Exclusion and the Constitution

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> All lines on a map, we must acknowledge, are imaginary; they are ideas of order imposed on the sloshing flood of time and space. Lines on a map are talismanic and represent the magical thinking of quantitative and rational people.
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> Janette Turner Hospital *Isobars* (1990)

On Being Inhospitable

It is frequently asserted that the geographical space that became Australia was, and is still in most parts, an inhospitable place. Inhospitable to strangers because it was unwelcoming to European sensibilities which preferred more gentle landscapes. The unreceptiveness of the land has become a cornerstone of the myths of the Australian pioneering spirit, of survival in conditions of hardship, of man against nature, of forcing the land (and its indigenous inhabitants) to capitulate and reveal itself. Henry Reynolds points out the pervasiveness of the narrative of 'struggle with nature—hard, heroic, but largely successful'[1]—the subtext being that the story was also one of violence and dispossession and the importation of a foreign concept of property, one which is exclusive and relatively absolute.

It is ironic in a way that the European import which is supposed to facilitate and order our collective existence in the inhospitable land, is itself a most inhospitable of legal systems. This lack of hospitality arises because, like its concept of property with which it shares some aspects of its intellectual heritage,[2] Western positivist law is premised upon the notion of exclusion. Positivist thought claims a separability of law from individual, cultural, and moral factors, and proceeds by reducing law to a singular set of dogmas, principles and rules. Just as

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1 Henry Reynolds, *Frontier: Aborigines, Settlers, and Land* (St Leonards: Allen and Unwin 1987).

2 Blackstone famously described property as the 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'. *Commentaries on the Laws of England*, Book II (Oxford: Clarendon Press 1778) 2. The parallels between property and sovereignty have frequently been noted, and, although since Hohfeld such an absolutist view of property is no longer current, it retains the symbolism of the 'sole and despotic dominion'. See Morris Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8; Wesley Newcombe Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 23; and (1917) 26 *Yale Law Journal* 710.

the land was subjected to a property regime, the imported law therefore also defines itself in terms of exclusion.[3] Law renders people homeless, or at least reasserts a pre-existing homelessness among those of us who were never fully at home here.[4]

It is possible to consider the issue of a constitution and exclusion on a number of levels. When we look at the positive law of the Australian constitution, for instance, it is clear that our constitutional system is characterised by a number of divisions, separations and exclusions. The principle of representative government excludes the people from direct involvement in government, separation of powers divides the functions of government into relatively exclusive terrains, and federalism separates state from state and the states collectively from the federal entity. Indeed the very idea of constitutionalism is based upon the idea of limitations on governmental powers: an attempt to act unconstitutionally is excluded from and exterior to the definition of legality within a specified system.

However, it is not the analysis of these doctrinal or political matters that are my concern in this article, but rather much more general questions based upon both social and philosophical critique. In particular, I wish to pose the following problems: first, in what sense is the identity of a constituted legal order based upon exclusion? Second, what different types of exclusion are operable in this context? Third, what sorts of exclusions are implicit in the Australian constitutional order? Finally, what are the political consequences of different types of exclusion?

Exclusionary Reasons

It will already be evident that an assumed association of a constitution and the idea of identity underlie this line of questions. Indeed, I take it somewhat for granted that one of the central characteristics of a constitution is its role in constituting the identity of a legal system *as* a legal system.[5] The constitutional law of a legal system is simply the law that gives shape, meaning, status, and identity to the law. In addition, a constitution is frequently regarded as an instrument for promoting some symbolic national identity as well as fulfilling its overt role of constructing

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3 It is most important to note that I do not make these claims in the interests of idealising non-Western notions of law. Nor is an evaluation about the relative merits of the different concepts of law very helpful. The point I wish to make is merely at the level of critique, analysis, and development of the Western and positivist concept of law.

4 In *The Gay Science* Nietzsche said 'We children of the future how could we be at home in this today? We feel disfavour for all ideas that might lead one to feel at home even in this fragile, broken time of transition' quoted in Wayne Morrison *Jurisprudence: From the Greeks to Postmodernism* (London: Cavendish Publishing, 1997) 298.

5 Although it may be broadly true to assert that a constitution constitutes the legal system as such, positivist identification of the legal character of law clearly does not end with a constitution, but must be based upon some liminal term which is neither clearly inside nor outside the legal structure. I do not wish to dwell on the fundamental problems of jurisprudence at this stage, but see Margaret Davies, *Delimiting the Law: Postmodernism and the Politics of Law* (London: Pluto, 1996).

legal order, legal institutions, and legitimacy.[6] Therefore any philosophical questioning of a constitution brings with it the problem of identity—not only the identity of the legal system, but also whatever national identity is played out in the symbolic dimension of the constitution.

