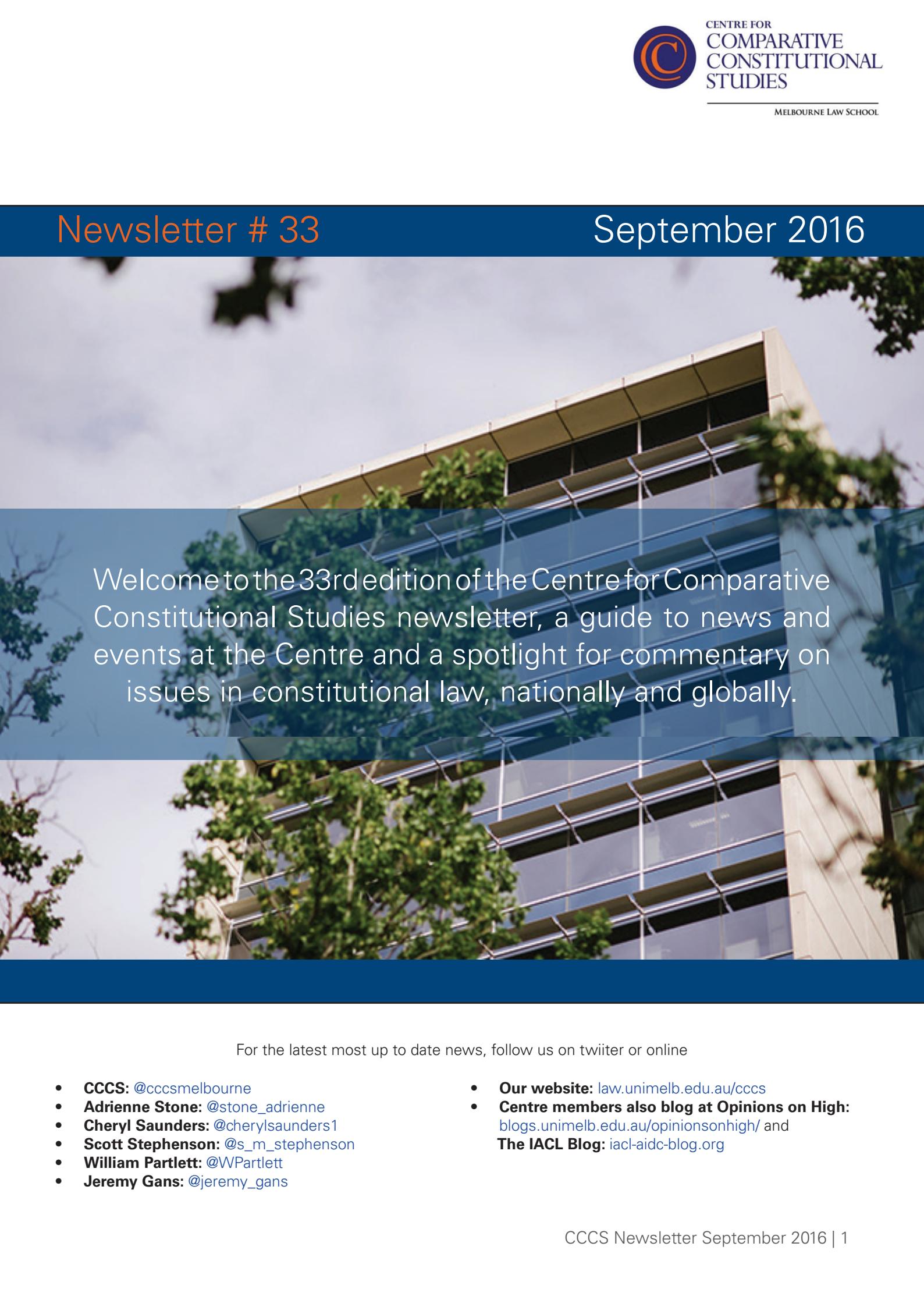




## Newsletter # 33

September 2016



Welcome to the 33rd edition of the Centre for Comparative Constitutional Studies newsletter, a guide to news and events at the Centre and a spotlight for commentary on issues in constitutional law, nationally and globally.

For the latest most up to date news, follow us on twiiter or online

- **CCCS:** [@cccsmelbourne](#)
- **Adrienne Stone:** [@stone\\_adrienne](#)
- **Cheryl Saunders:** [@cherylsaunders1](#)
- **Scott Stephenson:** [@s\\_m\\_stephenson](#)
- **William Partlett:** [@WPartlett](#)
- **Jeremy Gans:** [@jeremy\\_gans](#)
- **Our website:** [law.unimelb.edu.au/cccs](#)
- **Centre members also blog at Opinions on High:** [blogs.unimelb.edu.au/opinionsonhigh/](#) and **The IACL Blog:** [iacl-aidc-blog.org](#)

# Director's Report

I wrote in my last newsletter of the launch of the **Constitution Transformation Network** a major new initiative of CCCS. The last few months have been important for the Network which held its first major event, the **Melbourne Forum on Constitution Building in Asia and the Pacific** on 18–19 August. The forum, co-hosted with [International IDEA](#) is further reported on at page 9 of this newsletter. The forum was also the occasion for the launch of Dr Bui Ngoc Son's important new work *Confucian Constitutionalism in East Asia*. The Network also launched its [website](#) and [twitter](#) presence.

Important news and new initiatives for CCCS also emerged from the other side of the world at the [2016 Public Law Conference](#) at the University of Cambridge. The conference began with the exciting announcement that the **2018 Public Law Conference** will be held in Melbourne at CCCS. We are delighted to be co-hosting this major event and particular grateful to **Jason Varuhas** and the other Convenors for their enormous work in bringing the conference to Melbourne.

