BEYOND SUPERFICIALITIES: CROWN IMMUNITY AND CONSTITUTIONAL LAW

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> There has been no suggestion in [this] case that it is beyond the constitutional competence of the Western Australian Parliament to subject the Crown in right of [Western Australia] to the relevant provisions of the [(WA) Aboriginal Heritage Act 1972].[1]

I. INTRODUCTION

Seeing the general in the particular is, as Justice Holmes[2] often extolled, the difference between philosophy and gossip.[3] Occasionally,

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1. *Bropho v State of Western Australia* (1990) 93 ALR 207 Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 212 ("*Bropho*"). Does this cryptic reference to "constitutional competence" signal a federal constitutional law inconsistency problem involving s 109 of the Australian Constitution (Commonwealth legislation, eg, pursuant to s 51(xxvi) and the (WA) Aboriginal Heritage Act 1972) or a state constitutional law separation of powers problem? For the purposes of this article, the latter interpretation is adopted. But see infra n 30.
2. Oliver Wendell Holmes, Jr, (8 March 1841 - 6 March 1935), Judge of the Massachusetts Supreme Judicial Court (1882-1902), Justice of the US Supreme Court (1902-1932). See generally J Thomson "Playing with a Mirage: Oliver Wendell Holmes, Jr and American Law" (1990) 21 Rutgers LJ (forthcoming).
3. Eg, O Holmes "The Class of '61" in *Speeches by Oliver Wendell Holmes* (Boston: Little, Brown and Co 1891) (rep 1934) 95, 96 ("To see so far as one may, and to feel, the great forces that are behind every detail - for that makes all the difference between philosophy and gossip...."); O Holmes "The Bar as a Profession" in O Holmes *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920) (rep 1952) 153, 159 ("The difference between gossip and philosophy lies only in one's way of taking a fact."); O Holmes "Brown University - Commencement 1897" ibid

those perceptions of fundamental premises and principles, not merely repetitive recitation of minutiae, bestir Australian constitutional law.[4]

164, 166 ("the difference between the great way of taking things and the small - between philosophy and gossip - is only the difference between realizing the part as a part of a whole and looking at it in its isolation as if it really stood apart."); "Some Unpublished Letters of Justice Holmes" (1935) 1 T'ien Hsia Monthly 251, 261, 262 reprinted in M Lerner (ed) *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions* (Boston: Little, Brown and Co, 1943) 421-422 (Holmes' letter of 16 June 1923 to John Wu) ("My notion of the philosophic movement is simply to see the universal in the particular...."); M De Wolfe Howe (ed) *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski 1916-1935* vol 1 (Cambridge: Harvard University Press, 1953) 129 (Holmes' letter of 18 January 1918) ("Of course I know that ideas are merely shorthand for collections of the facts I don't care for. It is the eternal seesaw of the universe. A fact taken in its isolation ... is gossip. Philosophy is an end of life, yet philosophy is only cataloguing the universe and the universe is simply an arbitrary fact so that as gossip should lead to philosophy, philosophy ends in gossip."); ibid 810 (Holmes' letter of 27 December 1935) ("I prefer the abstract. I wrote to [Felix Frankfurter] ... that [Louis] Brandeis had an insatiable appetite for facts and that I hate them except as pegs for generalizations ... We begin with an empirical fact - that is gossip. We ... make it part of philosophy by formulating laws. At the end we have more or less of a system, showing that the Universe acts thus and not otherwise. But the universe so given is only an empirical fact. Why it should be as it is ... why it should be at all, we know not, and so we end as we began, with gossip.").

An example of this methodology is A Amar "*Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court" (1989) 56 U Chi L Rev 443 ("a careful re-examination of the narrow constitutional issues raised by § 13 [of the Judiciary Act 1789 (US)] will yield important insights into larger and much debated issues of constitutional law."). Applause for the opposite approach includes M Yudof "Equal Protection, Class Legislation, And Sex Discrimination: One Small Cheer For Mr Herbert Spencer's *Social Statics*" (1990) 88 Mich L Rev 1365 (footnote omitted):

> Eclecticism in law and philosophy is rarely in fashion, for instinctively many scholars strive for the systematic and universal, the would-be-conquerors of the diversity of history and ideologies and cultural particularism.... It seems admirable ... to abstract the universal from the diverse and mundane, to perceive an interconnectedness amid the apparent disarray and chaos. But [this] pursuit ... also may distract a scholar and distort reality.

4. Classic examples include G Sawer *Australian Federalism in the Courts* (Carlton, Vic: Melbourne University Press, 1967); L Zines *The High Court and the Constitution* 2nd edn (Sydney: Butterworths, 1987). See generally J Thomson "The Teaching of Constitutional Law: Are the Materials Adequate?" (1983) 15 UWAL Rev 418.

Bropho v State of Western Australia[5] ("*Bropho*") offers another opportunity for that to occur. Indeed, a hint of what might be revealed is already available.[6] Much greater extrapolation ought, however, to be pursued.