Now, Ernesto Laclau has written that 'antagonism and exclusion are constitutive of all identity'.[7] Although it is possible to think of certain kinds of identity as natural, pre-social, or essential, Laclau's assertion that **all** identity is constituted by 'antagonism and exclusion' undoubtedly draws upon certain structuralist and poststructuralist insights. In particular, it draws upon the idea that meaning itself is a product of linguistic difference, and consequently that systems of meaning (including those which constitute any identity as an identity) are arbitrary in that they do not exist in a natural state, and are not motivated by any order which exists outside language. According to Saussure, whose work is of immense influence in the context of 'postmodern' thought, meaning is an effect of the difference between signs. It does not reflect some pre-linguistic entity, but is entirely the construct of a system that categorises by differentiating between elements.[8] Most importantly, the notion that meaning is derived from systems of exclusion and differentiation has been taken up in a variety of contexts beyond linguistics. In fact, all concepts and all identities are said to be derived from difference, opposition, antagonism and exclusion. To give only one example, what it means to be 'female' or 'male' can be seen to derive from natural or biological tendencies, or it can be seen to be entirely a product of a system of social meaning in which female and male are constituted as opposed and mutually exclusive.

For modern lawyers who breathe the air of legal positivism, the idea of a system that constitutes its legal identity by exclusion is not overly difficult to comprehend.[9] Indeed, the whole point of positivism is that law, and therefore the

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6 Blackshield and Williams comment in the introductory chapter to their text that 'Australia's constitutional system is an awkward mixture of symbolism and substance.' A Blackshield and G Williams, *Australian Constitutional Law and Theory* (Sydney: Federation Press, 1998) 1. The national symbolism dimension has not traditionally been much in evidence in Australian constitutional law, although recent debate over the preamble and head of state illustrates amply its symbolic potential.

7 Ernesto Laclau, *Emancipation(s)* (London: Verso 1996) 52.

8 See Ferdinand de Saussure, *Course in General Linguistics* (New York: Philosophical Library 1959). An introductory explanation of Saussure's work and its relationship to postmodernism is to be found in Margaret Davies, *Asking the Law Question* (Sydney: Law Book Company, 1994), chapter 7.

9 This should not be taken to mean that I accept positivism. What I accept is the arbitrariness of meaning—that is, that meaning is not motivated by nature, by essences, or by intention, but rather by the signifying system. The correlation with of this with positivism is in the understanding of meaning as normative and conventional. However, I am of the view that positivism is untenable for several reasons: first, descriptive positivism simply does not reflect the political, moral, and social element of judicial decision making; second, prescriptive positivism is stiving for an unattainable goal, and in order to defend the idea of a system of norms which is objectively identifiable and describable, it must at some stage presuppose a high degree of availability of fixed meanings.

system of meaning constructed by law, is separate from non-law, at least at the level of defining and identifying law.[10] Positive law can only be understood by reference to the exclusion of those things that it is not.[11] Kelsen was particularly clear on the conception of law as providing a method of understanding the world: a norm is a 'scheme of interpretation' through which an act which is otherwise legally meaningless can be given a significance within the legal system.[12] Positivism is therefore only too aware of the fact that legal meanings are not motivated or determined by 'natural' meanings, and that law obtains its character as law through its distinction from non-law. Postmodernism obviously departs from positivism in many respects, some of which will be outlined later. In particular, however, a deconstructive approach rejects the possibility of absolute conceptual distinction: as Laclau says, 'the only thing—exclusion—which can constitute the system and thus make possible those identities, is also what subverts them'.[13] Identity is both constituted and subverted by exclusion. I will return to this apparent contradiction shortly.

At the most basic level, a constitution involves a setting apart of one nation and one legal order from neighbouring jurisdictions, and it therefore excludes, and forms identities, nations, and social order through exclusion. Indeed, the enactment of a first constitution is normally regarded as the founding moment of a legal order, and in this sense consists of a decision, which as Raz said, is an exclusionary or second-order reason: a decision is a reason to do something which logically overrides any other reason, and which overrides the balancing of reasons which might precede a decision.[14] A constitution says 'this is the one legal order, and any others are not legitimate.' The constitution is a decision to constitute the nation in a particular fashion, and as such excludes all other possible constitutions, and overrides any other normative system, and all competing laws. For example, in Australia the competing systems that are excluded from the prevailing legal system include Indigenous law, and religious laws. Although there may be discussion of recognition of indigenous law, and although Australian law is clearly based upon certain elements of Christian thought and morality, any such recognition is conceptualised as an incorporation of an 'other' into law, and not as a recognition of the other on its own terms.

Where the constitution is unwritten, it may seem completely fictional to speak of it in terms of a 'decision'.[15] However, a decision can take place in a

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10 HLA Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) 2.