CCCS was represented on the [program](#) by Professor Cheryl Saunders as a keynote speaker; Associate Professor Jason Varuhas as chair, a panellist and a conference convenor; and **Anne Carter** whose paper 'Constitutional Convergence: Some Lessons from Proportionality' was runner up for the **Richard Hart Award** for the best paper presented by an early career scholar.

Even further occasion for celebration emerged from the United Kingdom, this time from the Society of Legal Scholars, with the award to **Jason Varuhas** of the **Peter Birks Prize for Outstanding Legal Scholarship**. The high prestigious prize awarded for outstanding published books by scholars in their early careers is a wonderful testament to Jason's important book *Damages and Human Rights*. Rounding out this extraordinary period of achievement for CCCS scholars the launch of **Dr Scott Stephenson's** book *From Dialogue to Disagreement* the winner the [Inaugural Holt Prize](#). The book will be launched along with the book of co-winner **Dr Giovanni Di Lieto** of Monash University on **28 September** by **Justice Mark Leeming** of the Court of Appeal of New South Wales.

At this time of the year we are naturally turning our minds to 2017 and in particular to the launch of the [Laureate Project in Constitutional Law](#), to the next in our series of **CCCS Constitutional Law Conferences** which will be held on **21 July 2017**. We look forward to welcoming new visitors to the Centre including [Professor Denis Baranger](#) under the [Miegunyah Distinguished Visiting Fellows Program](#).



Professor Adrienne Stone

# Centre Update

## Adrienne Stone, Director

### Teaching

Freedom of Speech in the Melbourne Law Masters (from 13–19 July) with Professor Fred Schauer

### Presentations

Commentator, Australian Charity Law and Political Advocacy, 29 July 2106 (Melbourne Law School)

Co-Chair (with Associate Professor Stacey Steele, Asian Law Centre ) 'Roundtable on Japanese Constitutional Law' featuring Professor Hajime Yamamoto, Keio Law School, 11 August 2016

Panellist , Public Interest Law Panel, Melbourne Law School, 16 August 2016.

## Cheryl Saunders, Foundation Director

### Presentations

'Public Law and Public International Law: a Public Law Perspective on Interdependence' at *Dialogues between International and Public Law*, BIICL and MLS, 30 June–1 July 2016, London

Australian Democracy and Executive Law-making, Senate Occasional Lecture, March 2016 is now available on video: [http://www.aph.gov.au/Senate/occasional\\_lectures](http://www.aph.gov.au/Senate/occasional_lectures)

Book launch of Jason Varuhas, *Damages and Human Rights*, 3 August

'The High Court's Decision in M 68', Seminar, Australian Association of Constitutional Law, 15 August

Book launch of Bui Ngoc Son, *Confucian Constitutionalism in East Asia*, 17 August

Chaired a panel on 'Constitutional Design: Federalism and Devolution' at a conference on *Constitution Building in States with Territorially Based Societal Conflict*, Contransnet, CCCS, 18–19 August

'Transplants in Public Law' to the Cambridge Public Law Conference, 14 September, as a keynote speaker

Participated in a meeting of the Advisory Board of the Vienna University of Economics and Business, Vienna, 16 September

### Teaching

*Comparative Federal Constitutional Law* in the Melbourne Law Masters, 24–30 August, with Professor Vicki Jackson

### Publications

'Listening and Hearing: A Review of Two Books on Indigenous 'Recognition' in Australia', review of Damien Freeman and Shireen Morris (eds) *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* and Megan Davis and Marcia Langton (eds), *It's our country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform*, *Indigenous Law Bulletin* 8(24) 2016

## CCCS members

### Farrah Ahmed

#### Publications

Constitutional Statutes by Farrah Ahmed, Adam Perry.  
SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2743936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2743936)

Remedying Personal Law Systems by Farrah Ahmed.  
SSRN link: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2777337](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777337)

'The Autonomy Rationale for Religious Freedom'  
accepted in the Modern Law Review.

### Michael Crommelin

#### Presentations

Presented 'The Pacific 'Solution' to the Refugee Crisis: a case study' at the at *Dialogues between International and Public Law*, BIICL and MLS, 30 June–1 July 2016, London

### Alison Duxbury

#### Publications

Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press, Cambridge, 2016). <http://www.cambridge.org/au/academic/subjects/law/human-rights/military-justice-modern-age?format=HB>

### Anna Dziedzic

#### Presentations

'How can comparative research and gender analysis help to increase women's political participation in the Pacific?' presented at *Innovating for Impact: A Pacific Regional Consultation on Women's Political Empowerment and Leadership*, Nadi Fiji, 13–15 September 2016

### Beth Gaze

#### Teaching

Equality Law Internationally in the Melbourne Law Masters from 12–19 July with Professor Judy Fudge of the University of Kent at Canterbury.

#### Presentations

Convened and presented at an expert workshop on 'Reshaping Employment Discrimination Law Project: Towards Substantive Equality at Work?' with Associate Professor Anna Chapman on July 10 and 11, with international visitors Professors Judy Fudge, David Oppenheimer of the University of California at Berkley, and Colm O'Cinneide of University College London.

As part of the 'Reshaping Employment Discrimination Law Project: Towards Substantive Equality at Work?' workshop provided an Australian commentary at a public lecture panel session on 'Progressing equality at work: beyond non-discrimination' featuring the three international speakers on 10 July.