5. *Bropho* supra n 1. For *Bropho*'s historical and political antecedents see M Quekett "Aborigines to fight new brewery plan" The West Australian 26 November 1990, 1; "Time to pull down brewery" The West Australian 27 November 1990, 10. Prior to the High Court appeal, the WA Government indicated in 1989 that in respect of this particular dispute it would regard itself as bound by the Aboriginal Heritage Act 1972. See Western Australia, Legislative Council 1990 *Debates* 3666 (J Berinson); K Acott "Hand cans brewery declaration" The West Australian 20 July 1989, 5. The issue of whether the Crown in right of Western Australia, individuals acting on its behalf or statutory authorities were bound by s 17 of that Act was the "only issue" in *Bropho* supra n 1, 213. See also ibid, 219, 220 (referring to "the question"); Churches infra n 6, 690 ("solely concerned"). Despite the WA Governent's undertaking, the High Court decided the issue. Should it have done so? Compare *O'Toole v Charles David Pty Ltd* (1990) 64 ALJR 618 (advisory opinions); S Bandes "The Idea of a Case" (1990) 42 Stan L Rev 227, 245-250, 268-269, 308-311 (mootness doctrine). Although *Bropho* supra n 1 does not indicate whether the High Court was aware of the WA Government's undertaking, *Bropho v State of Western Australia* (unreported) Full Court of the Supreme Court of Western Australia 27 September 1989 Supreme Court Library no 7868 Malcolm CJ, 18-19 expressly refers to and discusses the consequences for the *Bropho* litigation of that undertaking. However, constitutional limitations on the High Court's jurisdiction do not apply to state courts exercising non-federal jurisdiction. For proceedings before the undertaking was given see *Bropho v State of Western Australia* [1990] WAR 87. For subsequent proceedings see *Bropho v State of Western Australia* (unreported) Supreme Court of Western Australia 19 December 1990 Supreme Court Library no 8651 (Rowland J).

6. S Churches "The Trouble with Humphrey in Western Australia: Icons of the Crown or Impediments to the Public?" (1990) 20 UWAL Rev 688, 695 (*Bropho* "is not concerned, as it at first seems, merely with a matter of statutory interpretation. The question of the relationship of statutes and the Crown is at heart *a constitutional issue* going to the equal application of the law. The decision in *Bropho* inevitably straddles the points of intersection between the Legislature, the Executive, and the Judiciary.") (emphasis added).

   Other commentary includes J Starke "The High Court's new approach to the question whether the Crown is bound by a statute" (1990) 64 ALJ 527; G Jamieson "Case Note: *Bropho v The State of Western Australia*" (1990) 20 Qld Law Soc J 397; D Kinley "Crown Immunity: A Lesson From Australia?" (1990) 53 MLR 819; S Churches "Aboriginal People and Government Responsibility and Accountability" (Dec 1990) no 47 Aboriginal Law Bulletin 6; G McIntyre "*Bropho v The State of W.A. & The W.A. Development Corporation*" (Dec 1990) no 47 Aboriginal Law Bulletin 8; M Mourell "Bropho v The State of Western Australia - A Case Note" (1991) 7 Aust Bar Rev 90.

One result may ensue: a panoramic view of the legal system and process, curtailing, in a democracy,[7] unabashed enthusiasm for judicial activism.[8]

7. Democracy is a protean concept. For discussion of direct, majoritarian and representative democracy see eg R Dahl *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956); R Dahl *Democracy and Its Critics* (New Haven: Yale University Press, 1989); D Held *Models of Democracy* (Stanford: Stanford University Press, 1987); C Coglianese "Book Review" (1990) 88 Mich L Rev 1662; C Sharman "Australia as a Compound Republic" (1990) 25 Politics 1.

   In what sense is WA a democracy? Members of the WA Parliament, including those appointed as Ministers of the Crown, are elected. See generally (WA) Electoral Act 1907 and (WA) Electoral Distribution Act 1947. But apart from s 6 para 3 of the (WA) Constitution Act 1889 and s 43(3) of the (WA) Constitution Acts Amendment Act 1899 (requiring at least one Minister to be a member of the Legislative Council) and constitutional conventions, there is no constitutional requirement that Ministers sit in Parliament. See generally G Winterton *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press, 1986) 85. Compare s 29(5) of the (WA) Constitution Act 1889 and s 38(6) of the (WA) Constitution Acts Amendment Act 1899 which, before their amendment, provided that upon appointment a Minister's parliamentary seat became vacant and that immediately thereafter Ministers were eligible for re-election to Parliament. See generally E Forsey *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1943) (rep 1990) 223-227, 297-298. In view of the WA Constitution's British constitutional heritage, it might be arguable that references to vacating or retiring from office on "political grounds" in s 6 para 3 and s 74 of the (WA) Constitution Act 1889 implies that Ministers must be members of Parliament. However, in some other countries where governments are responsible to Parliament or the lower legislative chamber, not all Ministers are constitutionally compelled to be members of Parliament. See eg Arts 20, 23, 49 and 50 of the Constitution of the French Fifth Republic 1958; Arts 67 and 68 of the Basic Law of the Federal Republic of Germany 1949; Arts 42(2), 57(2) and 69 of the Netherlands Consitution; Arts 67 and 68 of the Constitution of Japan 1946. State Governors (s 7(3) of the (Cth) and (UK) Australia Acts 1986) and judges (eg s 7 of the (WA) Supreme Court Act 1935) are appointed. The Commonwealth position is similar (ss 2, 7, 24 and 72(1) of the Australian Constitution) except that Senators may be appointed (s 15 para 1) and Ministers may hold office for 3 months before being elected to Parliament (s 64 para 3).