11 Austin's method, which involved distinguishing between divine laws, positive laws, positive morality, and metaphorical or figurative laws, provides one clear example of this point. See J Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicolson, 1954 [1832]).

12 See H Kelsen, *Pure Theory of Law* [Max Knight trans] (Berkeley: University of California Press 1967) 3–4; Stanley Paulson 'Kelsen on Legal Interpretation' (1990) 10 *Legal Studies* 136.

13 Laclau, above n 7, 53.

14 Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) 67. See also Jacques Derrida, 'Force of Law: the 'Mystical Foundations of Authority'' (1990) 11 *Cardozo Law Review* 919–1045.

15 See also Schmitt, *Political Theology* (Cambridge, Mass: MIT Press, 1985) 5, 10.

historical moment, or over time as the cumulative effect of a string of decisions emanating from the legal institutions. In any event, the point is that the process of constitution logically involves a setting apart, a defining against an outside.

Although exclusion seems necessary to a constitution and is unavoidable on a pragmatic level, the remainder of the paper will argue: first, that it is important always to acknowledge and scrutinise the mechanisms and political consequences of exclusion; second, that we have many choices about how the lines of exclusion are drawn; and third, that in any case we should be aiming for a political, legal and social attitude which regards constituted legal identity to be provisional, hospitable to the excluded and devalued other, and ethically committed to self-revision and negotiation.

Some Ins and Outs of Exclusion

There is more than one way to say 'no'

Although it may seem remote from the constitution of a legal system, I wish for a moment to consider the mechanisms of exclusion from the perspective of psychoanalytical theory. Admittedly, psychoanalysis has not been particularly influential in legal theory until recently, but it does have something to offer, at least at the level of analogising from the psychic identity of a human subject to the identity of a legal system.[16] However, I do not wish to apply psychoanalytical thought to legal theory in any detail (an undertaking which would be far too ambitious here:[17]) my interest at this point is only in a distinction which suggests a more subtle picture of exclusion than that raised by the inside/outside dichotomy.

The distinction in question is that between foreclosure and repression, two types of exclusion that are influential in the formation of aspects of personal identity (or of the 'subject'). Judith Butler explains the distinction as follows: 'Freud distinguishes between repression and foreclosure, suggesting that a repressed desire might once have lived apart from its prohibition, but that

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Schmitt's totalitarian argument rested on the proposition that the sovereign is 'he who decides on the exception' and that 'every legal order is based on a decision'. Although there are many compelling reasons to distinguish between Schmitt's views of law and state and those practised within the modern Australian state, the element of totality is still derived from an exclusionary thinking, or constant decisions to exclude the other.

16 See Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press 1995). I should add that I am extremely sceptical about psychoanalysis in general, and also about the many uses to which it has been turned. However, I do find some of its concepts evocative when translated into the context of legal theory.

17 But see Jeanne Schroeder, 'The Vestal and the Fasces: Property and the Feminine in Psychoanalysis' (1995) 16 *Cardozo Law Review* 805; Peter Goodrich, *Oedipus Lex.* Both works reflect the substantial impact psychoanalysis has made in theory in the humanities—an impact that began with literary and critical theory, but has expanded into feminist thought, political philosophy, and cultural theory generally.

foreclosed desire is rigorously barred, constituting the subject through a certain kind of pre-emptive loss.'[18] Repression, which is formative of the unconscious,[19] is by far the more developed concept in Freud's work: it refers to an internal refusal, for instance a desire or a thought which surfaces, but is banished for the sake of preserving our propriety or our self-image—'the essence of repression lies simply in turning something away, and keeping it at a distance from the conscious'.[20] Repression says 'no' by devaluation, silencing, circumvention, avoidance, or submersion.

In contrast to repression, foreclosure is a concept that was not highly developed by Freud.[21] Nonetheless, he did speak of certain conditions in which 'either the external world is not perceived at all, or the perception of it has no effect whatever' and in which the 'ego creates, autocratically, a new external and internal world'.[22] Foreclosure consists of a territorial claim, combined with a refusal to see the external world, at the same time as it may be said to institute an identity and reality peculiar to the individual. A subject may simply refuse to entertain certain things, they are barred, banned, locked out: at the same time an entirely subjective understanding of the internal and external reality is formed—in another discourse, we could say that what is involved in foreclosure is a refusal to engage in the shared language game, or to recognise the otherness of the other.[23] In a political sense, foreclosure may be seen to be an attempt at purity, oneness, self-identity. And it is pre-emptive in the sense that it simply places a block on the external world without ever allowing it to become manifest.

The operation of foreclosure in a subject is generally associated by psychoanalysis with the various types of psychosis.[24] Even upon such a brief sketch of the concept, it may be thought that such a moment of exclusion and differentiation, coupled with a subjective construction of the 'real', is at some level necessary to the constitution of *any* individual entity, and does not necessarily signal the presence of a psychic disorder.[25] The concept of foreclosure, however,

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18 Judith Butler, *The Psychic Life of Power* (California: Stanford University Press, 1997) 23.