#### Publications

Submitted for publication in *The Critical Judgments Project: Re-reading Monis v The Queen* (Federation Press, 2016) Ed. Gabrielle Appleby and Rosalind Dixon, Ch. 4. Anti-subordination Feminism

### Jarrod Hepburn

#### Presentations

Presented 'Parallel Expropriation Norms in International Law and Australian Law' at *Dialogues between International and Public Law*, BIICL and MLS, 30 June–1 July 2016, London

## William Partlett

### Publications

Courts and Constitution-Making, 50 Wake Forest L. Rev. 921 (2015). SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2730359](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730359)

Is Socialist Law Really Dead? 48 NYU J. Int'l L. & Pol. 463 (2016). SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2660098](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660098)

Restoration Constitution-Making, 9 Vienna J. Int'l Const. L. 514 (2015). SSRN: [https://www.academia.edu/25145656/Restoration\\_Constitution-Making](https://www.academia.edu/25145656/Restoration_Constitution-Making)

Colombia, New Constitutionalism, and History, IACL Blog, July 5, 2016. IACL Blog: <https://iacl-aidc-blog.org/2016/07/05/william-partlett-colombia-new-constitutionalism-and-history/>

Interpretation and the Impossibility of Implementation in Russian Prisoner Voting, August 18, 2016. IACL Blog: <https://iacl-aidc-blog.org/2016/08/18/analysis-interpretation-and-the-impossibility-of-implementation-in-russian-prisoner-voting/>

### Forthcoming publications

The Elite Threat to Constitutional Transitions, *Virginia Journal of International Law*

## Kristen Rundle

### Publications

'The stakes of procedural fairness: Reflections on the Australian position' 2016 23(3) *Australian Journal of Administrative Law*. Academia: [https://www.academia.edu/28277917/Rundle\\_procedural\\_fairness.pdf](https://www.academia.edu/28277917/Rundle_procedural_fairness.pdf)

## Dale Smith

### Publications

"Is the High Court Mistaken about the Aim of Statutory Interpretation?" (2016) 44(2) *Federal Law Review* 227-255. SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2836341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836341)

## Scott Stephenson

### Publications

*From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016)

### Presentations

'Reforming the Australian Constitution', Schools' Regional Constitutional Convention, 26 August 2016  
'Commentary on *Murphy v Electoral Commissioner*', CCCS Brown Bag Seminar, 13 September 2016

## Joo-Cheong Tham

### Publications

Iain Campbell, Martina Boese, and Joo-Cheong Tham, 'Inhospitable workplaces? International students and paid work in food services' *Australian Journal of Social Issues* Vol.51 No.3, 2016

### Opinion piece

'Better regulation of all political finance would help control foreign donations', *The Conversation*, 1 September 2016, also published by ABC News (<http://www.abc.net.au/news/2016-09-01/better-regulation-of-all-political-finance-would-help-control-it/7805806>)

### Media engagement

SBS Insight, Episode entitled, 'Fair Work, Fair Pay', 26 July 2016 (<http://www.sbs.com.au/news/insight/tvepisode/fair-work-fair-pay>)

ABC Perth Drive 720, 27 July 2016, Interviewed re SBS Insight

RN Breakfast, Political donations by mining industry create undue influence over government, 29 July 2016 (<http://www.abc.net.au/radionational/programs/breakfast/political-donations-by/7671958>)

ABC 7.30 Report 1 September 2016, Interviewed in relation to foreign political donations

Debra Killalea, 'Wolf Creek in real life: Insight on SBS reveals visa exploitation horror', 26 July 2016 (<http://www.news.com.au/lifestyle/real-life/news-life/wolf-creek-in-real-life-insight-on-sbs-reveals-visa-exploitation-horror/news-story/4944e6dd1febcd955dd2a075eff2e743>)



Madeleine King, 'Horror stories reveal risk of exploitation for foreign workers', SBS, 25 July 2016  
(<https://www.sbs.com.au/news/insight/article/2016/07/21/horror-stories-reveal-risk-exploitation-foreign-workers>)

Madeleine King, 'Justice elusive for victims of forced labour', SBS, 25 July 2016

### **Presentations**

Joo-Cheong Tham and Judy Fudge, 'Neoliberalism at work: A comparison of low-skill temporary labour migration programs in Australia and Canada', *International and Comparative Perspectives on Australian Labour Migration*, Melbourne Law School, 21–22 July 2016

Iain Campbell, Joo-Cheong Tham and Martina Boese, 'Temporary migrant workers in food services: Mapping and explaining high levels of precariousness in employment', *International and Comparative Perspectives on Australian Labour Migration*, Melbourne Law School, 21–22 July 2016

Martina Boese, Iain Campbell and Joo-Cheong Tham, 'Ethnicity at work: A comparative study of study of temporary migrants' network, agency and exploitation', *International and Comparative Perspectives on Australian Labour Migration*, Melbourne Law School, 21–22 July 2016

## **Jason Varuhas**

### **Publications**

*Damages and Human Rights* (Hart Publishing 2016) 499pp.  
- Awarded the UK Society of Legal Scholars Peter Birks Prize for Outstanding Legal Scholarship 2016.  
- Cited by the UK Supreme Court in *R (Lee-Hirons) v Secretary of State for Justice* [2016] UKSC 46 [46].

*Judicial Capture of Political Accountability*, Policy Exchange Judicial Power Project Policy Report (2016) 51pp. Available at: <http://judicialpowerproject.org.uk/judicial-capture-of-political-accountability/>

'The Development of the Damages Remedy under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law' [2016] New Zealand Law Review 213–254.

### **Visiting Position**

Watts Visiting Fellow, British Institute for International and Comparative Law, University of London, July 2016.

### **Presentations**

Book panel on *Damages and Human Rights* with Professor Brice Dickson (Queen's University Belfast) and Mr James Lee (King's College London), University of Montreal, 26 May 2016.

'Snakes and Ladders: the UK Supreme Court and the New Common Law Constitutionalism', International Symposium on Supreme Courts and the Common Law, University of Montreal, 27 May 2016.