   For US perspectives, especially on the relationship of democratic theory and judicial review, see M Edelman *Democratic Theories and the Constitution* (Albany: State University of New York Press, 1984); B Ackerman "The Storrs Lectures: Discovering the Constitution" (1984) 93 Yale L J 1013; A Amar "Philadelphia Revisted: Amending the Constitution Outside Article V" (1988) 55 U Chi L Rev 1043, 1090-1096; B Ackerman "Constitutional Politics/Constitutional Law" (1989) 99 Yale LJ 453, 461-486. See also D Galligan "Judicial Review and Democratic Principles: Two Theories" (1983) 57 ALJ 69.

8. Churches supra n 6, 697 ("The High Court has commendably given itself and inferior Australian Courts capacity to find an appropriate balance in the future."). But see ibid 695 ("The decision in *Bropho* may be subject to criticism for giving courts flexible powers of interpretation ..."). For a celebration of judicial power see D Malcolm "The State Judicial Power" (unpublished paper 9 Nov 1990). As to the

II. STATUTORY INTERPRETATION

Fashioning a presumption of statutory interpretation was the ostensible purpose of the judgments in *Bropho*. A bifurcated test emerged. What remained was the initial "presumption that the general words of a statute do not bind the Crown or its instrumentalities or agents."[9] However, vis-a-vis legislative intention to bind the Crown, this presumption is less stringent and more flexible than past applications of previous formulae - express words or necessary implication[10] - indicate.[11] It will, therefore, be easier to conclude that the requisite legislative intention exists. Recourse to "the provisions of the statute - including its subject matter and disclosed purpose and policy - when construed in a context which includes permissible extrinsic aids" is the procedure *Bropho* prescribes for determining whether that conclusion should be reached.[12]

changing attitudes of opposing ideological factions towards judicial activism depending on the US Supreme Court's decisions, see L Graglia "Judicial activism: even on the right, it's wrong" (1989) 95 Pub Interest 57; J Thomson "Making Choices: Tribe's Constitutional Law" (1986) 33 Wayne L Rev 229, 236-237; 240 n 48. See also E Maltz "The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence" (1990) 24 Ga L Rev 629; G Spann "Pure Politics" (1990) 88 Mich L Rev 1971.

9. *Bropho* supra n 1, 218. But see infra n 17.

10. See *Bropho* supra n 1, 214 (quoting *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58, 61, 63):

> [I]n the absence of express reference to the Crown ... a statute [does not] bind[] the Crown unless a test of "necessary implication" ... is applied and satisfied.... [I]t has been authoritatively stated that "necessary implication" means that it "must be manifest, from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound".... In determining whether [this manifest] test ... is satisfied ... it must be possible to affirm "that, at the time when the statute was passed and received the royal sanction, it was *apparent from its terms* that its beneficent purpose must be *wholly* frustrated unless the Crown were bound"....

Emphasis added in *Bropho*.

11. For a strict inflexible approach see *Commonwealth v Rhind* (1966) 119 CLR 584; *Bradken Consolidated Limited v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 ("*Bradken*"); *Brisbane City Council v Groups Projects Pty Ltd* (1979) 145 CLR 143; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172. See also *Lord Advocate v Dumbarton District Council* [1989] 3 WLR 1346. For a weaker presumption see *Roberts v Ahern* (1904) 1 CLR 406; *Minister for Works for Western Australia v Gulson* (1944) 69 CLR 338.

12. *Bropho* supra n 1, 217. "Permissible extrinsic aids" include second reading speeches, explanatory memoranda and parliamentary committee, royal commission and law

Within this melange, the date of "publication of the [*Bropho*] decision"[13] - 20 June 1990[14] - becomes relevant. In ascertaining the intent of legislation enacted prior to 20 June 1990, account must be taken "of the fact that [the manifestation and frustration][15] tests were seen as of general application at the time when the particular provision was enacted."[16] Even so, without those tests being "satisfied", an "apparent" legislative intent to bind the Crown will suffice.[17] For subsequent legislation, the absence of those tests diminishes the strength of the presumption. Whether the Crown is then bound by general legislative provisions "depend[s] upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises."[18]

III. SEPARATION OF POWERS: GENERAL

Superficially, *Bropho* appears to enunciate no more than a new judicially constructed[19] rule of statutory interpretation[20] for determining[21] whether state legislation binds the Crown in right of the enacting state.

reform commission reports. Ibid, 216 (referring to s 15AB of the (Cth) Acts Interpretation Act 1901; s 19 of the (WA) Interpretation Act 1984).