19 In Freud's early work, repression of unwelcome thoughts was regarded as the primary mechanism by which the distinction between conscious and unconscious is formed. In the later work, repression is only one of a number of defence mechanisms. See Anna Freud, *The Ego and the Mechanisms of Defence* (New York: International Universities Press, 1946) 45ff; Sigmund Freud, 'The Concept of Repression' in Freud *The Essentials of Psychoanalysis* (Middlesex: Penguin, 1986).

20 Sigmund Freud, ibid 524.

21 It was taken up in a more extensive fashion by Lacan in the course of revisiting Freudian thought. See for instance *Écrits: A Selection* [Alan Sheridan trans] (London: Tavistock, 1977) 200ff.

22 See Freud, 'Neurosis and Psychosis' in *The Essentials of Psychoanalysis,* 564.

23 Judith Butler emphasises the constitutive role of foreclosure, saying '[a]s foreclosure, the sanction works not to prohibit existing desire but to produce certain kinds of objects and to bar other from the field of social production.' *The Psychic Life of Power,* 25.

24 See Lacan, *Écrits*, 'On a question preliminary to any possible treatment of psychosis'.

25 Judith Butler for instance appears to be suggesting that at least in some contexts

appears to suggest a more totalitarian identity—one which completely denies and refuses the meanings of the world.

Psychoanalysis then, provides us with an outline of two mechanisms of exclusion, which I will return to in the next section of the paper. However psychoanalysis is only one part of the picture of a general questioning of the liberal presumption of an individually complete, autonomous, and rational subject. Feminist theorists in particular have argued in some detail not only that the liberal picture of the human being reflects the Western cultural construction of masculinity, but also that it is an ideological mask for a subjectivity which is in fact not pre-social, but the product of social relationships.[26] Jennifer Nedelsky for instance has argued that the liberal construction of the person is that of a (male) bounded, self-owning entity which is is socialised to be exclusive of the other: she argues that as individual subjects we are constituted by establishing boundaries to our selves which are a territorial claim over our selves.[27] To some degree we can make informed decisions about who we are and become, but the decisions are just as likely to be pressed upon us by circumstance and social norms: most importantly, individual choice is framed and constrained by the limitations of the cultural context. Thus, liberal political philosophy and feminist theory have respectively established and critiqued the ideology that separates individuals through exclusion of the other. This liberal individualism is in contrast to a more communitarian approach, an ethic of care, concepts of relational subjectivity, or cultural systems that do not so clearly distinguish between the human being and their environment.

One of the things which 20th-century theory about the human subject has taught us is that we cannot presume that the individual is a given fact of existence or of thought. The individual is not a pre-social entity but rather a construct of a cultural setting. Nor can we presume that, given the ideology of individualism, our subjectivity is a conceptually stable condition. It is easy to see that a self-constitution formed in the ways outlined by psychoanalysis and other theories of the subject will be somewhat fragmented, that the distinction between the inside and the outside will be fragile, and that there is never only an event of exclusion,

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there is no clear line to be drawn between disorder and normality, or even that what is termed 'normality' is of necessity coexistent with disorder. See Butler above n 23. See also Teresa de Lauretis, *The Practice of Love* (Bloomington: Indiana University, Press 194) ch 1.

26 The issue has been canvassed by many feminists from quite different theoretical perspectives, but see N Naffine, *Law and the Sexes* (Sydney: Allen and Unwin, 1990); Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) 152; Margaret Thornton 'The Cartography of Public and Private' in M Thornton (ed), *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) esp 11–12; Luce Irigaray, *This Sex Which Is Not One* [Catherine Porter trans] (Ithaca: Cornell University Press, 1985) 23-33.

27 Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' in Robert Post (ed), *Law and the Order of Culture* (Berkeley: University of California Press, 1991). See also Ngaire Naffine, 'The Body Bag' in Naffine and Owens (eds), *Sexing the Subject of Law* (Sydney: Law Book Company, 1997).

but an ongoing policing of boundaries.[28] Although by definition outside, that which is excluded pushes up against the subject, who is defined negatively against it. And the internally repressed elements form a kind of internal limit—again, they do not disappear but bubble away underneath in the unconscious: Freud says that repressed items may disappear to memory, but they retain their disruptive energy.[29]

The relational model of the human subject which has surfaced this century has resulted in a conception of ethical political relations which is rather different to individualistic rights-based structures. It is a conception which positively values the other as much as the self, and tends to emphasise relationality, openness, generosity, inclusion and friendship rather than separation, rights, and individual supremacy.[30] The question that some theorists have very recently begun to reconsider is the extent to which such values can be translated into a constitutional and political context. I say 'reconsider' here because there is an established tradition that raises the matters of friendship and love within the political context.[31]

Constitutional Exclusion

Legal and political theory have tended to draw heavily on metaphors of the person or the individual as descriptive or constitutive of the state or the law, and have done so for centuries. The body politic metaphor is the most obvious reference here: Thomas Hobbes, for instance wrote that the Leviathan or 'mortal god' was the personification of a collectivity. 'The only way to erect such a Common Power' he argued, is to

> reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one Man, or Assembly of men, to beare their person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their

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28 Ernesto Laclau discusses these matters in 'Subject of Politics, Politics of the Subject', 48–65 in Laclau, above n 7.