Book panel on *Damages and Human Rights* with Professor Claudia Geiringer (Victoria University Wellington), Hon Justice Matthew Palmer (New Zealand High Court) and Mr Chris Curran (Partner, Russell McVeigh), Victoria University of Wellington, 1 June 2016.

'Against the Public Law-Private Law Distinction', Conference on Dialogues Between Domestic and International Law, London, 30 June–1 July 2016.

'Mapping Public Law', Seminar, British Institute of International and Comparative Law, London, 5 July 2016.

'The Socialisation of Private Law', Obligations VIII Conference: Revolutions in Private Law, University of Cambridge, 19–22 July 2016.

Book panel on *Damages and Human Rights* with Professor Carol Harlow (LSE), Professor Christopher Forsyth (Cambridge) and Professor Robert Stevens (Oxford), Society of Legal Scholars Annual Conference, University of Oxford, 6–9 September 2016.

'Mapping Public Law', Public Law Conference 2016: The Unity of Public Law?, University of Cambridge, 12–14 September 2016.

### **Conference organisation**

Convenor, Public Law Conference 2016, University of Cambridge 12–14 September 2016.



## Book launch

Launch of *Damages and Human Rights*, Launched by Hon Stephen Gageler (High Court of Australia) and Professor Cheryl Saunders (Melbourne), Melbourne Law School, 3 August 2016.

## Blog post

'Judicial Capture of Political Accountability', Policy Exchange Judicial Power Project Blog, 6 June 2016. Available at: <http://judicialpowerproject.org.uk/jason-varuhas-judicial-capture-of-political-accountability/>

## Lulu Weis

### Publications

'Rethinking the Place of Private Law in Contemporary Political Philosophy' (review of Allan Beever, Forgotten Justice (Oxford 2013)) (2015) 40 Australian Journal of Legal Philosophy 163. Academia: [https://www.academia.edu/15668469/Rethinking\\_the\\_Place\\_of\\_Private\\_Law\\_in\\_Contemporary\\_Political\\_Philosophy\\_Comments\\_on\\_Allan\\_Beever\\_s\\_Forgotten\\_Justice](https://www.academia.edu/15668469/Rethinking_the_Place_of_Private_Law_in_Contemporary_Political_Philosophy_Comments_on_Allan_Beever_s_Forgotten_Justice)

### Presentations

'Originalism in Australia', Address to the Samuel Griffith Society Annual Conference, Adelaide (13 August 2016).

### Conference organisation

Co-organised and convened the 2016 Australian Society of Legal Philosophy Annual Conference, Melbourne Law School (22–24 July 2016).



# The Constitution Transformation Network

The Constitution Transformation Network is a new initiative that brings together a team of scholars at Melbourne Law School to explore both the practice and the concept of constitutional transformation.

At a practical level constitutional transformation is or has recently been underway in many states across the world. At heart, constitutional transformation involves the formulation and implementation of new Constitutions or major changes to existing Constitutions. It comprises questions about constitutional design as well as the processes of constitutional change. Depending on the context, constitutional transformation may encompass conflict resolution, peace building and other catalysts for regime change. It extends well beyond the ratification of new arrangements to include a period of transition, which may be drawn-out over a decade or more, and which covers implementation and constitutional change post-adoption.

In conceptual terms the very idea of a Constitution may be undergoing transformation, in the face of the conditions of internationalisation and globalisation that characterise present times. Pressures for change come from what is loosely described as the constitutionalisation of international law (the extent to which arrangements at the regional or international levels are beginning to take forms that might be described as 'constitutional') and the internationalisation of constitutional law (the impact of international actors and norms on constitutional transformation within a state). These interfaces between domestic and international interests have practical as well as theoretical implications.

The Constitution Transformation Network seeks to explore these issues through five interrelated and overlapping themes: peacebuilding; constitution making; international and domestic interfaces; regionalism; and the dynamics of implementation.

Collectively, team members bring knowledge in constitutional and comparative constitutional law, international law, military and international humanitarian law, regional law and Asian law. They believe that context is critically important in constitutional transformation, which therefore requires the knowledge and skills of comparative constitutional law. To that end, team members are committed to pooling their expertise to work together and with global partner institutions, scholars and practitioners to make a genuine difference to constitutional transformation in theory and practice.

The co-convenors of the Constitutions Transformation Network are [Laureate Professor Cheryl Saunders AO](#), [Dr William Partlett](#) and [Ms Anna Dziedzic](#).



**Website:** <http://law.unimelb.edu.au/constitutional-transformations>

**Twitter:** [@ConTransNet](#)

## Recent Events

# CONSTITUTION BUILDING IN STATES WITH TERRITORIALLY BASED SOCIETAL CONFLICT

18 and 19 August 2016

The Constitution Transformation Network and International IDEA jointly organised the **Melbourne Forum on Constitution Building in Asia and the Pacific** on 18–19 August 2016.

The theme of the Forum was 'Constitution Building in States with Territorially Based Societal Conflict'. The Forum brought together practitioners and scholars from across Asia and the Pacific to share their experiences of constitution building in societies in which there is territorially based conflict. States and polities represented at the Forum included Bougainville, India, Indonesia, Myanmar, Nepal, New Caledonia, Papua New Guinea, Philippines, Solomon Islands, Sri Lanka and Vietnam.

The Forum discussed how states and polities in the Asia Pacific region have sought to accommodate territorially based conflict in their constitutional systems, by considering:

- The nature of the societal conflict and the political/cultural impediments to solutions.
- The form and principal design features of federalism, devolution and/or local autonomy and how effective it is, or is likely to be.
- Arrangements for 'shared rule' in central governing institutions and constitutional provisions for shared ownership of the state, and how effective these are, or are likely to be.
- The principal features of the process that was/is being used for constitution building; whether these processes might themselves foster a sense of collective ownership of the constitution and the state; and any problems that have or might arise with the process.
- Challenges that arise in constitutional implementation.
- The insights that can be drawn for constitution building in conditions of societal conflict elsewhere in the region and globally.