13. *Bropho* supra n 1, 218.
14. See ibid, 207.
15. See supra n 10.
16. *Bropho* supra n 1, 218.
17. Ibid. Even if "apparent" requires something more compelling than superficiality, this caveat on pre-20 June 1990 tests appears to undermine the assertion that "[t]he effect of [*Bropho*] is not to overturn the settled construction of particular existing legislation. Nor is it to reverse or abolish the presumption that the general words of a statute do not bind the Crown or its instrumentalities or agents." Ibid. See also Starke supra n 6, 527 (concluding that *Bropho* "in effect reversed" the "long-settled" presumption).
18. *Bropho* supra n 1, 218. See also infra nn 37, 48, 50.
19. Compare ibid, 213 ("Being a judge-made rule of construction..."). *Bropho* represents an exercise of federal, not state, judicial power to determine issues of state (constitutional) law. See infra n 44.
20. Ibid, 213 ("[I]t has been consistently accepted that the rule ... is a rule of statutory construction" and not a "prerogative power of the Crown" of constitutional status).
21. Does the *Bropho* principle (see text at nn 9-18) have to be followed or adopted by others, eg legislatures and executives, when interpreting legislation? Compare legislative and executive interpretations of constitutions. J Thomson "Comparative Constitutional Law: Entering the Quagmire" (1989) 6 Ariz J Int'l & Comp L 22, 39 n 50 (references). Also compare the possibility that legislative directions to the judiciary concerning statutory interpretation may, on separation of powers principles, be unconstitutional. J Thomson "Constitutional Interpretation: History and the High Court: A Bibliographical Survey" (1982) 5 UNSWLJ 309, 320 n 44.

Undisturbed, from this perspective, is constitutional law. Within state constitutional law realms,[22] traditional views concerning the doctrine of separation of powers[23] continue to prevail.[24] Except to the extent that manner and form provisions are legally efficacious[25] and the Australia Acts or Australian Constitution are integral facets of state constitutions,[26] state parliamentary sovereignty subdues constitutionalism.[27] For example, impenetrable separation of powers barriers, creating a sphere of executive power inviolable from state legislative abrogation, control or regulation, are not erected.[28]

22. See generally J Thomson "State Constitutional Law: Some Comparative Perspectives" (1989) 20 Rutgers LJ 1059, 1077-1079 (state and provincial separation of powers issues in America, Australia, Canada and India). As to federal constitutional law see infra n 23.
23. See generally J Thomson "Using the Constitution: Separation of Powers and Damages for Constitutional Violations" (1990) 6 Touro L Rev 177, 203-210 (references to history, theory, comparative analyses and specific American applications).
24. See eg *Building Construction Employees and Builders' Labourers Federation Of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 ("*BLF* case"); *Attorney-General (NSW) v Quin* (1990) 64 ALJR 327 Mason CJ, 333-334 ("[U]nder the constitutional arrangements which prevail in New South Wales and the doctrine of separation of powers, to the extent to which it applies in that State ..."). See generally P Hanks *Australian Constitutional Law: Materials and Commentary* 4th edn (Sydney: Butterworths, 1990) paras 4.103-4.113.
25. See eg J Goldsworthy "Manner and Form in the Australian States" (1987) 16 MUL Rev 403; G Carney "An Overview of Manner and Form in Australia" (1989) 5 QUTLJ 69; J Thomson "The Australia Acts 1980: A State Constitutional Law Perspective" (1990) 20 UWAL Rev 409, 422-424. See also G Winterton "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 FL Rev 167.
26. See generally J Thomson "State Constitutional Law: The Quiet Revolution" (1990) 20 UWAL Rev 311.
27. See generally *BLF* case supra n 24; G de Q Walker "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 ALJ 276. The effect of the Australian Constitution - eg ss 90, 92, 109, 114 and 115 - and of the UK and Cth Australia Acts 1986 - eg ss 6, 7 - on state legislative power must also be considered.
28. See supra nn 22, 23, 24.

Against this background, *Bropho*'s silence on constitutional law is deafening.[29] Judicial and legislative powers are rampant. But are they supreme? Has executive power retreated into a domain contingent upon the beneficence of judges and parliamentarians? Or, is only a "suggestion" required to obviate the past and erect a constitutional prohibition on legislation pertaining to the executive?[30] To exclusively extol expanding judicial power obscures *Bropho*'s consequences and perpetuates myopia.[31]

29. Silence is often important in constitutional law. For examples see L Tribe *Constitutional Choices* (Cambridge: Harvard University Press, 1985) 29-44; L Tribe *American Constitutional Law* 2nd edn (Mineola, New York: Foundation Press, 1988) 403-404; H Hurd "Sovereignty in Silence" (1990) 99 Yale LJ 945; Thomson supra n 8, 239-240.

30. See text at supra n 1. But "beyond the constitutional competence" is the language of ultra vires, not of constitutional prohibitions.

