom: Threats to Religious Liberty in Australia' (Centre for Independent Studies, 2014) <https://www.cis.org.au/app/uploads/2015/07/pm139.pdf>

——— *The Tyranny of Tolerance: Threats to Religious Liberty* (Connor Court, 2017)

Lacorne, Denis, *Religion in America: A Political History*, tr George Holoch (Columbia University Press, 2011)

——— *The Limits of Tolerance: Enlightenment Values and Religious Fanaticism*, tr C Jon Delogu and Robin Emlein (Columbia University Press, 2019)

Langston, Douglas C, *Conscience and Other Virtues: From Bonaventure to Macintyre* (Pennsylvania State University Press, 2001)

Lazarev, Nikolai, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights' [2005] *Monash University Electronic Journal of Law* 9 <http://classic.austlii.edu.au/au/journals/MurUEJL/2005/9.html>.

Leeser, Julian, and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009)

Leher, Stephan P, *Dignity and Human Rights—Language, Philosophy, and Social Realizations* (Routledge, 2018)

Leigh, Ian, 'The Legal Recognition of Freedom of Conscience as Conscientious Objection: Familiar Problems and New Lessons', in R Ahdar (ed), *Research Handbook on Law and Religion* (Edward Elgar, 2018)

Levine, Sam, '"They Threw Us into Chaos": Wisconsin Lockdown Ruling Latest in Partisan War', *The Guardian* (online, 15 May 2020) *<https://www.reporter.am/they-threw-us-into-chaos-wisconsin-lockdown-ruling-is-latest-in-partisan-war-us-news/>*

Levin, Yuval, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of the Right and Left* (Basic Books, 2014)

Lewis, Anthony, *Freedom for the Thought We Hate: A Biography of the First Amendment* (Basic Books, 2007)

Lewis, Milton, 'A Brief History of Human Dignity: Idea and Application', in J Malpas and N Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer, 2007)

Lia, Brynjar, *Globalisation and the Future of Terrorism, Patterns and Predictions* (Routledge, 2005)

Little, David, *Religion, Order, and Law—A Study in Pre-Revolutionary England* (University of Chicago Press, 1984)

Livingstone, Tess, '600 Priests Reject Law on Seal of Confession', *The Australian* (online, 4 July 2018) <https://www.theaustralian.com.au/national-affairs/state-politics/600-priests-reject-law-on-seal-of-confession/news-story/84de20ef2e64cdee4aa325a3c936958d?nk=4a15b2adff77a86919004daeb00eb052-1542504021>

Loughlin, John, 'Human Dignity: The Foundation of Human Rights and Religious Freedom' (2016) 19 *Memoria y Civilización* 313

Maclure, Jocelyn, and Charles Taylor, *Secularism and Freedom of Conscience*, tr Jane Marie Todd (Harvard University Press, 2011)

Maddox, Marion, *God Under Howard: The Rise of the Religious Right in Australian Politics* (Allen & Unwin, 2005)

Malic, Kenan, *The Quest for a Moral Compass—A Global History of Ethics* (Melville House, 2014)

Marmor, Andrei, 'The Pure Theory of Law', ed Edward N Zalt, [2016] (Spring) *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/spr2016/entries/lawphil-theory/>

Marr, David, 'The Child Abuse Commission Didn't Flinch. Can Australia Show the Same Courage?', *The Guardian* (online, 15 December 2017) <https://www.theguardian.com/australia-news/commentisfree/2017/ dec/15/the-child-abuse-commission-didnt-flinch-can-the-church-show-the-same-courage-david-marr>

Marshall, Brenda and Rachael Mulheron, 'Access to Essential Facilities Under Section 36 of the Commerce Act 1986: Lessons from Australian Competition Law' (2003) 248(9) *Canterbury Law Review* 248

Marshall, Geoffrey, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, 1984)

——— *Constitutional Theory* (Oxford University Press, 1971)

Martina, Michael and Nathan Layne, 'Trump Applauds Wisconsin Ruling Striking Down Lockdown Order', *The Sydney Morning Herald* (online, 15 May 2020) <https://www.smh.com.au/world/north-america/trump-applauds-wisconsin-ruling-striking-down-lockdown-order-20200515-p54t6v.html>

Mason, Anthony, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79

——— 'Human Rights and Courts', in in Paul Babie and Neville Rochow (eds) *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012)

——— 'The Independence of the Bench' (1993) 10 *Australian Bar Review* 1

——— 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1

Mathew, Penelope, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) 17 *City Law Review* 177

McCall, Brian M, *The Architecture of Law—Rebuilding Law in the Classical Tradition* (University of Notre Dame Press, 2018)

McClellan, Justice Peter et al, *Royal Commission into Institutional Responses to Child Sexual Abuse: Final Report. Volume 1* (Commonwealth of Australia, 15 December 2017) <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf>

McCrudden, Christopher, 'Human Dignity in Human Rights Interpretation' (2008) 19 *European Journal of International Law* 655

——— (ed), *Understanding Human Dignity* (Oxford University Press, 2014)

MacCulloch, Diarmaid, *A History of Religion: The First Three Thousand Years* (Penguin Books, 2010)

McCullough, David, *John Adams* (Simon & Schuster, 2001)

McDonald, Henry, 'Gay Marriage Cake: Customer Takes Case to European court', *The Guardian* (online, 15 August 2019) <https://www.theguardian.com/uk-news/2019/aug/15/gay-marriage-cake-customer-takes-case-to-european-court>

McKinley, Jesse and Kirk Johnson, 'Mormons Tipped Scale in Ban on Gay Marriage', *New York Times* (online, 14 November 2008) <https://www.nytimes.com/2008/11/15/us/politics/15marriage.html>

McHugh, Michael, 'A Human Rights Act, the Courts and the Constitution' (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009) <http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh_2009.html>

McNeil, Kent, 'Envisioning Constitutional Space for Aboriginal Governments' (1993) 19(1) *Queen's Law Journal* 95

McRea, Ronan, *Religion and the Public Order of the European Union* (Oxford University Press, 2010)

Meagher, Roderick, Dyson Heydon and Mark Leeming, *Meagher, Gummow & Lehane's Equity Doctrines & Remedy* (LexisNexis Butterworths, 1984)

Menzies, Jennifer, 'Explainer: What Is the National Cabinet and Is It Democratic?' *The Conversation* (online, 31 March 2020) <https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>

Micklethwait, John, and Adrian Woolridge, *The Company: A Short History of a Revolutionary Idea* (Phoenix, 2003)

Middleton, John, 'Statutory Interpretation—Mostly Common Sense?' (2016) *Melbourne University Law Review* 626

Mill, James, 'Barrister Who Refused to Represent Gay Client Reprimanded', *Daily Mail Australia* (online, 26 July 2006) <http://www.dailymail.co.uk/news/article-397625/Barrister-refused-represent-gay-client-reprimanded.html>

Millar, Royce, and Rafael Epstein, 'Outcry at Greens Smear', *The Age* (online, 1 November 2010) <https://www.theage.com.au/national/victoria/outcry-at-greens-smear-20101031-178w6.html>

Miller, Russel V, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters (Professional) Australia, 36th ed, 2014)

Millington, Ben, 'Phillip Wilson's Overruled Conviction Explained and Why Public Opinion Was "Dashed"', *ABC News* (7 December 2018) <https://www.abc.net.au/news/2018-12-07/philip-wilson-sex-abuse-conviction-overturned-explained/10595040>.