A report of the Forum and key insights from the discussions will be published shortly.



## Recent Events

### Book launch: Damages and Human Rights

3 August 2016

CCCS hosted the book launch of Jason Varuhas' *Damages and Human Rights* on Wednesday 9 August at the Melbourne Law School. The book was launched by the **Hon Justice Stephen Gageler**, High Court of Australia and **Laureate Professor Cheryl Saunders**, Melbourne Law School.

*Damages and Human Rights* was awarded the UK Society of Legal Scholars Peter Birks Prize for Outstanding Legal Scholarship 2016.



*Damages and Human Rights* is a major work on awards of damages for violations of basic human rights that will be of compelling interest to practitioners, judges and academics alike. The subject, lying at the intersection of public law, private law and international law, is one that has posed ongoing challenges for the highest courts in common law jurisdictions. Dr Varuhas analyses the existing law and explores the theoretical foundations of such awards, arguing for a move away from 'public law' approaches characterised by open-ended discretion and a paucity of principle, in favour of an approach based in axiomatic damages principles developed in the law of torts. Professor David Feldman, Rouse Ball Professor of English Law, University of Cambridge, in the foreword to the book, says *Damages and Human Rights* "will quickly become the standard point of reference in its field. It is a pleasure to congratulate Dr Varuhas on this sustained, intellectually powerful and practically important piece of legal scholarship, and to commend it to the many readers, in many parts of the world, where it will, I hope, stimulate new approaches to the practice and theory of the subject".

**Dr Jason N. E. Varuhas** is Associate Professor at the University of Melbourne. He is also an Associate Fellow of the Centre for Public Law at the University of Cambridge. His research and teaching interests cross the public law-private law divide; his specialisms lie in administrative law, the law of torts, the law of remedies, and the intersection of public and private law. He has published on topics in private and public law in leading international journals and edited collections, has presented at international conferences across the common law world, authored policy reports, and has several books in press. Jason's most recent books include *Damages and Human Rights* (Oxford, Hart Publishing, 2016), and *Public Law Adjudication in Common Law Systems* (Oxford, Hart Publishing, 2016), a volume of essays co-edited with colleagues at the University of Cambridge. He is a founder and co-convenor of the Public Law Conferences, a biennial series of major international conferences on public law.

## Recent Events

# Book launch: Confucian Constitutionalism in East Asia 18 August 2016

CCCS jointly hosted the book launch of Dr Bui Ngoc Son's *Confucian Constitutionalism in East Asia* at Melbourne Law School on Wednesday 18 August.



Western liberal constitutionalism has expanded recently, with, in East Asia, the constitutional systems of Japan, South Korea and Taiwan based on Western principles, and with even the socialist polities of China and Vietnam having some regard to such principles. Despite the alleged universal applicability of Western constitutionalism, however, the success of any constitutional system depends in part on the cultural values, customs and traditions of the country into which the constitutional system is planted. This book explains how the values, customs and traditions of East Asian countries are Confucian, and discusses how this is relevant to constitutional practice in the region. The book explores classical ideas and imperial practice of Confucian constitutionalism, intellectual efforts to integrate Confucianism with modern constitutionalism, and develop a normative theory of mixed constitutionalism in the contemporary East Asia. The book has implications for both comparative political theory and comparative constitutional inquiry.

**Dr Bui Ngoc Son** is a research fellow of the Centre for Asian Legal Studies, Faculty of Law, National University of Singapore, when he was previously a postdoctoral fellow. He is a PhD from The University of Hong Kong. He was a visitor at Melbourne Law School, a visiting researcher at Harvard Law School, and a visiting scholar at Tsinghua Law School. He is the author of the book *Confucian Constitutionalism in East Asia* (Routledge, 2016). His articles have been published or forthcoming in *American Journal of Comparative Law*, *Law & Social Inquiry*, *University of Illinois Law Review*, *The Journal of Comparative Law*, *Chinese Journal of Comparative Law*, *Loyola of Los Angeles International and Comparative Law Review*, *Australian Journal of Legal Philosophy*, among others. He has also published 8 books and numerous articles in Vietnamese. His research interests include: legal change in the contemporary socialist world, Asian legal systems, Asian legal and political philosophy, Asian comparative constitutional law, and comparative constitutional theory.

## Recent Events

### CCCS Seminar series: 4 August 2016

#### The geopolitics of energy and investment arbitration

Professor Anatole Boute  
*Chinese University of Hong Kong*



*This seminar was jointly hosted by the Centre for Comparative Constitutional Studies (CCCS) and Centre for Resources, Energy and Environmental Law (CREEL).*

**Abstract:** Energy is not just a key economic sector, it is also of crucial geostrategic importance. The dual economic and strategic nature of energy influences the regulation of trade and investment in this industry. However, the legal discipline is poorly equipped to fully understand the inherent complexity of energy security. This paper proposes to use theories of “geopolitics” – i.e. the analysis of the interaction between geographical forces and political processes – to reflect the strategic nature of energy in the legal analysis of this sector. The focus is on the regulation of energy investments. Foreign control over strategic energy assets can be perceived as a threat to national energy security. State-owned energy companies can be used as “geopolitical actors” in the pursuit of broader foreign policy objectives. Building on the “geopolitics” energy law and investment law literature, this paper examines the regulation of “geopolitical investments” under investment arbitration and, on this basis, proposes a new interdisciplinary perspective to the study of energy security and investment protection.