29 Freud, *Introductory Lectures on Psychoanalysis* [James Strachey trans] (Harmondsworth: Pelican, 1973) 335.

30 This trend reflects something of a sea change in political theory, and cannot necessarily be attributed to any one thinker or school. However, see Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (New York: Routledge, 1991); Iris Marion Young *Justice and the Politics of Difference* (New Jersey: Princeton University Press, 1990); Emmanuel Levinas 'Ideology and Idealism' reprinted in Séan Hand (ed), *The Levinas Reader* (Oxford: Blackwell, 1989); Jacques Derrida *Politics of Friendship* [George Collins trans] (London: Verso 1997).

31 See, eg Aristotle, *Ethics* (Middlesex: Penguin, 1976), Bk.VIII. The tradition is also discussed in Adam Geary, 'Towards a Feminist Critique of Sovereignty: Guild Pluralism, Political Community and the Relevance of Luce Irigaray to English Constitutional Thought' in Millns and Whitty (eds), *Feminist Perspectives on Public Law* (London: Cavendish, 1999).

Judgements, to his Judgement.[32]

Thus the multitude is reduced to One, who acts as a *persona* for the authorship and authority of the collectivity. The metaphor is not confined to the political sphere: we could also point out that just like the natural person, law is often regarded as internally rational, coherent, autonomous, separate, sovereign, and intentional—if not in practice, then at least as an ideal.

If our conception of law and therefore our legal and political institutions are shaped to some degree by this personification, then it seems reasonable to ask how a legal entity is constituted as a subject or as an identity. I do not claim that law's identity is any more complete, total, or stable than that of the human subject—in fact, as I will indicate, the exclusionary structures of identity formation dictate that no such stability is possible.

Therefore I would like to argue that constituted legal identity as it is commonly understood within Western legal discourse also arises from mechanisms analagous to those of foreclosure and repression. Foreclosure—the constitutional blocking of certain elements—takes place in various ways. Obviously, there is a territorial claim, which carries with it a claim to sovereignty over the territory and a barring of any competing claim to sovereignty. For instance, the presumption of Australian sovereignty which allows institutions to assume their own legitimacy and therefore to function, consists of the preclusion of any question of a competing sovereignty or of any law not legitimised by the constitution from the order of law.[33] That which is foreign, and anything that may threaten internally the unity of the constitutional system is barred. The constituting act that precludes competing normative orders and foreign jurisdictions is co-extensive with the formation of the legal reality that is specific to that system.

In this way law presents itself, as Derrida says, as 'an absolutely emergent order, absolute and detached from any origin',[34] meaning that law refuses to justify its existence—it just is, and questions of its ultimate legitimacy are foreclosed (except of course to legal philosophers). Significantly, this is a matter integral to the identity of law, making inviolable the 'the skeleton of principle which gives the body of our law its shape and internal consistency'.[35] Therefore the foundational force of the legal system must be understood not as an event which took place at

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32 Thomas Hobbes *Leviathan,* (Cambridge: Cambridge University Press, 1991 [1651]), Chapter XVII 120.

33 Sangeetha Chandra-Shekeran, for instance, says that 'the most remarkable achievement of the 'ground-breaking' case of *Mabo* was, not the long overdue legal recognition of Aboriginal prior ownership to Australian land, but the deftness with which the majority judges managed to encircle the symbol of the nation without falling prey to the *open secret* of the dubious foundation of British sovereignty.' 'Challenging the Fiction of the Nation in the "Reconciliation" Texts of *Mabo* and *Bringing Them Home*' (1998) 11 *Australian Feminist Law Journal* 107–133, 123.

34 Derrida 'Before the Law' in Derek Attridge (ed), *Jacques Derrida: Acts of Literature* (New York: Routledge, 1992) 194.

35 Brennan J in *Mabo v Queensland (No. 2)* (1991–1992) 175 CLR1 29.

some time in the past, but as an ongoing act of exclusionary practices.[36]

Prevailing constitutional ideology therefore appears still to demand in a legal system a relatively high degree of unity, identity and correlation to a defined territory. This is not to say, however, that increasingly complex, dispersed and overlapping nodes of legal power belonging to different systems, will not radically alter the emphasis upon the essential identity and boundedness of a legal system. It may eventually become nonsensical or irrelevant to speak of 'Australian law' at all. (Even now, it is an extremely vague idea.)