Mitchell, Stephen, 'Requisitioned Transport in the Roman Empire: A New Inscription from Pisidia' (1976) 66 *Journal of Roman Studies* 106

Moens, Gabriel, and John Trone, *Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 6th ed, 2001)

de Montesquieu, Charles, *The Spirit of the Laws*, tr Thomas Nugent (Neeland Media, 2010)

Moon, Richard, *Freedom of Conscience and Religion* (Irwin Law, 2014)

Moore, Anthony et al, *Bradbrook, MacCallum and Moore's Australian Real Property Law* (Thompson Reuters, 6th ed, 2016)

Moulds, Sarah, 'Splitting the Bill: How the Feds Could Cut Through Division on Religious Freedom', *Headlinez Pro* (online, 16 September 2019) <https://headlinezpro.com/splitting-the-bill-how-the-feds-could-cut-through-division-on-religious-freedom/>

——— et al, '"Lawful Discrimination": Exceptions Under the EOA to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status' (South Australian Law Reform Institute, Report, June 2016)

Murphy, Cullen, *God's Jury—The Inquisition and the Making of the Modern World* (Mariner Books, 2013)

Murphy, Katharine, 'Kerryn Phelps Urges PM to Release Ruddock religious Freedom Review Before Byelection', *The Guardian* (online, 26 September 2018) <https://www.theguardian.com/australia-news/2018/sep/26/kerryn-phelps-urges-pm-to-release-ruddock-religious-freedom-review-before-byelection?CMP=share_btn_link>

Niels, Gunnar et al, *Economics for Competition Lawyers* (Oxford University Press, 2011)

Nothwehr, Dawn M, *Mutuality: A Formal Norm for Christian Social Ethics* (Wipf & Stock Publishers, 1998)

Novak, Michael, *Toward a Theology of the Corporation* (American Enterprise Institute for Public Policy Research, 1981)

Nowak, Peter, *Sex, Bombs, and Burgers: How War, Pornography, and Fast Food Have Shaped Modern Technology* (Viking Canada, 2010)

Nussbaum, Martha C, *The Cosmopolitan Tradition: A Noble but Flawed Ideal* (The Belknap Press of Harvard University Press, 2019)

——— 'Kant and Stoic Cosmopolitanism' (1997) 5(1) *The Journal of Political Philosophy* 1

——— *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books, 2018)

Okun, Arthur M, *Equality and Efficiency: The Big Trade-off* (Brookings Institution, 1975)

O'Mahony, Conor, 'There Is No Such Thing as a Right to Dignity' (2012) 10(2) *International Journal of Constitutional Law* 551.

O'Malley, John W, *What Happened at Vatican II* (Harvard University Press, 2008)

O'Neill, Nick, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights in Australian Law* (Federation Press, 2nd ed, 2004)

Palenčár, Marián, 'Some Remarks on the Concept and Intellectual History of Human Dignity' (2016) 26 *Human Affairs* 462

Parkinson, Charles O, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press 2007)

Parkinson, Patrick, 'Courting Religious Voters in the 2019 Federal Election' *ABC Religion & Ethics* (online, 3 April 2019) <https://www.abc.net.au/religion/courting-religious-voters-in-the-2019-federal-election/10966804>

——— 'Christian Concerns about an Australian Charter of Rights', in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012)

Penner, J, 'Hohfeldian Use-Rights in Property', in JW Harris (ed) *Property Problems: From Genes to Pension Funds* (Kluwer Law International 1998)

Pinker, Steven, *Enlightenment Now: Science, Humanism, and Progress* (Penguin Random House, 2018)

——— 'The Stupidity of Dignity', *The New Republic* (online, 28 May 2008) < *https://newrepublic.com/article/64674/the-stupidity-dignity*>

Plastow, Killian, 'Are Taxes Illegal? A Look at the Anti-tax Sovereign Citizen Movement', *The New Daily* (online, 19 December 2018) <https://thenewdaily.com.au/news/national/2018/12/19/sovereign-citizen-government/>

Platt, Stephen R., *Imperial Twilight: The Opium War and the End of China's Last Golden Age* (Atlantic Books, 2017)

de Plevitz, Loretta, 'Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 308

Plucknett, Theodore FT, *A Concise History of the Common Law* (Liberty Fund, 6th ed, 2010)

Pollman, Elizabeth, 'Corporate Disobedience' (2019) 68 *Duke Law Journal* 709

Portaru, Adina, 'Freedom of Expression Online: The Code of Conduct on Countering Illegal "Hate Speech" Online', *Revista Romana de Drept European* n. 4/2017, Wolters Kluwer Romania

Posner, Richard, *Antitrust Law: An Economic Perspective* (University of Chicago Press, 1976)

Poulos, Elenie 'Constructing the Problem of Religious Freedom: An Analysis of Australian Government Inquiries into Religious Freedom' (2019) 10(10) *Religions* 1

——— 'Protecting Freedom/Protecting Privilege: Church Responses to Anti-discrimination Law Reform in Australia' (2018) 24 *Australian Journal of Human Rights* 117

Pound, Alistair, and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson Lawbook, 2008)

Quick, John, and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1976)

Quinlan, Michael, 'An Unholy Patchwork Quilt: The Inadequacy of Protections of Freedom of Religion in Australia', in Iain T Benson, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius?* (Connor Court, 2019)

Rachels, James, *The Elements of Moral Philosophy*, (Random House, 1986)

Radan, Peter, and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths Australia, 4th ed, 2019)

Rajkomar, Alvin, et al 'Scalable and Accurate Deep Learning with Electronic Health Records' (2018) 1 *npj Digital Medicine* Art 18 <https://www.nature.com/articles/s41746-018-0029-1>

Rakove, Jack, *Beyond Belief, Beyond Conscience: The Radical Significance of the Free Exercise of Religion* (Oxford University Press, 2020)

Ramsay, Ian M, and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250

Rangan, Kash, Lisa A Chase, and Sohel, Karim, 'Why Every Company Needs a CSR Strategy and How to Build It' *Harvard Business School* (online, 5 April, 2012) <https://www.hbs.edu/faculty/Publication%20Files/12-088.pdf>

Ranger, Steve, 'What is the IoT? Everything You Need to Know About the Internet of Things Right Now Updated: The Internet of Things Explained. What the IoT is, and Where It's Going Next.', *ZDNET* (online, 21August 2018) <https://www.zdnet.com/article/what-is-the-internet-of-things-everything-you-need-to-know-about-the-iot-right-now/>

Ratcliffe, Rebecca, 'Major Western Brands Pay Indian Garment Workers 11p an Hour', *The Guardian* (online, 1 February 2019) <https://www.theguardian.com/global-development/2019/feb/01/major-western-brands-pay-indian-garment-workers-11p-an-hour?CMP=share_btn_>

Ravitch, Frank S, 'Be Careful What You Wish for: Why *Hobby Lobby* Weakens Religious Freedom' (2016) 55 *Brigham Young University Law Review*

———*Freedom's Edge—Religious Freedom, Sexual Freedom, and the Future of America* (Cambridge University Press, 2016)

Rawls, John, *A Theory of Justice* (Harvard University Press, revised ed, 1999)

——— *Justice as Fairness: A Restatement* (The Belknap Press of Harvard University Press, 2001)

——— *The Law of Peoples* (Harvard University Press, 1999)

——— *Political Liberalism* (Columbia University Press, 2005)

Raz, Joseph, *The Authority of Law* (Oxford University Press, 2nd ed, 2009)

——— *Practical Reason and Norms* (Oxford University Press, 1999)

Reich, Robert, *The Common Good* (Vintage, 2018)

Remeikas, Amy, 'Covidsafe—Australian Government Launches Coronavirus Tracing App Amid Lingering Privacy Concerns', *The Guardian* (online, 26 April 2020) <https://www.theguardian.com/australia-news/2020/apr/26/australias-coronavirus-tracing-app-set-to-launch-today-despite-lingering-privacy-concerns>

Richards, Bernadette, Mellisa de Zwart and Karinne Ludlow, *Tort Law Principles* (Lawbook, 2013)

Risse, Mathias, 'Securing Human Rights Intellectually: Philosophical Inquiries about the Universal Declaration', in Jennifer M Shaphard, Stephen M Kosslyn and Evelynn M Hammonds (eds), *The Harvard Sampler: Liberal Education for the Twenty-First Century* (Harvard University Press, 2011)

Rivers, Julian, 'Is Religious Freedom Under Threat from British Equality Laws?' (2019) 33(2) *Studies in Christian Ethics* 1

——— *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)

——— 'Three Principles for Christian Citizens' (2009) 18(1) *Cambridge Papers—Toward a Biblical Mind*

Robertson, Geoffrey, 'Mandy Rice-Davies: Fabled Player in a Very British scandal', *the Guardian* (online, 19 December 2014) *<https://www.theguardian.com/politics/2014/dec/19/mandy-rice-davies-fabled-player-british-scandal-profumo>*

Robins, Nick, *The Corporation That Changed the World: How the East India Company Shaped the Modern Multinational* (Pluto Press, 2nd ed, 2012)

Robinson, Nathan, 'Wisconsin is Starting to Resemble a Failed State', *The Guardian* (online, 19 May 2020) <https://www.theguardian.com/commentisfree/2020/may/19/wisconsin-coronavirus-supreme-court-failed-state>

Rochow, Neville, 'Causes of Coming Discontents: The European Union as a Role Model for Australia?', (2017) 27 *Proceedings of the Twenty-Ninth Conference of the Samuel Griffith Society* 103

——— *Evidence, Judicial Notice and Party Comment: Principles for Ascertaining Facts Which Predicate Constitutional Validity* (Master of Laws Thesis, University of Adelaide 1987)

——— 'Immortal Beings Without Soul or Conscience: Toward a Corporate and an AI Ethic' in Paul Babie and Rick Sarre (eds), *Religion Matters: The Contemporary Relevance of Religion* (Springer Nature Singapore, 2020)