**Professor Anatole Boute** is an Associate Professor at the Chinese University of Hong Kong and Legal Advisor to the International Finance Corporation (World Bank Group).

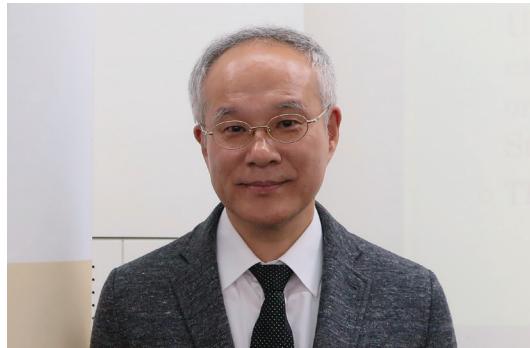
## Recent Events

### CCCS Seminar series: 16 August 2016

#### Imposed Constitutions

**Professor Yasuo Hasebe**

*Professor of Constitutional Law at Waseda University*



**Abstract:** The concept of an imposed constitution seems simple and clear. If a written constitution is imposed on a people without their full agreement, that is an imposed constitution, though opinion may differ over what constitutes the ‘full agreement’ of a people for this purpose. Strictly speaking, ‘full agreement’ will require that a majority of the people consent to a constitution through a formal procedure. However, it is unusual to regard every constitution lacking ‘full agreement’ in this strict sense as an imposed constitution. And we may say that, regarding every constitution, at least some part of people acquiesces in it, rather than consenting to it. Whether a constitution is imposed or not is a question of degree, not a question of kind.

Inherent in this concept of imposed constitution is the assumption that constituent power belongs to the people. Therefore, a constitution which a monarch concedes to his or her subjects (*constitution octroyée*) is also a kind of imposed constitution. The French Charter of 1814 is a model case which influenced the conceded constitutions of Southern German states of 1818–1820, and indirectly the Constitution of the Empire of Japan of 1889.

If a constitution is imposed, it is usually supposed that it lacks legitimacy because the people themselves, as the inherent holders of constituent power, should be able to establish their own constitution. The current Constitution of Japan has sometimes been attacked as an illegitimate constitution imposed by the occupying forces, though we can pose a question of whether it was imposed upon the people at all. Since the concept of the imposed constitution is predicated on the theory of constituent power (*pouvoir constituant*) of the people, this concept loses its pertinence if the validity and legitimacy of constitutions cannot be explained by the theory of constituent power.

**Yasuo Hasebe** is Professor of Constitutional Law at Waseda University, President of Japan Association of Constitutional Law and 2016 Weng Yuan-Chang Foundation Chair Professor at National Taiwan University, College of Law.

## Recent Events

### CCCS Seminar series: 7 September 2016

#### Minimum Core Obligations: Human Rights in the Here and Now

**Professor John Tasioulas**

*Director of the Yeoh Tiong Lay Centre for Politics,  
Philosophy, and Law at the Dickson Poon School  
of Law, King's College London*



*This seminar was jointly hosted by the Centre for Comparative Constitutional Studies (CCCS) and Institute for International Law and the Humanities (IILAH).*

**Abstract:** Professor Tasioulas offers an account of the concept of minimum core obligations as those obligations associated with a human right that must be immediately fully complied with by all states. They are, in that sense, obligations to which the doctrine of 'progressive realization' is inapplicable. Professor Tasioulas distinguishes this understanding of the minimum core from interpretations that add extra elements, such as justiciability, non-derogability or special normative grounding. Having set out the concept of a minimum core obligation, he then explains the value of this concept as a response to the problem of priority-setting when implementing human rights obligations. He also offers guidelines for determining the content of minimum core obligations, taking as an illustration the treatment of the human right to health.

The paper concludes by addressing three major challenges: (a) is the minimum core the same for all states, or should it vary in light of their different resource levels? (b) if the minimum core is invariant across states, does this render it objectionably insensitive to important contextual differences? and (c) is the recognition of a 'minimum core' of human rights obligations potentially counter-productive in practice insofar as it poses a risk of unduly downgrading the importance of non-core obligations.

**John Tasioulas** is the inaugural Chair of Politics, Philosophy & Law and Director of the Yeoh Tiong Lay Centre for Politics, Philosophy, and Law at the Dickson Poon School of Law, King's College London. During the Spring quarter of 2016 he was a Visiting Professor of Law at the University of Chicago Law School.

Professor Tasioulas has degrees in Law and Philosophy from the University of Melbourne, and a D.Phil in Philosophy from the University of Oxford, where he studied as a Rhodes Scholar. He was previously a Lecturer in Jurisprudence at the University of Glasgow and Reader in Moral and Legal Philosophy at the University of Oxford, where he taught from 1998-2010. His most recent appointment was as Quain Professor of Jurisprudence at University College London.

## Forthcoming events

The Centre for Comparative Constitutional Studies will host a series of conferences, seminars and events in 2017 & 2018. For more information on these and other events see <http://law.unimelb.edu.au/centres/cccs#events>

### 2016

**The Jim Carlton Integrity Lecture:  
Accountability: Do programs work? (and how can we find out?) or  
'Through a glass darkly...'**

Professor the Hon. Peter Baume, AC  
co-hosted with the [Accountability Round Table](#)

16 August 2016, 6:30pm  
GM15 The David P Derham Lecture Theatre, Melbourne Law School

### 2017

**CCCS Constitutional Law Conference** 21 July 2017  
Melbourne Law School

**2017 Miegunyah Fellowship Public Lecture**  
by [Professor Denis Baranger](#), Professor of Public law, l'Université Paris II Panthéon-Assas  
Melbourne Law School

### 2018

**Third Biennial Public Law Conference**  
co-hosted with the Faculty of Law, University of Cambridge  
July 2018, Melbourne Law School



## Call for Participants

# WINTER SCHOOL ON FEDERALISM AND GOVERNANCE 2017

The Winter School is a cross-border postgraduate programme located in the heart of the Alps under the auspices of the Secretary General of the Council of Europe.