A second way in which foreclosure may be said to operate in the formation of a legal system concerns the idea that law itself is by definition separated from a social, political, or moral 'other'. Western constitutions presuppose a positivist separation of law from non-law—obviously not a complete empirical separation, but rather a formal separation. In its self-image, law precludes an other, whether that be the individual human person, morality, custom, or social norms. Positive law constructs its own 'scheme of interpretation',[37] its own legal reasoning, and its own reality and it does this in part by attempting to foreclose the realities that structure our non-legal existences.

However, exclusion as repression is also evident in a constitution. A constitution addresses a subject, a citizen, and in doing so holds out a model or ideal. For instance the Australian Constitution has been criticised for speaking to men, to non-Aboriginal people, to the white majority. Margaret Thornton's work on citizenship amply illustrates the male-centred notion of the citizen who operates within political discourse.[38] Specifically in relation to Australia's constitutional system, Deborah Cass and Kim Rubenstein have explored the ways in which women have not been represented in Australia's supposedly representative democracy: women have not been encouraged to become representatives, have not been represented in political affairs, and have not been symbolised as political players.[39] Moreover, they argue that the historical lack of sufficient representation(s) of women continues to inform current symbolism and practice.

In any process in which an assumed standard plays the role of the universal subject, others are devalued, silenced, or repressed. The problem here is that the universalised individual is never truly universal or inclusive, but is interpreted as, assumed to be, or originally constructed as, a dominant social group, or 'benchmark

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36 I have discussed this matter at much more length in 'Legitimate Fictions' in Tom Cohen (ed), *Cambridge Companion to Derrida* (forthcoming) and in *Delimiting the Law* (London: Pluto Press, 1996).

37 See Kelsen above n 12.

38 See Margaret Thornton, 'Embodying the Citizen' in M Thornton (ed), *Public and Private* (Melbourne: Oxford University Press 1995); see also Elizabeth Kingdom, 'Citizenship and Democracy: Feminist Politics of Citizenship and Radical Democratic Politics' in Millns and Whitty (eds), above n 31; Drucilla Cornell *At the Heart of Freedom: Feminism, Sex, and Equality* (New Jersey: Princeton University Press, 1998) 16–17; Wendy Brown *States of Injury: Power and Freedom in Late Modernity* (New Jersey: Princeton University Press, 1995) 156–158.

39 Deborah Cass and Kim Rubenstein 'Representation/s of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3.

man'. As Thornton comments: 'the body politic remains a predominantly fraternal organisation. When the body politic speaks with one voice, the voices of women and differentiated others are heard indistinctly or not at all.'[40] As she indicates, it is in fact doubtful whether there could be any abstract (disembodied) standard sufficiently devoid of content that it could be filled by the identity of any person.[41] And the necessary residual content marks any standard as belonging to a dominant social group. Even where no such standard is envisaged, the language of institution formation is a specific language, one that does not include marginalised persons, but rather draws upon an intellectually exclusive tradition. Replacing one benchmark with another or even with a multiplicity of standards will not solve the problem of exclusion, although it may go some way towards mitigating it.

The political order and constitutional law structuring it therefore repress in the process of reduction to universal standards and symbolism. However, a constitution may also repress by what it does not say: if the constitution is mute on equality, for instance, then existing power differences may be normalised and justified. If a constitution does not raise a particular interest to the status of being constitutionally protected, then it may be regarded as peripheral to the identity of the polity.

Perhaps these matters raise questions about the content of a particular constitutional regime, rather than of constitutional form. However, I would argue that it is as much a question of form as anything, since the **one** sovereignty demands a bar on any competing order, while the single law requires separation from, and silencing of, the individual and cultural differences of the people.

Now, at this point I would like to make a comparison with modes of thought which deal with the question of social power—feminist thought and postcolonial thought, for example, which also speak of at least two methods by which the identity and power of particular social groups is maintained—a territorial method which is appropriative of space and which establishes frontiers and divisions in society; and a repressive method by which the social 'others' are defined as lesser according to given social standards and expectations. The political theorist Wendy Brown puts this distinction quite clearly in her book *States of Injury*, when she says that 'Bourgeois, white, heterosexual, colonial, monotheistic, and other forms of domination all contain these two moments', which are 'control of vast portions of social territory' and 'techniques of marginalisation and subordination'.[42] Clearly these two moments, as Brown argues, are not separate: the claiming of social, linguistic, or political space carries with it the marginalisation and repression of those constructed as not entitled to space. The two modes of power are mutually constitutive.