——— 'Paying for Human Rights Before the Bill Comes—Towards a More Comprehensive Domestic Implementation of International Human Rights Norms in Australia' (Research Paper No 2009-004, University of Adelaide Law School, 2009)

——— 'Somnambulating Towards AI Dystopia? The Future of Rights and Freedoms' (2018) 5 *Agathon* 43

——— 'Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade' (2014) 5 *Western Australian Jurist* 25

——— and Paul Babie, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) 3 *Brigham Young University Law Review* 821

——— and Jacqueline Rochow, 'From the Exception to the Rule: Dignity, *Clubb v Edwards* and Religious Freedom as a Right' (2020) 47(1) *University of Western Australia Law Review* 92

——— et al, 'Creating and Conserving Constitutional Space' in Paul T Babie, Neville G Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief—Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020)

Romm, Tony and Elizabeth Dwoskin, 'U. S. Regulators Have Met to Discuss Imposing a Record-setting Fine Against Facebook for Privacy Violations' *The Washington Post* (online, 19 January 2019) <*https://www.washingtonpost.com/technology/2019/01/18/us-regulators-have-met-discuss-imposing-record-setting-fine-against-facebook-some-its-privacy-violations/*>

Rorty, Richard, *Contingency, Irony and Solidarity* (Cambridge University Press, 1989)

Rosen, Michael, *Dignity: Its History and Meaning* (Harvard University Press, 2012)

Ruddock Committee Expert Panel (Cth), *Religious Freedom Review: Report of the Expert Panel* (Commonwealth of Australia, 2018) <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>

Ruggie, John Gerard, 'Human Rights and the Future International Community' (1983) 112(4) *Daedalus* 93

——— *Just Business: Multinational Corporations and Human Rights* (W Norton & Company, 2013)

Russell, Jesse, and Ronald Cohn, *Ethics of Artificial Intelligence* (Lennex Corp., 2012)

Ryrie, Alec, *Unbelievers: An Emotional History of Doubt* (William Collins, 2019)

Sacks, Jonathan, *The Dignity of Difference: How to Avoid a Clash of Civilisations* (Bloomsbury Publishing, rev ed, 2003)

Sajó, András, 'Individual Religious Liberty under Article 9 and Identity as Dignity' (2019) *Judicial Power in a Globalized World* 1 <https://www.academia.edu/41681471/Individual_Religious_Liberty_under_Article_9_and_Identity_as_Dignity>

Sakkal, Paul, 'Royal Commission Finds Pell 'Conscious' of Priests Abusing Children in Early '70s', *The Age* (online, 7 May 2020) <https://www.theage.com.au/national/victoria/long-awaited-george-pell-royal-commission-findings-released-20200507-p54qmo.html>

Saldinger, Adva, 'Climate, Cybersecurity Top List of Global Threats in New Report' *Devex* (online, 18 January 2018) <https://www.devex.com/news/climate-cybersecurity-top-list-of-global-threats-in-new-report-91899>

Sandberg, Russell and Norman Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 *Cambridge Law Journal* 302.

Sandel, Michael J, *Justice: What is the Right Thing to do?* (Penguin Books, 2009)

——— *What Money Can't Buy—The Moral Limits of Markets* (Penguin Books, 2012)

Sander, Peter, *Madoff—Corruption, Deceit, and the Making of the World's Most Notorious Ponzi Scheme* (The Lyons Press, 2009)

Sands, Philippe, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (Weidenfeld & Nicolson, 2017)

Sangiovanni, Andrea, *Humanity Without Dignity—Moral Equality, Respect, and Human Rights* (Harvard University Press, 2017)

Sarre, Rick, 'The First World War and Conscientious Objection in Australia' (2019) 31(4) *A Journal of Social Justice* 548

Satariano, Adam, and Jack Nicas, 'E.U. Fines Google $5.1 Billion in Android Antitrust Case', *The New York Times* (online, July 18, 2018) <https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html>

Sarre, Rick, 'Section 116 of the Australian Constitution in the Context of the First World War Conscientious Objection', in Iain Benson, Michael Quinlan, A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius* (Connor Court, 2019)

Saunders, Cheryl and Adrienne Stone, *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018)

Sawer, Geoffrey, *Australian Federalism in the Courts* (Melbourne University Press, 1967)

Scardamaglia, Amanda, and Angela Daly 'What Consumers Need from the ACCC Inquiry into Google and Facebook', *The Conversation* (online, 5 December 2017) <https://theconversation.com/what-consumers-need-from-the-accc-inquiry-into-google-and-facebook-88560>

Scharffs, Brett G, 'Conceptualising Reasonable Accommodation', in Paul T Babie, Neville Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020)

——— 'Our Fractured Attitude towards Corporate Conscience', in Daniel N Robinson and Richard N Williams (eds*), Religious Liberty—Essays on First Amendment Law* (Cambridge University Press, 2016)

——— 'Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent and Those Hostile to Religion Should Care' (2017) 2 *Brigham Young University Law Review* 957

Schneewind, JB, *Essays on the History of Moral Philosophy* (Oxford University Press, 2010)

——— (ed), *Moral Philosophy from Montaigne to Kant* (Cambridge University Press, 2003)

Schockenhoff, Eberhard, *Natural Law & Human Dignity,* tr Brian McNeil (Catholic University of America Press, 2003)

Schönecker, Dieter and Elke Elisabath Schmidt 'E Kant's Ground-Thesis. On Dignity and Value in the Groundwork' (2018) 52 *Journal of Value Inquiry* 81

Schreuer, Cristoph, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447

Schroeder, Doris, 'How to Define Dignity and Its Place in Human Rights—A Philosopher's View', *The Conversation* (online, 9 August 2017) <https://theconversation.com/how-to-define-dignity-and-its-place-in-human-rights-a-philosophers-view-81785>

——— and AH Bani-Sadr, *Dignity in the 21st Century* (Springer, 2017)

Schuller, Florian (ed), *Dialectics of Secularization: On Reason and Religion*, tr Brian McNeil (Ignatius Press, 2006)

Schwab, Klaus, *The Fourth Industrial Revolution* (Crown Publishing Group, 2017)

Seidel, Andrew L, *The Founding Myth: Why Christian Nationalism is Un-American* (Sterling, 2019)

Sensen, Oliver, *Kant's Conception of Human Dignity* (de Gruyter Kantstudien-Ergänzungshefte No. 166, 2011)

——— *Kant on Human Dignity* (de Gruyter Verlag, 2011)

Shelley, Mary, *Frankenstein or The Modern Prometheus* (Vintage, 2007)

Sherman, Nancy, *Making a Necessity of Virtue: Aristotle and Kant on Virtue* (Cambridge, 1997)

Shershow, Scott Cutler, *Deconstructing Dignity* (University of Chicago Press, 2013)

Shiffrin, Steven H, *What's Wrong with the First Amendment* (Cambridge University Press, 2016)

Shu, Catherine, 'Google Acquires Artificial Intelligence Startup DeepMind for More Than $500M' *TechCrunch* (online, 26 January 2014) <https://techcrunch.com/2014/01/26/google-deepmind/?guccounter=1>

Simonite, Tom, 'Google's Learning Software Learns to Write Learning Software', *Wired* (online, 13 October 2017) <https://www.wired.com/story/googles-learning-software-learns-to-write-learning-software/>

——— 'Moore's Law Is Dead. Now What?' *MIT Technology Review* (online, 13 May 2016) <https://www.technologyreview.com/s/601441/moores-law-is-dead-now-what/>

Simpson, Amelia, in Rosalind (eds), *Australian Constitutional Values: Equal Treatment and Non-discrimination through the Functionalist Lens* (Hart, 2018)

Singer, Joseph, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' [1982] (6) *Wisconsin Law Review* 975

——— *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* (Yale University Press, 2015)

——— 'Religious Liberty & Public Accommodations: What Would Hohfeld Say?', in Shyam Balganash, Ted Sichelman, and Henry Smith (eds), *Wesley Hohfeld A Century Later: Edited Major Works, Select Personal Papers, and Original Commentaries* (Cambridge University Press, forthcoming)

——— and Isaac Saidel-Goley, 'Things Invisible to See: State Action and Private Property' (2018) 5 *Texas A&M Law Review* 439

Singh, Vijay Kumar, 'Applying "Essential Facility Doctrine"—What's the Right Approach?' (2011) 1(B-151) *Competition Law Reports*

Size, Robert, 'The Australian Constitution and the United States' 14th Amendment' (Governor-Generals' Prize Essay, 2015) < http://www.cefa.org.au/robert-size>

Smith, Abbe, 'Defending the Unpopular Down-Under' (2006) 30 *Melbourne University Law Review* 495

Smith, James K A, *Desiring the Kingdom: Worship, Worldview, and Cultural Formation* (Baker Academic, 2009)

——— *How (Not) to Be Secular: Reading Charles Taylor* (WM B Eerdmans Publishing, 2014)

Smith, Merina, *Revelation, Resistance, and Mormon Polygamy: The Introduction and Implementation of the Principle, 1830–1853* (Utah State University Press, 2013)

Smith, Rhonda L, and David K Round, 'A Strategic Behaviour Approach to Evaluating Competitive Conduct Agenda' (1998) 5(1) *Agenda* 25

Smith, Steven D, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010)

——— 'The Phases and Functions of Freedom of Conscience' (Research Paper No 10-024/2010, San Diego Legal Studies, 25 May 2010) <https://ssrn.com/abstract=1615625>

——— 'The Tenuous Case for Conscience' (Research Paper No 26/2004, University of San Diego Public Law and Legal Theory Research Paper Series, 2004)

Spigelman, James, 'The Forgotten Freedom: Freedom from Fear' (2010) 59 *International and Comparative Law Quarterly* 1.