31. For example, Professor Thayer opined

> that the exercise of [judicial review] ... is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors....
>
> The tendency of a common and easy resort to [judicial review] ... is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

J Thayer *John Marshall* (Boston: Houghton, Mifflin & Co, 1901) 106-107 quoted in M De Wolfe Howe (ed) *James Bradley Thayer, Oliver Wendell Holmes, and Felix Frankfurter on John Marshall* (Chicago: University of Chicago, 1967) 85-86. See generally S Gabin "Judicial Review, James Bradley Thayer, and the 'Reasonable Doubt' Test" (1976) 3 Hastings Const LQ 961. For differing assessments of the US Supreme Court's performance see eg Thomson supra n 23, 187 n 45, 210 n 185. More general critiques of judicial review and its consequences include J Bakan "Strange Expectations: A Review of Two Theories of Judicial Review" (1990) 35 McGill LJ 439; A Hutchinson "Charter Litigation and Social Change: Legal Battles and Social Wars" in R Sharpe (ed) *Charter Litigation* (Toronto: Butterworths, 1987) 357; A Hutchinson "Tribal Noises" [1986] Am B Found Res J 79. See also supra n 8.

IV. SEPARATION OF POWERS: LEGISLATIVE V EXECUTIVE

Executive suppression of legislation encompassing the Crown is unequivocally rejected by *Bropho*.[32] Denuded of that power, what other means do state executives have to retaliate against legislative instrusions? Pardons,[33] the power to refuse assent to Bills[34] and non-enforce-

32. "This notion of a prerogative to override the provisions of a duly enacted statute ... is quite contrary to the whole course of British constitutional development since 1688.... It certainly has no place in the law of [Australia]...." *Bropho* supra n 1, 213. But the executive power of disallowance (and reservation) has been exercised in relation to Australian colonial legislation. See J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) 695-697 (list of disallowed Bills); R Lumb *The Constitutions of the Australian States* 4th edn (St Lucia, Qld: University of Queensland Press, 1977) 1979 11-15, 30, 65, 71. See also Australian Constitution s 58 (reservation) and s 59 (Queen's power to disallow Commonwealth legislation); J Quick and R Garran supra, 692-698; G Winterton *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (Melbourne: Melbourne University Press, 1983) 19, 217, 218, 221; (*"The Governor-General"*); G Winterton *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press, 1986) 29-30, 133, 134, 162; *Final Report of the Constitutional Commission* vol 1 (Canberra: AGPS, 1988) 72, 82-84, 99.

33. See generally 8 *Halsbury's Laws of England* (4th edn 1974) paras 949-953; *Burt v Governor-General* [1989] 3 NZLR 64. For differing views of the nature and source of state Governors' pardon powers see eg s 8 of the (Qld) Constitution (Office of Governor) Act 1987; Hanks supra n 24, paras 5.010, 5.017; P Hanks *Fajgenbaum and Hanks' Australian Consitutional Law* 2nd edn (Sydney: Butterworths, 1980) paras 5.011-5.013; Thomson supra n 24, 317-319. As to the Governor-General's pardon power see eg Winterton *The Governor-General* supra n 32, 48, 224 n 255, 312 n 100; Hanks supra n 24, paras 5.026-5.036; H Renfree *The Executive Power of the Commonwealth of Australia* (Sydney: Legal Books, 1984) 493. Compare the US President's pardon power. See eg art 2 s 2 of the US Constitution ("power to grant reprieves and pardons for offences against the United States, except in cases of impeachment"); K Moore *Pardons: Justice, Mercy and the Public Interest* (New York: Oxford University Press, 1989); Tribe supra n 29, 256 n 10; P Hole "Forgive and Forget: Honoring Full and Unconditional Pardons" (1989) 41 Me L Rev 273; M Rozell "The Presidential Pardon Power: A Bibliographic Essay" (1989) 5 J Law & Politics 459.

34. See eg (WA) Constitution Act 1889 s 2(3) ("Every Bill ... shall be of no effect unless it has been duly assented to by or in the name of the Queen."); Australian Constitution ss 58, 60 (Governor-General's and Queen's assent). Although these powers must be exercised on ministerial advice - see J Thomson "Reserve Powers of the Crown" (1990) 13 UNSWLJ (forthcoming) - that advice to assent may not be given. See eg (NSW) Privy Council Appeals Abolition Bill 1979 (referred to in G Whitlam *The Whitlam Government 1972-1975* (Ringwood, Vic: Penguin Books, 1985) 150-151; "... but Walker can't get his Act together" Sydney Morning Herald 30 April 1981, 7). See also "Wrong Bill Assented to by the Governor-General"

ment of legislation[35] may remain. Of course, judicial protection may be available if the "suggestion" not advanced in *Bropho* was adopted by the courts.[36]

Precisely the opposite result has, however, ensued: not only can legislative power vanquish executive power and immunities but state legislation binding the Crown in right of the enacting state will be the normal, rather than exceptional, situation.[37] Separation of powers considerations are judicially ignored and negated in both constitutional and statutory contexts. Is a complete parliamentary triumph, therefore, inevitable?