The mechanisms by which constitutional identity is formed mirror the territorial and repressive modes of social power described by Brown. Constitutions have a monopoly over legal territory, and take the power of law away from

40 Thornton, above n 38, 214.
41 Ibid 215–216.
42 Brown, above n 38, 167.

individuals and communities. A written constitution is on one level only a form of words with formal institutional consequences, and is therefore distanced from issues of social power. However, we must not be misled by the rhetorical and formal separation of the constitutional order from everyday imbalances of power into thinking that it escapes responsibility for inequalities: arguably where a constitutional order fails to recognise and deal with the fact of social division such patterns of dominance are rewritten within the very identity of the law.

Models of Inclusion

It is therefore important to ask, what would a constitution look like which did not foreclose or repress, which did not entrench and naturalise power? In a world divided by national boundaries foreclosure and division of some sort seem inevitable. Therefore it is important to understand and acknowledge fully the ways in which exclusion has shaped and continues to shape the polity: for example, others have argued and I would agree that it is damaging to the individual and collective psyche to mystify the origins of Australian law by failing to acknowledge its origins and ongoing establishment in force.[43] It is also possible for a constitution to insist upon an inclusive symbolism and a praxis that recognises both individuality as well as group identity.

As I mentioned above, the critique of the liberal individualistic model of subjectivity has brought with it an alternative model—one which places more emphasis upon the values of respect for the other, openness, generosity of self, and reciprocation as constitutive of the subject. And the obvious question for legal theory has become, how can such values be incorporated into law—or even, how can political and constitutional organisation take account of a relational understanding of subjectivity which does not repress the question of power in the name of an abstract equality? The challenge that such questions pose is to the very foundation of public law, because it intrudes the most private and individual of values into the public order. There has even been talk of political love as an important moment in a reformulation of our constitutional ordering.[44] Such recognition of values and emotions that are conventionally regarded as private and individual is therefore a case of personalising the political. The feminist adage that the personal is political is well known, but more attention has been given to the ways in which personal relationships are relationships of power, defined by convention, context, law, and social custom. What more recent political theory does is to emphasise the personal, private, or even intimate element in political discourse, and to propose alternative methods of understanding the public sphere so that the division is not mystically entrenched.[45]

Alternative models of legal and constitutional identity-formation have been

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43 See, for instance, the comments reproduced at pp 109–110 in Chandra-Shekeran, above n 33.

44 See, for instance, Geary, above n 31, esp 138ff. See also my comments below.

45 A project which is taken up in a very compelling manner by Margaret Thornton, above n 38.

proposed, which are more inclusive, or more plural than prevailing models. I can only briefly mention some of these possibilities. For instance, Luce Irigaray has argued for a system that separately recognises and protects the rights of woman as well as the rights of man, with a political love as the motivating feature.[46] Although not framed as an issue in constitutional law, clearly Irigaray's arguments do have constitutional implications, for her ideas revolve around the possibility of a differently constituted law. Drucilla Cornell has begun to develop a notion of the 'imaginary domain' which 'is the space of the 'as if' in which we imagine who we might be if we made ourselves our own end and claimed ourselves as our own person.'[47] The imaginary domain is a space of self-representation, including sexual self-representation, which operates both at the individual psychic and at the public level and which allows those constituted as 'other' to represent their difference publicly and politically. It implies a public space that does not repress individual differences in the name of a universal subject, but rather allows difference to be symbolised, manifested, and reconciled with the demand for equality.

Although such modelling of alternative constitutions and alternative conceptions of the relationship between law and the individual is important and inevitable, my view is that much change can be achieved not only by the explicit reformulation of law's fundamental conceptions, but also by more subtle attitudinal and cultural development. I would like very briefly to outline this approach in the remaining sections of the paper.

Constitutional Performances

For me, the problem of exclusion from the legal identities created by a constitution will not be resolved only by devising a particular kind of constitutional order. Even the recognition of plural legal orders will be exclusive if they are based upon a concept of law that is separate and exclusive. And although an apparently inclusive text may be important symbolically, if it is to carry meaning in the practical world of legal and social relationships, it must co-exist in a dynamic relationship with that practical world: the text is only the framework through which judicial and legislative attitudes find their expression.[48] A new constitutional model will only be effective if the values that underpin it are maintained by those who uphold it, and therefore it is important to consider the process by which legal order is maintained. In fact, I would go so far as to say that the formal constitution as such is secondary to social attitudes and ideology.

Changing the formal constitution does not necessarily change anything about the relationship between the individual, the community and the law, although

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46 Luce Irigaray *je, tu, nous: Toward a Culture of Difference* [Alison Martin trans] (New York: Routledge, 1993); Luce Irigaray *I love to You: Sketch of a Possible Felicity in History* [Alison Martin trans] (New York: Routledge, 1996).