Steinmann, AC, 'The Legal Significance of Human Dignity' (PhD thesis, North-West University, November 2016) <https://repository.nwu.ac.za/bitstream/handle/10394/25824/Steinmann_%20AC_2016.pdf?sequence=1&isAllowed=y>

Stern, Philip J., *The Company-State: Corporate Sovereignty & the Early Modern Foundations of the British Empire in India* (Oxford University Press, 2011)

——— 'Politics and Ideology in the Early East India Company-State: The Case of St Helena, 1673–1709' (2007) 35)1) *The Journal of Imperial and Commonwealth History* (online) <https://www.tandfonline.com/doi/full/10.1080/03086530601143362?scroll=top&needAccess=true>

Stone, Adrienne 'The Common Law and The Constitution: A Reply' (2002) 26(3) *Melbourne University Law Review* 646

Stone, Bruce and Nicholas Barry 'Constitutional Design and Australian Exceptionalism in the Adoption of National Bills of Rights' (2014) 47(4) *Canadian Journal of Political Science* 767.

Stone, Julius, *Precedent and Law—Dynamics of Common Law Growth* (Butterworths, 1985)

Strassfeldt, Robert N, 'Introduction: Corporations and Their Communities' (2008) 58(4) *Case Western Reserve Law Review* 1017

Strohm, Paul, *Conscience: A Very Short Introduction* (Oxford University Press, 2011)

Sullivan, Winnifred Fallers, *The Impossibility of Religious Freedom* (Princeton University Press, 2005)

Susskind, Richard, and Daniel Susskind, *The Future of the Professions—How Technology will Transform the Work of Human Experts* (Oxford University Press, 2017)

Swan, David, 'People Have Lost Trust in Facebook and Google, Says Tech Festival Boss', *The Australian* (online, 9 February 2019) <https://www.theaustralian.com.au/business/technology/people-have-lost-trust-in-facebook-and-google-says-tech-festival-boss/news-story/41a89f0e8a5c9696e4c1bf1666f2cc8f?nk=4a15b2adff77a86919004daeb00eb052-1549713122>

Tabacco Mar, Ria, 'Religion and the Right to Discriminate', *The Economist* (online, 26 April 2018) <https://www.economist.com/open-future/2018/05/24/freedom-of-speech-and-religion-is-not-a-licence-to-discriminate >

Tarbell, Ida M., *The History of the Standard Oil Company* (McClure, Phillips and Co., 1904)

Taylor, Charles, *A Secular Age* (Belknap Press of Harvard University Press, 2007)

Taylor, Josh, 'Covidsafe App: How Australia's Coronavirus Contact Tracing App Works, What It Does, Downloads and Problems', *The Guardian* (online, 5 May 2020) <https://www.theguardian.com/australia-news/2020/may/05/covid-safe-app-downloads-ios-android-iphone-australian-government-covidsafe-tracking-how-to-download-install-works-working-problems-australia-coronavirus-contact-tracing>

Taylor, Kate 'These 10 Companies Control Everything You Buy', *The Independent* (online, 31 May 2017) <https://www.independent.co.uk/extras/these-10-companies-control-everything-you-buy-a7765461.html>

Taylor, Russell, 'Indigenous Constitutional Recognition: The 1967 Referendum and Today' (Papers on Parliament No. 68, 27 May 2017) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/Papers_on_Parliament_68/Indigenous_Constitutional_Recognition_The_1967_Referendum_and_Today>

Ten, CL (ed), *Mill's On Liberty—A Critical Guide* (Cambridge University Press, 2008)

Tennant, Kylie, *Evatt, Politics and Justice* (Angus & Robertson, 1970)

Thakur, Ramesh, 'Responding to Covid-19: Can We Save Lives and Preserve Our Quality of Life at the Same Time?' (Australian Strategic Policy Institute, 2020) <https://www.aspistrategist.org.au/responding-to-covid-19-can-we-save-lives-and-preserve-our-quality-of-life-at-the-same-time/>.

Thompson, A Keith, 'The Economic Impact of Religious Volunteering and Donation', in Iain T Benson, Michael Quinlan and A Keith Thompson (eds), *Religious Freedom in Australia—A New Terra Nullius?* (Connor Court, 2019)

——— 'The Persistence of Religious Privilege', in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Edward Elgar, 2018)

Thompson, Adam, 'How Governments use Big Data to Violate Human Rights' *The Conversation* (online, 14 January 2019) <https://theconversation.com/how-governments-use-big-data-to-violate-human-rights-109537>

Timmerman, Jens (ed), *Kant's Groundwork of the Metaphysics of Morals: A Critical Guide* (Cambridge University Press, 2009)

de Tocqueville, Alexis, *Democracy in America: Volume 1*, tr Henry Reeve (Bantam Classics, 2000)

Tomasic, Roman, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002)

Toohey, John, 'A Government of Laws, and Not of Men?' (1993) 9 *Public Law Review* 163

Tran, Danny and James Oaten, 'Melbourne Archbishop Commits to Protecting Confessional, as Pope Begs Forgiveness for Abuse', *ABC News* (online, 22 August 2018) <https://www.abc.net.au/news/2018-08-22/melbourne-archbishop-commit-protect-confession-pope-beg-forgive/10149358>.

Tribe, Laurence H, 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics' (1989) 103(1) *Harvard Law Review* 1

Trindade, Francis, and Peter Cane, *The Law of Torts in Australia* (Oxford University Press, 2nd ed, 1993)

Tuchman, Barbara, *The Zimmerman Telegram* (Random House, 2014)

Turner, John G, *Brigham Young—Pioneer Prophet* (Harvard University Press, 2012)

Uleman, Jennifer K, *An Introduction to Kant's Moral Philosophy* (Cambridge University Press, 2010)

United Nations, '"Proving Our Worth Through Action": 5 Things Guterres Wants the UN to Focus on in 2019' *UN News* (online, 16 January 2019) <https://news.un.org/en/story/2019/01/1030592>

Vaidhyanathan, Siva, *Anti-social Media: How Facebook Disconnects Us and Undermines Democracy* (Oxford University Press, 2018)

Valero Estarellas, Maria J, 'State Neutrality, Religion, and the Workplace', in W Cole Durham Jr and Donlu Thayer, *Religion and Equality: Law in Conflict* (Routledge, 2018)

Vatican Council, 'Declaration on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious' (Vatican, 1965)

Velijanovski, Cento, *Economic Principles of Law* (Cambridge University Press, 2007)

Verbruggen, Robert, 'Google, Facebook, Amazon: Our Digital Overlords', *Nation Review* (online, 12 December 2017) <https://www.nationalreview.com/2017/12/google-facebook-amazon-big-tech-becoming-problem>

Villiger, ME, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009)

Wahlquist, Calla and Daniel Hurst, 'New Coronavirus Cases in Australia Could Number Almost zero by July, Modelling Suggests', *The Guardian* (online, 6 April 2020) <https://www.theguardian.com/world/2020/apr/06/new-coronavirus-cases-in-australia-could-number-almost-zero-by-july-modelling-suggests>

Waldman, Steven, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* (Random House, 2009)

——— *Sacred Liberty—America's Long, Bloody, and Ongoing Struggle for Religious Freedom* (Harper One, 2019)

Waldron, Jeremy, 'Dignity and Rank' (2007) 48 *European Journal of Sociology* 201

——— *Dignity, Rank, & Rights* (Oxford University Press, 2012)

——— 'Is Dignity the Foundation of Human Rights?' (Paper 374, New York University Public Law and Legal Theory Working Papers, 2013) <http://lsr.nellco.org/nyu_plltwp/374>