To the extent that the executive controls Parliament,[38] a negative response is sustainable. A provision in each statute expressly providing that the Crown is not bound by legislation is the most expedient option. Another alternative is the inclusion in general Interpretation Acts of specific rules indicating whether and when the Crown is within the scope

(1977) 51 ALJ 61; "Safeguards to ensure that the wrong Bill is not assented to" (1977) 51 ALJ 800.

35. As to Appropriation Acts, which authorise expenditure, the generally accepted view is that the executive has a discretion whether or not to spend appropriated funds. See eg *Wakely v Lackey* (1880) 1 LR (NSW) 274, 282-283, 285-286; *Victoria v Commonwealth* (1975) 134 CLR 338 Jacobs J, 404-405. As to other state legislation see eg *Tonkin v Brand* [1962] WAR 2; *Green v Purdon* (1988) 15 NSWLR 269 (special leave to appeal refused by the High Court (1989) 7 Leg Rep SL 4). For differing views as to whether there is a constitutional impediment to Commonwealth legislation depriving the executive of this enforcement power see Winterton *The Governor-General* supra n 32, 101-110.

    Compare the US President's power to impound funds appropriated by Congress. See eg L Fisher *Constitutional Conflicts Between Congress and the President* (New Jersey: Princeton University Press, 1985) 155-156, 236-239; Tribe *American Constitutional Law* supra n 29, 256-262. Compare also the US President's power to enforce legislation. See eg P Shane and H Bruff *The Law of Presidential Power: Cases and Materials* (Durham: Carolina Academic Press, 1988) 295-506; Winterton *The Governor-General* supra n 32, 289 n 76; W Gwyn "The Indeterminacy of the Separation of Powers and the Federal Courts" (1989) 57 Geo Wash L Rev 474, 484-494; S Carter "The Independent Counsel Mess" (1988) 102 Harv L Rev 105, 114-116.

36. See text at supra n 1. For arguments against such limitations on Commonwealth legislative power see Winterton *The Governor-General* supra n 32. As to judicial protection against such exercises of executive power see infra n 42.

37. "The reality would seem to be that in the future all regulatory and 'mischief resolving' legislation will be presumed to bind the Crown...." Churches supra n 6, 695.

38. A common exception is where upper legislative chambers are controlled by opposition parties. Eg, in 1990, in the Commonwealth Senate, WA, SA, Vic, NSW and Tas.

of other legislation.[39] However, even "completely unqualified and mandatory" interpretative rules "would necessarily give way" when confronted with "a contrary legislative intent" in future enactments.[40] Without manner and form impediments,[41] subjugation of constitutionalism by parliamentary supremacy is the result.

V. SEPARATION OF POWERS: JUDICIAL V EXECUTIVE

Executive power is also subjected to judicial review. Traditionally, the constitutionality of executive activities has been a matter of judicial concern. Similarly, requirements of good faith, relevant considerations and natural justice are now imposed by courts on the exercise of some executive powers. Conjecture only surrounds whether judicial supervision will be extended to the manner in which constitutionally conferred executive authority is exercised.[42] Executive retaliation is, however, possible. Removal of judges, refusal to enforce court orders, deprivation of financial assistance and jurisdiction stripping are examples.[43]

39. Examples are provided in *Bropho* supra n 1, 213. See also *B.M.G. Resources Ltd v Municipality of Beaconsfield* [1988] Tas R 142 (applying (Tas) Acts Interpretation Act 1931 s 6(6) that "[n]o Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included therein for that purpose."). See also (WA) Interpretation Amendment Bill 1990 cl 3 (proposing to insert s 7A that the Crown is not bound by WA legislation unless that legislation "expressly" or "by necessary implication" binds the Crown); Western Australia, Legislative Council 1990 *Debates* 3665 (J Berinson on the Interpretation Amendment Bill 1990).
40. *Bropho* supra n 1, 217-218.
41. See supra n 25. An initial question is whether such interpretation legislation would be subject to manner and form requirements or be binding on future state Parliaments for other reasons. See Thomson supra n 25, 424. *Bropho* does not appear to address these possibilities as the Court's reason for prior interpretation legislation giving way to future enactments is that "the subsequent enactment would represent a *pro tanto* repeal or amendment of the earlier provision." *Bropho* supra n 1, 218.
42. On all these issues see Winterton *The Governor-General* supra n 32, 123-143; Thomson supra n 26, 319 nn 47 (federal), 48 (state).
43. Sometimes legislative co-operation may be required. See generally G Winterton "The British Grundnorm: Parliamentary Supremacy Re-Examined" (1976) 92 LQR 591, 591 n2; J Thomson "Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective" (1983) 62 Tex L Rev 559, 561-563; J Thomson "Removal of High Court and Federal Judges: Some Observations Concerning Section 72(ii) of the Australian Constitution (Part 1)" [1984] Aust Current L 36033.