47 Cornell, above n 38, 8. See also Cornell, *The Imaginary Domain.*

48 Constitutions do not necessarily reflect the spirit of a community: some merely consist of a formal and dry construction of legal institutions, or on the other hand, a meaningless statement of rights which are not in reality pursued.

it may alter some of the institutional forms and relationships of the legal entity.[49] It is possible, however, to adopt a broader and more inclusive definition of a constitution. We could regard a constitution not as an historical event, and much less as a document, but as a *process* or *performance* that forms a national and legal identity.[50] My reason for taking such an approach is derived from the logic of exclusion which I explained earlier—the establishment of an identity through the exclusive mechanisms of foreclosure and repression does not result in a pure and present identity, but rather an identity which requires maintenance, the limits of which require policing. It is a conceptually fragile identity reinforced and upheld by some very resilient assumptions and customs. A constitution therefore can never be complete, and it always requires maintenance—not merely to keep the text in touch with social change, but in the everyday and continuing presumption that it is operable.

It is therefore possible to turn the legal metaphysics around so that the constitution is not regarded only as the inviolable original norm with mystical and forgettable origins, but rather as a dialogue between such an imagined norm and the societal and institutional forces which maintain it. It is a construction and an effect of continual decision-making. The materiality of a constitution arises from the conversation which takes place between the text and its interpreters and agents. And therefore it can be changed not only by the legally prescribed procedures but also by communal and judicial attitude.

'A More Pregnant Concept of Constitution'[51]

Instead of continuing to foreclose, the political injunction which results from critical reflection about the nature of subjectivity and identity is to welcome the other into what is most properly our own. Instead of insisting upon the separation of legal identity, and instead of taking as central a body politic which is exclusive, differentiated and self-possessing, we can perhaps envisage a body politic which is self-determining and autonomous but which is not separated from the social context, and which is willing to open its frontiers to the 'other'.[52] What we need is a notion of constituted legal identity which does not involve the construction of a singular legal reality, which is capable of adjusting itself to other world views, and

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49 Feminists have become well aware of the fact that law reform does not necessarily result in an improved social environment for women, although it may be one important element of a larger strategy.

50 I am of course, influenced by Judith Butler's analysis of gender identity as performance: she argues that gender is not a stable, fixed or ontologically necessary identity category, but rather one which we create by living in accordance with perceived norms and stereotypes. See J Butler *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

51 The title 'a more pregnant concept of constitution' is a suggestive phrase that I have unashamedly misappropriated and taken out of context from Husserl, *Cartesian Meditations: An Introduction to Phenomenology* [Dorion Cairns trans] (Dordrecht: Martinus Nijhoff, 1960) 56.

52 See Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998) 67.

which is attentive to its own (lack of) rational and justifiable foundations. Therefore Derrida has said:

> I have to welcome the Other whoever he or she is unconditionally, without asking for a document, a name, a context, or a passport. This is the very first opening of my relation to the Other: to open my space, my home—my house, my language, my culture, my nation, my state, and myself.[53]

But, some qualifications need to be made, since we are never talking about an equal other, but one who exists within a power relationship. First, the value of the 'home' must be treated with caution, since it is for many people a place of physical and psychological violence, and in some contexts may carry a rhetorical significance which is itself exclusive.[54] Second, it is all very well to require those persons, nations or institutions who have the benefit of a relatively assured identity to practise a more hospitable policy but for those whose very identity has typically been defined in terms of accessibility, the demand to be hospitable may not appear to represent much progress.[55] Third, I also note the extreme irony of this injunction when taken in the context of Australian politics—it demands not only that Anglo-Australians be hospitable to those construed as foreigners, but also to the Aboriginal people whose home we have made our own.

However, I would argue that it is possible and necessary for those in socially dominant positions to develop a non-appropriative attitude to the 'other', and for such an attitude to be reflected in constitutional law and policy. A text that is welcoming, open, and inclusive would be the first symbolic step, but even more important is critical reflection about the political responsibility involved in ongoing constitutional performances, and continued adjustment of the exclusionary practices of law.

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53 Talk given by Derrida at the University of Sussex, Centre for Contemporary French Thought, reproduced at <http://www.susx.ac.uk/Units/frenchthought/derrida.htm>.

54 See Chandra-Shekeran, above n 43; see also Hannah McGlade and Jeannine Purdy 'From Theory to Practice: Or What is a Homeless Yamatji Grandmother Anyway?' (1998) 11 *Australian Feminist Law Journal* 137.

55 María Lugones has emphasised that an attitude of openness may be very dangerous to some people in some contexts. Lugones does not address hospitality as such, but rather 'world-travelling' which is an attitude of hospitality to the 'world' of the other, a non-appropriative attitude. See M Lugones, 'Playfulness, 'World'-Travelling, and Loving Perception' (1982) 2 *Hypatia* 3.

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