——— 'Is Dignity the Foundation of Human Rights?', in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015)

——— *One Another's Equals—The Basis of Human Equality* (The Belknap Press of Harvard University Press, 2017)

——— *The Harm in Hate Speech* (Harvard University Press, 2012)

Watson, Susan, 'The Corporate Legal Person' (2018) *Journal of Corporate Law Studies* 1

Williams, CR, 'Burdens and Standards in Civil Litigation' (2003) 25(2) *Sydney Law Review* 165

Williams, George, *The Case for an Australian Bill of Rights: Freedom in the War on Terror*, (UNSW Press, 2004)

——— 'The Federal Parliament and the Protection of Human Rights' (Research Paper 20, 1998-99, 11 May 1999, Parliament of Australia) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20>

——— *Human Rights under the Australian Constitution* (Oxford University Press, 1999)

——— 'Legislating for a Bill of Rights' (2000) 25(2) *Alternative Law Journal* 62

Williams, Roy, *God, Actually* (ABC Books, 2008)

Wilson, Stephen, 'I'm a Privacy Expert—And I've Downloaded the COVIDSafe App', *The Sydney Morning Herald* (online, 4 May 2020) <https://www.smh.com.au/politics/federal/i-m-a-privacy-expert-and-i-ve-downloaded-the-covidsafe-app-20200503-p54pc6.html>

Winfield, Percy H, 'Public Policy in the English Common Law' (1928) 42(1) *Harvard Law Review* 76

Winkler, Adam, '"Corporations Are People" Is Built on an Incredible 19th-Century Lie—How a Farcical Series of Events in the 1880s Produced an Enduring and Controversial Legal Precedent', *The Atlantic* (online, 5 March 2018) <https://www.theatlantic.com/business/archive/2018/03/corporations-people-adam-winkler/554852/>

——— *We the Corporations—How American Business Won Their Civil Rights* (Liveright Publishing, 2018)

Winterton, George, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630

Wright, Aaron, *Blockchain and the Law: The Rule of the Code* (Harvard University Press, 2018)

Wright, Shane, 'Virus Will Leave an Economic Impact for Decades', *The Sydney Morning Herald* (online, 7 April 2020) <https://www.smh.com.au/politics/federal/virus-will-leave-an-economic-impact-for-decades-20200406-p54hk9.html>

Wu, Timothy, *The Curse of Bigness—Anti-Trust in the New Gilded Age* (Columbia Global Reports, 2018)

Yapijakis, C, 'Hippocrates of Kos, the father of clinical medicine and Asclepiades of Bithynia, the father of molecular medicine. Review' (2009) 23(4) *InVivo* 507

Young, Neil J, *We Gather Together—The Religious Right and the Problem of Interfaith Politics* (Oxford University Press, 2016)

Zimmermann, Augusto, 'Gay Marriage: After the Honeymoon', *Quadrant* (online, 12 September 2017) <https://quadrant.org.au/opinion/qed/2017/09/augusto-zimmermann/#>

Zingales, Luigi 'How E.U.'s Google Fine Explains High Cellphone Costs in the U.S.', *The New York Times* (online, 24 July 2018) <https://www.nytimes.com/2018/07/24/opinion/european-union-google-fine-monopoly.html>

Zubacz, Gregory, *The Seal of Confession and Canadian Law* (Wilson & Lafleur, 2009)

Zuboff, Shoshana, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs, 2019)

Zwartz, Barney, 'Religion in the Media: How Has It Changed, Where Is It Going, Why Does It Matter?', *Australian Broadcasting Corporation Religion & Ethics* (online, 24 August 2016) <https://www.abc.net.au/religion/religion-in-the-media-how-has-it-changed-where-is-it-going-why-d/10096622>

B Cases

Adamson v New South Wales Rugby League Ltd (1991) 31 FCR 242

Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (1943) 67 CLR 116

Alberta v Hutterian Brethren of Wilson Colony [2009] 2 SCR 567

Alexis Nunez and Holly McGowan v Watchtower Bible and Tract Society of New York Inc; Christian Congregation of Jehovah's Witnesses; and Thompson Falls Congregation of Jehovah's Witnesses (Unreported, Supreme Court of the State of Montana, 2020)

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

American Legion v American Humanists Association, 588 US ___ (2019)

Amoco Australia Pty Ltd v Rocca Bros Motor Co Engineering Pty Ltd (1973) 133 CLR 288

Aspen Skiing Co v Aspen Highlands Skiing Corp, 472 US 585 (1985)

Attorney-General v British Broadcasting Corporation [1981] AC 303

Attorney-General v The Adelaide Steamship Co Ltd (1913) 18 CLR 30

Attorney-General (Vic); Ex rel. Black v The Commonwealth (1981) 146 CLR 599

Attorney-General for South Australia v Corporation of the City of Adelaide (2013) 249 CLR 1

Australian Broadcasting Corporation v Kane (No. 2) [2020] FCA 133

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Australian Communist Party v Commonwealth (1951) 83 CLR 1

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54

Bartels v Iowa, 262 US 404 (1923)

Barton v The Queen (1980) 147 CLR 75

Blomley v Ryan (1954) 99 CLR 362

Bob Jones University v United States, 461 US 574 (1983)

Bostock v Clayton County, 590 US ___ (2020)

Brooks v Burns Philp Trustee Co. Ltd (1969) 121 CLR 432

Browne v Tasmania (2017) 261 CLR 328

Buckley v Tutty (1971) 125 CLR 353

Bull v Hall [2013] UKSC 73

Burwell v Hobby Lobby, 573 US 682 (2014)

California v Central Pacific Railroad Co, 127 US 1, 28 (1888)

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22

Carter Holt Harvey Building Products Group Ltd v Commerce Commission (New Zealand) [2004] UKPC 37

Ceneavenue Pty Ltd v Martin (2008) 106 SASR 1

Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120

Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (2014) 308 ALR 615

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

Citizens United v Federal Election Commission, 558 US 310 (2010)

Clubb v Edwards; Preston v Avery [2019] HCA 11

Clyne v New South Wales Bar Association (1960) 104 CLR 186

Cole v Whitfield (1988) 165 CLR 360

Commercial Bank of Australia v Amadio (1983) 151 CLR 447

Commonwealth v Tasmania (1983) 158 CLR 1

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v Amos, 483 US 327 (1986)

Cox Broadcasting Corporation v Cohn, 420 US 469 (1975)

Davis v Church of Jesus Christ of Latter-Day Saints, 258 Mont 286 (Mont, 1993)

De Jonge v Oregon, 299 US 353 (1937)

DeMarco v Holy Cross High School 4 F.3d 166 (2nd Cir, 1993)

D'Emden v Pedder (1904) 1 CLR 91

Derry v Peek (1889) 14 App Cas 337

Elane Photography LLC v Willock, 309 P.3d 53 (NM Ct App, 2013)

Employment Division Department of Human Resources of Oregon v Smith, 494 US 872 (1990)

Everet v Williams (1725) 2 *Pothier on Obligations* 3; 9 LQR 197

Eweida v United Kingdom [2013] ECHR 37

Farrington v Tokushige, 273 US 284 (1927)

Fejo v Northern Territory (1998) 195 CLR 96

Fibrosa SA v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32

Fiske v Kansas, 274 US 380 (1927)

Florida Star v B.J.F, 491 US 524 (1989)

Giannarelli v Wraith [1988] HCA 52; (1988) 165 CLR 543

Gitlow v New York, 268 US 652 (1925)

Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212, 2017 SKQB 109

Google Inc v Australian Competition and Consumer Commission [2013] HCA 1

Grace Bible Church Inc v Reedman (1984) 36 SASR 376

Greater Glasgow Health Board v Doogan [2014] UKSC

Grosjean v American Press Co, 297 US 233 (1936)

Hamdan v Rumsfeld, 548 US 557 (2006)

Harley v McDonald [2001] 2 AC 678

Herbert Morris Ltd v Saxelby [1916] 1 AC 688

Herndon v Lowry, 301 US 242 (1937)

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall [2018] 1 SCR 750

Hirsch v Zinc Corporation Ltd (1917) 24 CLR 34

Hogarth v Karp [2013] SASC 159

Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission, 565 US 171 (2012)

Hyde v Hyde (1866) LR 1 PD 130

Murphy v Overton Investments Pty Ltd (2004) 216 CLR 388

National Socialist Party of America v Village of Skokie, 423 US 43 (1977)

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Near v Minnesota, 283 US 697 (1931)

Nebraska Press Association v Stuart, 427 US 539 (1976)

Nixon v Condon, 286 US 73 (1932)

Nixon v Herndon, 273 US 536 (1927)

Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd [1894] AC 535

Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 27

Obergefell v Hodges, 576 US ___ (2015)

Otter Tail Power Co v United States, 410 US 366 (1973)

Our Lady of Guadalupe School v Agnes Morrissey-Berru (9th Cir, No 17-56624, 30 April 2019)

OV & OW v Members of the Board of the Wesley Mission Council (2010) 79 NSWLR 606

PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2011] NSWSC 1216

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

Pell v The Queen [2020] HCA 12

Peters (WA) Ltd v Petersville Ltd (2001) 205 CLR 126

Petrofina (Great Britain) Ltd v Martin [1966] Ch 146

Phillips v Brooks Ltd [1919] 2 KB 243

Pierce v Society of Sisters, 268 US 510 (1925)

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

Proprietors of Charles River Bridge v. Proprietors of, 36 U.S. 420 (1837) 36 US 420 (Pet.)

Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd (1989) 167 CLR 177

R. *v Blackmore*, 2018 BCSC 367

R *v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254

R *v Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1

Re the Governor, Goulburn Corrections Centre; Ex parte Eastman (1999) 200 CLR 322

Re Judiciary & Navigation Acts (1921) 29 CLR 257

Re Wakim; Ex parte McNally (1999) 198 CLR 511

Roe v Wade, 410 US 113 (1973)

Rasmussen v Bennett, 228 Mont 106 (Mont, 1987)

Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Intern (C-673/16) [2018] ECJ

Ridelalgh v Horsefield [1994] 3 All ER 848

Rondel v Worsley (1969) 1 AC 191

Saif Ali v Sydney Mitchell & Co (1980) AC 198

Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22

Santa Clara County v. Southern Pacific Railroad Company, 118 US 394 (1886)

Smethurst v Commissioner of Police [2020] HCA 14

South Carolina v Barnwell Bros, 303 US 177 (1938)

St. James School v Darryl Biel, as Personal Representative of the Estate of Kristen Biel (9th Cir, No 17-55180, 17 December 2018)

State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash, 2019).

Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211

Stone & Rolls Ltd (in liq) v Moore Stephens [2009] All ER 330

Stromberg v California, 283 US 359 (1931)

Sue v Hill (1999) 199 CLR 462

S.V. v. Italy (55216/08) [2018] ECHR

Swinfen v Lord Chelmsford [1860] Eng R 838; (1860) 5 H & N 890 (157 ER 1436)

Telecom Corporation of New Zealand Ltd v Clear Communications Ltd [1995] 1 NZLR 385

Town of Greece v Galloway, 572 US 565 (2014)

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104

The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379

The Queen v A2; The Queen v Magennis; The Queen v Vaziri [2019] HCA 35

Thomas v Mowbray (2007) 233 CLR 307

Trinity Lutheran Church of Columbia v Comer, 582 US ___ (2017)

Trinity Western University v Law Society of Upper Canada [2018] SCC 33

Trump v Hawaii, 585 US ___ (2018)

Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis (2007) 70 NSWLR 565

United States v Carolene Products Co, 304 US 144 (1938)

United States v Hart, 701 F.2d 749 (8th Cir, 1983)

United States v Microsoft Corporation 253 F.3d 34 (2001)

Uttinger v Trustees of the Hospitaller Order of St John of God Brothers [2008] NSWSC 1354

Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV (Judgment of the Court (Grand Chamber), C-414/16, ECLI:EU:C:2018:257, 17 April 2018)

Verizon v Trinko, 540 US 398 (2004)

Wallis Nominees (computing) Pty Ltd v Pickett (2013) 45 VR 657

Walsh v St *Vincent de Paul Queensland (No. 2)* [2008] QDAT 32

Whitney v California, 274 US 357 (1927)

White v Flower & Hart (1998) 156 ALR 169

White v Flower & Hart (1999) 87 FCR 134

Wilkinson v Osborne (1915) 21 CLR 89

Williams v Spautz (1992) 174 CLR 509

Wilson v Anderson [2002] 213 CLR 401

Yorke v Lucas (1985) 158 CLR 661

C Legislation

Acts Interpretation Act 1901 (Cth)

Age Discrimination Act 2004 (Cth)

Allgemeines Gleichbehandlungsgesetz [German general law on equal treatment] (Germany) 14 August 2006, BGBl IS, 2006, 1897

Americans with Disabilities Act, 42 USC § 1201 (1990)

Australian Constitution

Australian Human Rights Commission Act 1986 (Cth)

Australian Security Intelligence Organisation Act 1979 (Cth)

Charter of Rights and Responsibilities Act 2006 (Vic)

Competition and Consumer Act 2010 (Cth)

Constitution Act, C 1982

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 2/12

Das zuletzt durch Artikel 8 SEPA-Begleitgesetz vom (Germany) 3 April 2013, BGBl IS, 2013, 610

Disability Discrimination Act 1992 (Cth)

Encroachments Act 1994 (SA)

Equal Opportunity Act 1984 (SA)

Fair Work Act 2009 (Cth)

Federal Court Rules 2011 (Cth)

Human Rights Act 2004 (ACT)

Human Rights Act 2019 (Qld)

Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Independent Contractors Act 2006 (Cth)

Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)

Planning, Development and Infrastructure Act 2016 (SA)

Public Health and Wellbeing Act 2008 (Vic)

Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015 (Vic)

Public Order (Protection of Persons and Property) Act 1971 (Cth)

Racial Discrimination Act 1975 (Cth)

Religious Discrimination Bill 2019 (Cth)

Religious Freedom Restoration Act, 42 USC § 2000bb-bb4

Reproductive Health (Access to Terminations) Act 2013 (Tas)

Sex Discrimination Act 1984 (Cth)

South Australian Bar Association Barristers' Conduct Rules (2010)

Trading with the Enemy Act 1939 (Cth)

D Treaties and International Agreements

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, UNTS 213 (entered into force 3 September 1953)

Convention on the Rights of the Child, opened for signature 20 November 1989, GA Res 44/25 (entered into force 2 September 1990)

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984)

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A8/10 (10 December 1948)

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

World Medical Association, *Declaration of Geneva,* first adopted September 1948

E Other

1. Speeches and Presentations

Allsop, JLB, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (Speech, Centre for Comparative Law, Faculty of Law, University of Hong Kong, 20 October 2016) <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020>

Bathurst, TF, 'The Place of Lawyers in Politics' (Speech, Opening of Law Term Dinner, 31 January 2018) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180131.pdf>

Bell, Virginia, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (The Sir Ninian Stephen Lecture, 29 April 2016)

Buyse, Antoine, 'Dignified Law: The Role of Human Dignity in European Convention Case-Law' (Speech, Utrecht University, 11 October 2016) <http://echrblog.blogspot.com/2016/10/the-role-of-human-dignity-in-echr-case.html>

Byrnes, Bronwyn, 'Discrimination Law and Freedom of Religion' (Legal Wise Seminars, 21 November 2018) <https://legalwiseseminars.com.au/search/SeminarDetail?SessionId=OND1811N09>

Croucher, Rosalind, 'Free and Equal: An Australian Conversation on Human Rights' (Speech, Australian Human Rights Commission, 8 October 2019) <https://humanrights.gov.au/about/news/speeches/free-and-equal-australian-conversation-human-rights>

Fraser, John, 'The Australian Economy and Challenges of Change' (Speech, The Treasury/China Advanced Leadership Program, 25 November 2015) <https://treasury.gov.au/speech/the-australian-economy-and-challenges-of-change>

French, Robert, 'Protecting Human Rights Without a Bill of Rights' (Speech, John Marshall Law School, 26 January 2010) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>

French, Robert, 'Theories of Everything and Constitutional Interpretation' (Speech, Gilbert & Tobin Centre of Public Law, 19 February 2010) 4. <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/644_RobertFrench.pdf>.

Bell, J 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (The Sir Ninian Stephen Lecture, 29 April 2016) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj29apr2016.pdf>

Kennedy, Steven, 'An Introduction to the Australian Consumer Law' (Speech, Standing Committee of Officials of Consumer Affairs Forum for Consumers and Business Stakeholders, 26 November 2009) <https://treasury.gov.au/sites/default/files/2019-03/SCOCA_Steven_Kennedy.pdf>

Kirby, Michael, 'A Bill of Rights for Australia - But Do We Need It?' (Speech, Queensland Chapter of the Young Presidents Association, 14 December 1997) <http://www.lawfoundation.net.au/ljf/app/&id=/A60DA51D4C6B0A51CA2571A7002069A0>

Perram, Justice, 'Constitutional Principles and Coherence in Statutory Interpretation' (Paper delivered 11 November 2016) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perram/perram-j-20161118>

Rochow, NG, 'The Cab-Rank Rule and its Implications' (Lecture, South Australian Bar Association, 19 May 2010)

——— 'Is the Bar Uber-Sensitive? A Celebration of the Cab-Rank Rule' (South Australian Bar Association, August 2018).