The 2017 edition will focus on "**FEDERALISM AND POWER-SHARING**"

### **Dates and venues: 30 January–10 February 2017**

The first week (30 January–3 February) takes place at the Faculty of Law and School of Political Science and Sociology, Leopold-Franzens-Universität Innsbruck, **Austria**;

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# Comparative Constitutional Law Update

## 1. CASES

### A. HIGH COURT OF AUSTRALIA

#### ***Murphy v Electoral Commissioner [2016] HCA 36 (5 September 2016)***

Certain provisions of the *Commonwealth Electoral Act 1918* (Cth) prevent the Electoral Commissioner from adding a person to, or otherwise updating, the Electoral Roll during the 'suspension period' between 8pm on the day of the closing of the Rolls and the close of the poll for an election.<sup>1</sup> The plaintiffs sought a declaration that these provisions were invalid. They argued that the suspension period 'precluded people otherwise eligible to enrol and vote' and were, therefore, contrary to the constitutional requirement that Members of Parliament be 'directly chosen by the people'.<sup>2</sup> In particular, the plaintiffs relied on *Roach v Electoral Commissioner*<sup>3</sup> and *Rowe v Electoral Commissioner*,<sup>4</sup> arguing that:

1. A law which has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the Constitution is invalid unless the disqualification is for a substantial reason.
2. Such a law will be for a substantial reason only if it is reasonably appropriate and adapted to serve an end which is consistent or compatible with the constitutionally mandated system of representative government.<sup>5</sup>

#### **Judgment**

All of the judges of the Court rejected the challenge to the *Electoral Act*.

French CJ and Bell J distinguished *Roach* and *Rowe* on the basis that those cases concerned 'a change to the law adverse to the exercise of the franchise', whereas the present challenged concerned 'the omission of the legislature to maximise opportunities for the exercise of the franchise'.<sup>6</sup> Their Honours gave weight to the fact that the limitations were long-standing, holding that *Electoral Act* did not impose a burden on the realisation of the requirement that Members of Parliament be chosen by the people; it was not sufficient to show that alternative methods might increase opportunities for enrolment.<sup>7</sup>

Kiefel J similarly distinguished *Roach* and *Rowe*.<sup>8</sup> Her Honour endorsed the use of proportionality testing in determining the limits of legislative power where legislation burdens the franchise. Applying this approach, her Honour held that the purpose of impugned provisions was, broadly, the facilitation of 'the efficient conduct of an election' and that the provisions, which had the effect of minimising delays and increasing certainty in the Roll, bore a rational connection to that purpose.<sup>9</sup> Her Honour considered that it could not be concluded that alternative statutory schemes would be as efficient in achieving this purpose.<sup>10</sup>

1 Sections 94A(4), 95(4), 96(4), 101, 102(4), 103A(5), 103B(5), 118(5).

2 *Murphy v Electoral Commissioner [2016] HCA 36 (5 September 2016) [3]* (French CJ and Bell J) ('Murphy'); *Australian Constitution ss 7 and 24*.

3 (2007) 233 CLR 162.

4 (2010) 243 CLR 1.

5 *Murphy [2016] HCA 36 (5 September 2016) [22]* (French CJ and Bell J).

6 *Ibid* [40].

7 *Ibid* [41]–[42].

8 *Ibid* [52].

9 *Ibid* [69].

10 *Ibid* [73].

Gageler J emphasised ‘that closure of the Rolls is and has always been a step in the conduct of an election under our national electoral law’.<sup>11</sup> His Honour firmly rejected the use of proportionality testing: the appropriate question was simply whether there was a substantial reason for the burden.<sup>12</sup> His Honour held that the reason for the impugned provisions was to promote ‘the orderly conduct of national elections’ and that this was substantial.<sup>13</sup> His Honour further held that, whether or not the current suspension period ‘might be regarded as outmoded, … [it] is not so unfit for the purpose for which it was so long ago designed that it can no longer be said to be reasonably appropriate and adapted to serve that purpose’.<sup>14</sup>

Keane J held that the *Constitution* confers on the Parliament a broad power to create the electoral system that effects the constitutional requirement of ‘choice by the people’.<sup>15</sup> Furthermore, the concept of ‘choice by the people’ covers ‘the broader aspects of the electoral system which are necessary to facilitate that choice and against which the desirability of maximising voting opportunities must be balanced’.<sup>16</sup> His Honour thus held that ‘to accept the argument that the requirements of ss 7 and 24 can only be satisfied by electoral laws which maximise the opportunity for voting … is to make a nonsense of the absence of an express statement to that effect in these sections themselves’.<sup>17</sup>

Nettle J accepted that restrictions on the period in which persons may enrol to vote must be justified by a ‘substantial reason’.<sup>18</sup> This requires that the restriction be reasonably appropriate and adapted to a legitimate end.<sup>19</sup> His Honour held that the *Electoral Act* is ‘directed to the achievement of a degree of order and certainty which enhances the democratic process’ and that the impugned provisions were reasonably appropriate and adapted to that end.<sup>20</sup> Although there were alternative means of managing the electoral Roll, it was not clear that these were ‘capable of achieving the same level of order and certainty’.<sup>21</sup> The ‘relatively broad discretion’ conferred by the *Constitution* left it open to Parliament to prefer the system established by the *Electoral Act*.<sup>22</sup>