Bropho intrudes into these issues. Federal judicial power[44] was endorsed as the expositor of whether and when state executive power can be subjugated by state legislative power. Failure to proffer the separation of powers "suggestion" in the High Court, however, left the most overt constitutional issue open for future judicial resolution.[45] In marked contrast is the removal of Crown immunity. Despite an initial impression, perpetuated by *Bropho*, that state Parliaments engender such an occurrence, the reality is different. Judges determine the existence and parameters of this facet of executive power. Obvious examples are the judicial formulation and application of rules, principles and presumptions of statutory interpretation to determine Crown immunity questions. *Bropho* graphically illustrates this judicial power.

Less noticeable, but more powerful, is the judicial construction of the content and character of those rules, principles and presumptions. Previously, a divergence was apparent.[46] *Bropho*, however, replaces the "inflexible"[47] judicial rule of executive immunity from legislation, which had begun to predominate, with a flexible approach to deciding conundrums concerning state Crown immunity from state legislation.[48] Inevitably, such flexibility,[49] even if constrained,[50] enhances judicial power.

44. The High Court, "vested" with "[t]he judicial power of the Commonwealth", was exercising appellate jurisdiction. Australian Constitution ss 71, 73(ii).
45. See text at supra nn 29-30.
46. See supra n 11 (contrasting the strict inflexible approach and weaker presumption).
47. *Bropho* supra n 1, 216, 217, 218.
48. Churches supra n 6, 695:

> Some will complain that a formerly inflexible rule, that could be applied with almost mathematical precision, has now been replaced by a flexible test which will depend on a Court's assessment of a number of factors which will vary with the circumstances of each future case.
>
> ...
>
> The High Court has adopted a wide discretionary power in determining the relationship of statutes to the Crown....

See also infra n 50.

49. Eg, it has been suggested that "a flexible test ... depend[s] on a Court's assessment of a number of factors which will vary with the circumstances of each future case." Churches supra n 48.
50. Two possibilities are "general principles [set out in *Bropho*] according to which the interpretation must be performed" and "[t]he reality ... that in future all regulatory and 'mischief resolving' legislation will be presumed to bind the Crown...." Churches supra n 6, 695. Attainment of the latter would, however, convert the flexible approach back into an inflexible rule. Compare supra n 48.

Endorsing a flexible test, which depends upon judges assessing or balancing various factors and interests,[51] starkly exposes how executive power is exposed to the vicissitudes of the courts.

VI. SEPARATION OF POWERS: JUDICIAL V LEGISLATIVE

It is, however, futile to utilise judicial review theories to marginalise subjective values or personal preferences in constitutional adjudication - the quest for neutral principles or universal truths - in order to create and maintain a distinction between law and politics.[52] Even so, endeavours to insulate courts from attacks, primarily directed at their performance in determining the constitutional validity of legislation, continue.[53] Ostensibly, *Bropho* does not involve that judicial task: statutory interpretation appears to be its only concern. Here, judicial deference to legislative power is manifest. Diminution, but not reversal, of the judicially created presumption against legislation binding the Crown[54] and greater judicial respect for and effort to ascertain legislative intention are the obvious indications. Elevation of legislation over executive immunity may more frequently be the result.[55]

To the extent that this judicial posture has altered or represents the relationship between state legislative and executive powers, it may entail consequences or be based on principles of constitutional dimension. *Bropho* can, therefore, be perceived as rendering a negative response to the "suggestion" concerning constitutional competence. In doing so, it is an affirmation and exercise of judicial power to determine the constitutional parameters of legislative power.

51. See eg Churches supra n 6, 695 (assessment of factors), 697 (find "appropriate balance"). See generally T Aleinikoff "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943 (balancing methodology and how it transforms constitutional adjudication).
52. For various theories of judicial review see Thomson supra n 22, 1075 nn 76-80, 1075 n 81; M Moore "The Written Constitution and Interpretivism" (1989) 12 Harv JL & Pub Pol'y 3. See generally A Hutchinson "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43 U Miami L Rev 541.
53. See eg M Moore "Do We Have an Unwritten Constitution?" (1989) 63 S Cal L Rev 107 (advocating value-laden interpretative theory).
54. See text at supra n 9.
55. See supra n 37.

VII. OTHER CIRCUMSTANCES

Bropho was concerned with state legislation and the Crown in right of the enacting state.[56] Four other situations were not involved: Commonwealth legislation and the Crown in right of the Commonwealth; Commonwealth legislation and the Crown in right of a state; state legislation and the Crown in right of the Commonwealth; and state legislation and the Crown in right of another state. Do *Bropho*'s statutory interpretation principles and presumption and constitutional assumptions extend to those realms?

Commonwealth legislation has been proposed to apply the *Bropho* test to the first situation.[57] Unresolved is the constitutional law conundrum of the extent to which Commonwealth legislative power can nullify Commonwealth executive immunity.[58] Within limits, Commonwealth legislation binding states is, however, constitutional.[59] Whether Commonwealth legislation does may also be determined by the *Bropho* test.[60] In the third situation, Commonwealth legislation also purports[61] to indi-

56. *Bropho* did not involve the extent, if any, to which a third party dealing with the Crown is entitled to the Crown's immunity. See generally *Bradken* supra n 11, 124, 129, 138; *Australian Conservation Foundation Inc v South Australia and Ophix Finance Corp Pty Ltd* (1988) 53 SASR 349 (special leave to appeal granted by the High Court (1990) 18 Leg Rep SL 1). Nor, apparently, does *Bropho* apply to circumstances where the Sovereign is personally involved. *Bropho* supra n 1, 213, 218-219; Churches supra n 6, 693. Also, for *Bropho*, the "Sovereign" and "a Crown instrumentality" seem to be distinguished from the Crown's "employees or agents". *Bropho* supra n 1 , 219; Churches supra n 6, 693.