2. Web Pages

European Commission, *Shaping Europe's Digital Future* (Web Page, n.d.) <https://ec.europa.eu/digital-single-market/en/artificial-intelligence>

Australian Christian Lobby, *Homosexuality* (Web Page, n.d.) <htttps://www.acl.org.au/tags/homosexuality>

Attorney-General's Department (Cth), *Marriage Equality in Australia* (Web Page, 2017) <https://www.ag.gov.au/marriageequality>

——— *Religious Freedom Bills—Second Exposure Drafts* (Web Page, 31 January 2020) <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>

Australian Human Rights Commission, *About Constitutional Recognition* (Web Page, n.d.) <https://humanrights.gov.au/our-work/about-constitutional-recognition#:~:text=Recognition%20of%20Aboriginal%20and%20Torres,Islander%20peoples%20but%20against%20anyone>

Australian Parliament, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Website, n.d.)

<https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/treaty/report/c05>

Beige, Oliver, 'Facebook and Monopoly Rents in the Time of the Middle Man Economy', *Medium* (Web Page, 16 February 2018) <https://medium.com/@oliverbeige/facebook-and-monopoly-rents-in-the-time-of-the-middleman-economy-5336fad3402f>

Bossmann, Julia, 'Top 9 Ethical Issues in Artificial Intelligence', *World Economic Forum* (web page, 21 October 2016) <https://www.weforum.org/agenda/2016/10/top-10-ethical-issues-in-artificial-intelligence/ >

Buddenbaum, Judith M, 'Religion and the Media', *Oxford Bibliographies* (Web Page, 24 May 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199756841/obo-9780199756841-0097.xml>

Business & Human Rights Resource Centre, 'UN 'Protect, Respect and Remedy' Framework and Guiding Principles', *Business & Human Rights Resource Centre* (Web Page, n.d.) <https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>

Buston, Olly, 'Technology and Human Rights: Artificial Intelligence', *Business and Human Rights Centre* (web page, n.d.) <https://www.business-humanrights.org/en/technology-and-human-rights-artificial-intelligence>

Cox, Savannah, 'How Left-Handedness Came to Be Seen as Evil', *All That's Interesting* (Web Page, 17 January 2018) <https://allthatsinteresting.com/left-handedness-evil>

CSIRO, 'Maker-assisted Breeding', *CSIRO* (Web Page, 18 December 2019) <https://www.csiro.au/en/Research/Farming-food/Innovation-and-technology-for-the-future/Gene-technology/Marker-breeding>

Department of Health (Cth), 'COVIDSafe App', *Resources* (Web Page, 5 May 2020) <*https://www.health.gov.au/resources/apps-and-tools/covidsafe-app*>

Foster, Neil, 'Protecting Religious Freedom in Australia Through Legislative Balancing Clauses', *BePress* (Web Page, 2017) < https://works.bepress.com/neil_foster/111/>

Dickson, Ben, 'Artificial Intelligence and the Disruption of Employment' (Blog Post, 21 March 2017) <https://bdtechtalks.com/2017/03/21/artificial-intelligence-and-the-disruption-of-employment/>

European Commission, *Artificial Intelligence* (Web Page, 16 April 2020) <https://ec.europa.eu/digital-single-market/en/artificial-intelligence>

Finch, Sarah '9 Disruptive Technology Trends For 2019', *D/Ruption* (Web Page, 3 January 2019) <https://disruptionhub.com/disruption-trends-9-for-2019/>

Forbes, 'Hobby Lobby Stores', *Companies* (Web Page, 2020) <https://www.forbes.com/companies/hobby-lobby-stores/#4158ca996cee>

Foster, Neil, 'Victoria's Conversion Practices Bill is as Bad as They Say It Is', *Freedom for Faith* (Web Page, 18 January 2021) <https://freedomforfaith.org.au/articles/victorias-conversion-practices-bill-is-as-bad-as-they-say-it-is/>

——— 'Balancing Religious Freedoms Rights is not 'Discrimination" on Law and Religion Australia, *Law and Religion* (Blog Post, 17 November 2017) <https://lawandreligionaustralia.blog/2017/11/27/balancing-religious-freedom-rights-is-not-discrimination/>

Freedom for Faith, 'We Don't Have to Speculate' (Web Page, undated) <freedomforfaith.org.au/we-dont-have-to-speculate>

Future of Life Institute, *AI Policy—United States* (Web Page, 2019) <https://futureoflife.org/ai-policy-united-states/?cn-reloaded=1&cn-reloaded=1>

Glendon, Mary Ann, 'The Bearable Lightness of Dignity' *First Things* (Web Page, May 2011) <https://www.google.com/url?q=https://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity&sa=U&ved=0ahUKEwig5bOls8zhAhWh7nMBHQw3A8MQFggUMAg&client=internal-uds-cse&cx=012931863361944243753:ft8sxapyb_o&usg=AOvVaw1CWT6mDrX2pgeCvWDM4jX3>

Government of Canada, *Canada–France Statement on Artificial Intelligence* (Web Page, 7 June 2018) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/europe/2018-06-07-france_ai-ia_france.aspx?lang=eng>

Hanson Robotics, *Sophia* (Web Page, 2020) <https://www.hansonrobotics.com/sophia/>

Harding, Mary, 'Ideals and the Hippocratic Oath', *Patient* (Web Page, 2015) <https://www.medicinenet.com/script/main/art.asp?articlekey=20909>; <https://www.wma.net/policies-post/wma-declaration-of-geneva/>

HBC Heritage, *Our History: Overview* (Web Page, October 2015) <http://www.hbcheritage.ca/history>

HealthDirect, "Social Distancing and How to Avoid the COVID-19 Infection' *Coronavirus FAQs* (Web Page, May 2020) <https://www.healthdirect.gov.au/coronavirus-covid-19-how-to-avoid-infection-faqs>

High Court of Australia, 'Kathleen Clubb v Alyce Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor [2019] HCA 11' (Web Page, 10 April 2019) <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2019/hca-11-2019-04-10.pdf>

Hill, Mark 'Judicial Overreach and Reasonable Accommodation: Some British Reflection on the US Supreme Court Decision in *Obergefell v. Hodges*', *Talk About* (Web Page, 1 July 2020) <https://talkabout.iclrs.org/2020/07/01/judicial-overreach-and-reasonable-accommodation-some-british-reflection-on-the-us-supreme-court-decision-in-obergefell-v-hodges/>

Holy See, *Dignitatis Humanae* (Web Page, n.d.) <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>

Howe, Amy, 'Opinion Analysis: Court Rules that Catholic Elementary School Teachers are 'Ministers,' Cannot Sue for Employment Discrimination', *Scotusblog* (Blog post, 8 July 2020) <https://www.scotusblog.com/2020/07/opinion-analysis-court-rules-that-catholic-elementary-school-teachers-are-ministers-cannot-sue-for-employment-discrimination/>

Human Dignity Initiative, *Declaration* (Web Page, December 2018) <http://dignityforeveryone.org/>

Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience, and religion (Art. 18)*, 48th sess, UN Doc CCPR/C/21/Rev.21/Add.4 (30 July 1993)

'Human Rights Laws', *Human Rights News, Views & Info* (Web Page, n.d.) <https://rightsinfo.org/brexit/human-rights-laws/> (no longer accessible)

IBM, *'What Is Quantum Computing?'* (Web Page, n.d.) <https://www.ibm.com/quantum-computing/learn/what-is-quantum-computing/>https://www.ibm.com/quantum-computing/what-is-quantum-computing/

IBM, *Deep Blue* (Web Page, n.d.) <https://www.ibm.com/ibm/history/ibm100/us/en/icons/deepblue/>

ING, *First Principles of Religion: Human Dignity, Freedom of Expression, and Freedom of Religion* (Web Page) <https://ing.org/first-principles-religion-human-dignity-freedom-expression-freedom-religion/>

International Center for Law and Religion Studies at Brigham Young University, Provo, Utah, USA (Web Page) <https://www.iclrs.org/>

'John Adams', *White House* (Web Page) <https://www.whitehouse.gov/about-the-white-house/presidents/john-adams/>

Jura Forum, 'Drittwirkung der Grundrechte - Definition, Erklärung und Mittelbare vs. Unmittelbare Drittwirkung', *Jura Forum* (Blog Post, n.d.) <https://www.juraforum.de/lexikon/grundrechte-drittwirkung-der>