Gordon J held that the *Electoral Act* did not impose ‘a relevant restriction on, or exclusion from, the franchise’: ‘there was no legislative diminution of an existing opportunity to enrol, transfer or vote’ and ‘the suspension period does not prevent any group of electors from voting’.<sup>23</sup> Her Honour held that, even if the *Electoral Act* did impose a restriction, the creation of ‘an orderly process for [Members of Parliament] to be “directly chosen by the people”’ was a substantial reason justifying that restriction. Her Honour also considered whether the ‘structured’ proportionality approach adopted by the joint judgment in *McCloy* was applicable to the question before the Court.<sup>24</sup> Her Honour held that it was not, distinguishing between the limits on legislative power derived from the implied freedom of political communication and the limits derived from the requirement that Members of Parliament be ‘chosen by the people’ on the basis that ‘Parliament is required to enact laws which provide for an electoral system’ and is given broad discretion to do so.<sup>25</sup>

11 Ibid [103].

12 Ibid [101].

13 Ibid [104].

14 Ibid.

15 Ibid [227].

16 Ibid [181].

17 Ibid [227].

18 Ibid [224].

19 Ibid, citing *Roach* (2008) 233 CLR 162, 199 [85] (Gummow, Kirby and Crennan JJ).

20 Ibid [250].

21 Ibid [252].

22 Ibid [254].

23 Ibid [308], [309], [320].

24 Ibid [297].

25 Ibid [301], [302] (emphasis added).

## B. SUPREME COURT OF THE UNITED STATES

***Whole Woman's Health et al v Hellerstedt Commissioner, Texas Department of State Health Services et al, 579 US \_\_\_\_ (2016) (27 June 2016)***

This case concerned the Fourteenth Amendment 'liberty' clause<sup>26</sup> and its application in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833 (1992) ('Casey') which held that a law is constitutionally invalid if the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability'.<sup>27</sup>

The issue in this case was whether two provisions of the Texas' House Bill 2 violated the US Constitution as interpreted in *Casey*.<sup>28</sup> The first provision, termed the 'admitting-privileges requirement', required that physicians performing abortions have admitting privileges at a hospital within 30 miles of the location at which any abortion is performed'.<sup>29</sup> The second provision, termed the 'surgical centre requirement', required that the minimum standards for an abortion facility be equivalent to the minimum regulatory standards for ambulatory surgical centres.<sup>30</sup>

The appellants claimed that the 'admitting-privileges requirement' and 'surgical centre requirement' violated the Constitution's Fourteenth Amendment as interpreted in *Casey*. The Court held five to three that each provision placed a substantial obstacle in the path of women seeking an abortion and therefore 'constitutes an undue burden on abortion access, violating the Fourteenth Amendment of the Federal Constitution'.<sup>31</sup>

### **Judgment**

Breyer J delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor and Kagan JJ joined. Breyer J reiterated that the standard established in *Casey* 'required [courts] to consider the burdens a law imposes on abortion access together with the benefits those laws confer'<sup>32</sup> and 'whether the burden imposed on abortion access is "undue"'.<sup>33</sup> With respect to the first provision there was 'sufficient evidence that the admitting privileges requirement led to the closure of half of the Texas' clinics'<sup>34</sup> whilst it did not 'help to cure ... significant health-related problems'.<sup>35</sup> Similarly, with respect to the second provision, Breyer J held that it 'provided few ... health benefits for women, and [posed] a substantial obstacle to women seeking abortions'.<sup>36</sup> Therefore both provisions constituted an 'undue burden' and were constitutionally invalid.<sup>37</sup>

Ginsburg J filed a concurring opinion and held that the laws 'would simply make it more difficult for [women] to obtain abortions'. Ginsburg J noted that '[w]hen a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners'. Therefore laws, such as those under consideration, that 'do little or nothing for health, but rather strew impediments to abortion ... cannot survive judicial inspection'.<sup>38</sup>

26 United States Constitution.

27 *Whole Woman's Health et al v Hellerstedt Commissioner, Texas Department of State Health Services et al, 579 US \_\_\_\_ (2016) (27 June 2016) 1 (Breyer J) ('Whole Woman's Health et al v Hellerstedt Commissioner 579 US \_\_\_\_(2016)').*

28 *Whole Woman's Health et al v Hellerstedt Commissioner 579 US \_\_\_\_(2016) 1 (Breyer J).*

29 Tex. Health & Safety Code Ann. §171.0031(a) (H.2.B Laws).

30 Tex. Health & Safety Code Ann. §245.010(a) (H.2.B Laws).

31 *Whole Woman's Health et al v Hellerstedt Commissioner 579 US \_\_\_\_(2016) 2 (Breyer J).*

32 *Ibid 20 (Breyer J).*

33 *Ibid.*

34 *Ibid 26 (Breyer J).*

35 *Ibid 22 (Breyer J).*

36 *Ibid 36 (Breyer J).*

37 *Ibid 26 (Breyer J).*

38 *Ibid 2 (Ginsburg J).*

Thomas J filed a dissenting opinion, stating that the majority 'reimagines the undue-burden standard'<sup>39</sup> for abortion access, creating a 'benefits-and-burdens', 'free-form', 'balancing test',<sup>40</sup> that ultimately should be deferred to the legislature to resolve.<sup>41</sup>

Alito J, joined by Roberts CJ and Thomas J, filed a second dissenting opinion. Alito J held that there is no direct causal link between the Texas law and the closings of abortion clinics.<sup>42</sup> Alito J also held that even if some applications of the provisions were unconstitutional, the 'severability clause plainly requires that those applications be severed and the rest left intact'.<sup>43</sup>

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39 Ibid 5 (Thomas J).

40 Ibid 7 (Thomas J.).

41 Ibid 8–9 (Thomas J.).

42 Ibid 34 (Alito J.).

43 Ibid 40 (Alito J.).