57. (Cth) Governments and Government Instrumentalities (Application of Laws) Bill 1990 cl 5(2); Australia, House of Representatives 1990 *Debates* 1309, 1311 (M Duffy). For the pre-*Bropho* position see *Bradken* supra n 11.

58. For the view that all federal executive power can constitutionally be controlled by Commonwealth legislation see Winterton *The Governor-General* supra n 32, 94-101.

59. See generally Zines supra n 4, 285-297; *New South Wales Bar Association v Forbes MacFie Hansen Pty Ltd* (1988) 82 ALR 431.

60. (Cth) Governments and Government Instrumentalities (Application of Laws) Bill 1990 cl 11; *Debates* supra n 57, 1313 (M Duffy). For the pre-*Bropho* position see *Bradken* supra n 11; Hanks supra n 24, para 6.081.

61. Would this legislation "necessarily give way" when confronted with "a contrary legislative intent" in subsequent Commonwealth enactments? Compare supra nn 40 and 41 (referring to *Bropho* supra n 1, 217-218). For an application of *Bropho* in this third situation see *Re Commissioner of Water Resources and Leighton Contractors Pty L:td* (1990) 96 ALR 242.

cate when state laws do and do not apply to the Commonwealth Crown.[62] Again, difficult constitutional questions obtrude.[63] Finally, state legislation can constitutionally bind the Crown in right of another state.[64]

VII. CONCLUSION

Facets of *Bropho*, other than crown immunity from legislation, also ought to command attention. Methods of statutory interpretation, the precendential significance, if any, of previous decisions and the implication that English law, together with Canadian and American law, is to be treated as foreign law[65] are obvious examples. From such a melange a more central issue emerges: Does *Bropho* represent judicial activism in the classic American sense[66] of an absence or lack of judicial deference to the legislature or executive? Initially, *Bropho* appears to defer to the legislature. It diminishes, but does not reverse, the rigidity of the presumption of crown immunity and seemingly accords greater judicial respect to legislative intention. However, without express words in the statute under judicial consideration,[67] it is the courts which enunciate and declare Parliament's intention vis-a-vis the Crown[68] and, by relinquish-

62. (Cth) Governments and Government Instrumentalities (Application of Laws) Bill 1990 cl 5(3).
63. See generally Zines supra n 4, 312-327; *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231.
64. *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 518 ("*Uther*") (Latham CJ discussing NSW legislation applying priority rules in NSW to debts owed to the Crown in right of other states). This aspect of *Uther* was not over-ruled by *Commonwealth v Cigamatic Pty Ltd (in Liquidation)* (1962) 108 CLR 372.
65. *Bropho* supra n 1, 212-213.
66. See eg M Silverstein *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca: Cornell University Press, 1984); J Simon *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* (New York: Simon and Schuster, 1989).
67. As to the effect of Interpretation Acts see text accompanying supra nn 39-41.
68. For instance, Brennan J in *Bropho* supra n 1, 222

> agree[d] with the majority [in *Bropho*] that it is appropriate [for courts] to determine the scope of the exemption of Crown activity by reference to all the circumstances which might legitimately reveal the actual or *imputed* intention of the legislature or *assist in imputing to the legislature* an intention which it *might* reasonably have formed had the legislature adverted to the question. (Emphasis added)

ing the previous rigid presumption, *Bropho* has provided the judiciary with much greater latitude to control the relationship of legislation and executive power. From this perspective, *Bropho* is a clear manifestation of judicial supremacy.

Eulogising that judicial power because results and doctrinal developments coincide with personal preferences is not a sufficient response. First, it fails to realistically appraise judicial decision-making processes.[69] Therefore, when change occurs, advocates of a powerful and activist judiciary rapidly resile from that position.[70] More importantly, it places too much emphasis and reliance on one element of a complex and inter-related political and constitutional system.[71] Isolating the power and performance of courts from that milieu is the inevitable result. Constructive criticism, which peers below the surface reflections of judicial opinions, is one antidote.[72] If such criticism is correctly and constantly applied, general premises should be easier to identify and stimulating debates engendered. Hopefully, High Court sycophants and critics will tolerate nothing less.

69. For an initial foray in the Australian context see eg J Goldsworthy "Realism About the High Court" (1989) 18 FLR 27; B Galligan "Realistic 'Realism' and the High Court's Political Role" ibid 40; J Goldsworthy "Reply to Galligan" ibid 50.
70. See supra n 8.
71. See supra n 7.
72. See eg F Easterbrook "Ways of Criticizing the Court" (1982) 95 Harv L Rev 802.