Magarey, Kirsty and Roy Jordan, 'Parliament and the Protection of Human Rights', *Parliament of Australia* (Web Page, 12 October 2010) < https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/briefingbook43p/humanrightsprotection >

'Marriage Amendment Bill 2004' *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd005#:~:text=Introduced%20on%2027%20May%202004,the%20Senate%20the%20following%20day>

Masci, David, '5 Facts About Evolution and Religion', *Pew Research Center* (Webpage 30 October 2014) <https://www.pewresearch.org/fact-tank/2014/10/30/5-facts-about-evolution-and-religion/>

Mason, Anthony, 'Why Do We Need a Bill of Rights?' *Human Rights Act for Australia* (Web Page, 2006) <http://www.humanrightsact.com.au/2008/2006/03/29/mason-why-do-we-need-a-bill-of-rights>

McKay, Dave, 'Humans Wanted: Why Automation Won't Kill Off Your Job' (15 January 2019) *World Economic Forum* (Web Page, n.d.) <https://www.weforum.org/agenda/2019/01/humans-wanted-why-automation-wont-kill-off-your-job/>

McLaren, Michael, Craig Ulyatt, and Christopher Knowles, 'The "Cab Rank Rule": A Fresh View', *Bar Standards Board* (Web Page, 28 February 2012)

<https://www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_paper_28_2_13_v6__final_.pdf> *(no* longer accessible)

MIT Technology Review, 'AI can beat us at games—but sometimes by cheating', *MIT Technology Review* (Web Page, 28 February) <https://www.technologyreview.com/2018/02/28/144980/ai-can-beat-us-at-games-but-sometimes-thats-by-cheating/>

'Moore's Law or How Overall Processing Power for Computers Will Double Every Two Years', *Moore's Law* (Web Page, n.d.) <http://www.mooreslaw.org/>

Parker, Derek, 'How Governments Are Using Blockchain Technology', *INTHEBLACK* (Web Page, 22 August 2018) <https://www.intheblack.com/articles/2018/08/22/how-governments-using-blockchain-technology>

Parliament of Australia, 'Jurisdictional Issues—The Interface Between the Federal and State Judicial Systems' Committees (Web Page, undated) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/judicial_system/report/c05>

Payton, Bre, 'Ultra-Rich Gay Activist on Targeting Christians: It's Time To "Punish the Wicked"', *The Federalist* (online, 19 July 2017) <http://thefederalist.com/2017/07/19/ultra-rich-gay-activist-targeting-christians-time-punish-wicked/>

Pew Research Center, *Religion and Electronic Media* (Web Page, 6 November 2014) <https://www.pewforum.org/2014/11/06/religion-and-electronic-media/>

Royal Commission into Institutional Responses to Child Abuse, *Our Inquiry* (Web Page) <*https://www.childabuseroyalcommission.gov.au/our-inquiry*>

Russian Orthodox Church, Department for External Church Relations, 'Human Dignity as Religious and *ethical category*', *The Russian Orthodox Church* (Web Page, 2019) <https://mospat.ru/en/documents/dignity-freedom-rights/i/>

'Sentencing Remarks in DPP v George Pell', *County Court Victoria* (Web Page, 13 March 2019) <https://www.countycourt.vic.gov.au/news-and-media/news-listing/2019-03-13-sentencing-remarks-dpp-v-george-pell>

Scharffs, Brett G, 'Freedom of Religion and Belief for Everyone Everywhere: Lessons Learned and Good Practices', *Talk About: Law and Religion* (Blog Post, 1 April 2020) <https://talkabout.iclrs.org/2020/04/01/freedom-of-religion-and-belief-for-everyone-everywhere-lessons-learned-and-good-practices/>

——— 'The World-Defining Contest between Monism and Dualism and the Future of Religious Freedom', *Talk About: Law and Religion* (Web Page, 15 April 2020) <https://talkabout.iclrs.org/2020/04/15/the-world-defining-contest-between-monism-and-dualism-and-the-future-of-religious-freedom/>

——— and Brock Mason, 'Three Ways of Thinking About Reasonable Accommodation', *Talk About* (Web Page, 21 July 2020) <https://talkabout.iclrs.org/2020/07/21/three-ways-of-thinking-about-reasonable-accommodation/>

Schwartz, Barry, 'Google Now a Verb in The Oxford English Dictionary' *Search Engine Watch* (Web Page, 29 June 2006) <https://searchenginewatch.com/sew/news/2058373/google-now-a-verb-in-the-oxford-english-dictionary>

Sensen, Oliver, 'Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms', *Dignity Genealogy* (Blog Post, 13 September 2016) <https://dignitygenealogy.wordpress.com/2016/09/13/sintese-do-texto-human-dignity-in-historical-perspective-the-contemporary-and-traditional-paradigms-de-oliver-sensen/>

Socher, Richard, 'AI Isn't Dangerous, but Human Bias Is', *World Economic Forum* (Web Page, 17 January 2019) <https://www.weforum.org/agenda/2019/01/ai-isn-t-dangerous-but-human-bias-is/>

Swanborough, Jahda, 'The Previous Industrial Revolutions Broke the Environment. Can the Current One Fix It?', *World Economic Forum* (Web Page, 20 April 2017) <https://www.weforum.org/agenda/2017/04/fix-the-environment-there-s-an-app-for-that/>

'Theological Voluntarism', *Stanford Encyclopedia of Philosophy* (Web Page, 4 June 2019) <https://plato.stanford.edu/entries/voluntarism-theological/>

'The Pragmatic Theory of Truth' *Stanford Encyclopedia of Philosophy* (Web Page, 21 March 2019) <https://plato.stanford.edu/entries/truth-pragmatic/>

United Nations, *Secretary-General's High-level Panel on Digital Cooperation* (Web Page) <http://www.un.org/en/digital-cooperation-panel/>

Venter, Christine M, 'Human Dignity, SOGI Claims, and the Obergefell Decision' *Talk About: Law and Religion* (Blog Post, 1 July 2020) <https://talkabout.iclrs.org/2020/07/01/human-dignity-sogi-claims-and-the-obergefell-decision/>.

Villa, Dominic, *COVID-19 Law* (Web Page) <https://thecovid19.law.blog>

Vincent, James, 'This Is When AI's Top Researchers Think Artificial General Intelligence Will Be Achieved' *The Verge* (Web Page, 27 November 2018) <https://www.theverge.com/2018/11/27/18114362/ai-artificial-general-intelligence-when-achieved-martin-ford-book >

Weigel, George, 'After Cardinal Pell's Rightful Acquittal', *First Things* (online, 15 May 2020) <https://www.firstthings.com/web-exclusives/2020/04/after-cardinal-pells-rightful-acquittal>

Wilson, Robin Fretwell and Tanner Bean, 'Fairness for All: An Answer to the Special Rapporteur's Call for a Practical Resolution between Freedom of Religion or Belief and LGBT+ Non-discrimination', *Talk About: Law and Religion* (Blog Post, 20 April 2020) <https://talkabout.iclrs.org/2020/04/20/fairness-for-all-an-answer/>

Zimmermann, Augusto, Lorraine Finlay, and Joshua Forrester, 'Why Australia Should Not Have a Religious Freedom Act' *Western Australia Legal Theory Association* (Web Page, 12 February 2019) <https://walta.net.au/2019/02/25/why-australia-should-not-have-a-religious-freedom-act/>

3. Press Releases

Christian Medical Fellowship, 'Lawyers Christian Fellowship and Christian Doctors Welcome High Court Decision to Back Leslie Burke Case' (Press Release, 30 July 2004) <https://www.cmf.org.uk/advocacy/pressrelease/?id=32>

European Commission, 'Special Envoy Ján Figeľ' (Press Release, European Commission, May 2018) <https://ec.europa.eu/europeaid/special-envoy-jan-figel_en>

High Court of Australia, 'Pell v The Queen [2020] HCA 12' (Media Release, 7 April 2020) <https://www.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-12-2020-04-07.pdf.>

Office the Prime Minister and Cabinet, 'COAG Becomes National Cabinet', (Press Release, 2 June 2020) <https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet>

Office of the Prime Minister and Cabinet, 'National Cabinet Statement' (Media Release, 29 March 2020)

Office of the Prime Minister and Cabinet, 'Update on Coronavirus Measures' (Media Release, 27 March 2020)

4. Media and Audiovisual

2001—A Space Odyssey (Stanley Kubrick Productions, 1968)

A.I. (Amblin Entertainment, 2001)

Blade Runner (Ladd Entertainment, 1982)

Blade Runner 2049 (Alcon Entertainment, 2017)

I, Robot (Davis Entertainment, 2004)

Metropolis (UFA, 1927)

Minority Report (20th Century Fox, 2002)