

GERALD ALLOWAY, ASSISTANT EDITOR
Victoria University of Wellington - Faculty of Law

JOHN PREBBLE QC, EDITOR
Professor of Law, Victoria University of Wellington - Faculty of Law, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien, Adjunct Professor of Law, University of Notre Dame Australia - School of Law

MĀMARI STEPHENS, EDITOR
Senior Lecturer of Law, Victoria University of Wellington

[Browse ALL abstracts for this journal](#)

[Links: Subscribe ~ Unsubscribe](#) | [Distribution](#) | [Network Directors](#) | [Submit ~ Revise Your Papers](#)

Announcements

Victoria University of Wellington Student and Alumni Subseries Issue I: Comparative Constitutionalism

Comparative Constitutionalism is the first in 2018 of several issues of The the Student/Alumni sub-Series of the VUW Legal Research Papers.

The Student/Alumni sub-Series was launched in 2015. It publishes a selection of honours and postgraduate papers from Victoria University of Wellington Law School.

The sub-Series includes both general and thematic issues.

Table of Contents

- **The Long Shadow of Constituent Power: An Historical Critique**
[Alec Duncan](#), Victoria University of Wellington, Faculty of Law, Student/Alumni
- **Inclusive Constitution-Making: Lessons from Iceland and Ireland for Aotearoa New Zealand**
[Rebecca McMenamin](#), Victoria University of Wellington, Faculty of Law, Student/Alumni
- **A Black Veil Over Europe: Are Legislative Prohibitions on Islamic Dress ('Burqa Bans') Justified?**
[Nicola Robbins](#), Victoria University of Wellington, Faculty of Law, Student/Alumni
- **The Place of Backlash in Decisions of the New Zealand Judiciary**
[Kate Wilson](#), Victoria University of Wellington, Faculty of Law, Student/Alumni

[^top](#)

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

■ **"The Long Shadow of Constituent Power: An Historical Critique"** 
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 1/2018

ALEC DUNCAN, Victoria University of Wellington, Faculty of Law, Student/Alumni
Email: duncandore@gmail.com

According to the theory of constituent power, only the people can legitimately create constitutional orders. Emmanuel Sieyès and Carl Schmitt's conception of the theory hold that this power is unmediated: its democratic purpose and procedure mean that legal devices cannot constrain its exercise. However, responding to concerns about the power's use by authoritarian regimes to

legitimate anti-democratic constitutional amendments, constitutional theorists have recently sought to devise ways to legally limit the power's potential. This paper maintains that the theory and the critiques thereof are incomplete because they do not consider social and political factors – distinct from procedural concerns – relevant to how people perceive the legitimacy of constitutional regimes.

This paper advances three arguments. First, that Sieyès and Schmitt's conception confers legitimacy and unlimited potential on procedurally correct exercises of the constituent power. Secondly, that this connection between procedure and legitimacy is not demonstrated by historical instances of revolutionary constitution-making. Finally, that revolutionary exercises of the power tend to destroy the democratic basis on which it is premised. The paper concludes by urging constitutional theorists to carefully examine contextual factors during instances of constitution-making and to distance the theory of constituent power from revolutionary instances of constitution-making.

"Inclusive Constitution-Making: Lessons from Iceland and Ireland for Aotearoa New Zealand"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No 2/2018

REBECCA MCMENAMIN, Victoria University of Wellington, Faculty of Law, Student/Alumni
Email: bex.mcm@gmail.com

New Zealand's constitutional journey has been revived in recent years through three expert-led dialogues on more certain, formalised and new constitutionalism: the Constitutional Advisory Panel (2013), Matike Mai Aotearoa (2016) and Constitution Aotearoa (2017). This paper advocates that any constitution-making in New Zealand should follow inclusive processes to uphold democratic legitimacy and facilitate deliberation. There are three key elements of inclusive constitution-making. First, the people should have ownership over important parts of the process. Second, there should be a citizen-led representative drafting body – a constituent assembly without the power to make ordinary law and comprised of politically independent delegates. Third, there should be public oversight of the process to ensure transparency and provide for meaningful consultation. This paper undertakes a comparative exercise, analysing recent inclusive constitution-making experiences in Iceland and Ireland, to offer proposals for inclusive constitution-making in Aotearoa New Zealand. New Zealand's most significant challenge in terms of ownership is considering the proper role for experts and balancing the power of political elites in a climate of constitutional apathy. In terms of representation, the most significant challenge for New Zealand is how to represent the interests of Māori as tangata whenua and how to represent traditionally marginalised voices in politics, such as those of women, ethnic minorities and youth. In terms of public oversight, the biggest challenge is how we can use digital democracy in constitution-making.

"A Black Veil Over Europe: Are Legislative Prohibitions on Islamic Dress ('Burqa Bans') Justified?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No 3/2018

NICOLA ROBBINS, Victoria University of Wellington, Faculty of Law, Student/Alumni
Email: nicola.robbins@vuw.ac.nz

Recently in Europe there has been an increase in legislative prohibitions on Islamic dress. These prohibitions, which primarily target headscarves and full-face veils, are colloquially referred to as "burqa bans". Although "burqa bans" exist in many European countries, this paper specifically looks at examples from Switzerland, Turkey and France, and three resulting European Court of Human Rights cases, *Dahlab v Switzerland*, *Şahin v Turkey*, and *S.A.S v France*. This paper also considers the justifications used to support the respective "burqa bans", namely secularism, coercion and gender equality, and attempts to ascertain their veracity. This paper concludes that the justifications given do not satisfy the goals they claim to achieve, therefore, the bans are not justifiable.

"The Place of Backlash in Decisions of the New Zealand Judiciary"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 4/2018

KATE WILSON, Victoria University of Wellington, Faculty of Law, Student/Alumni
Email: kate-wilson@hotmail.co.nz

Issues central to a group identity, or *nomos*, are very significant to those who hold them. When those issues clash in courts, judges can be faced with very difficult and controversial decisions. When they have the authority and discretion to address issues of *nomos*, New Zealand courts both can and should consider the backlash that their decisions could cause, as backlash in the New Zealand context tends to lead to meaningful change to a judge's decision. However, a democratic constitutionalist view of backlash realizes that it is not always a negative phenomenon. Instead, backlash is evidence of

subjects within a system contesting the norms and nomos that underlie their constitutional law. This conception of backlash is well suited to New Zealand's constitutional experience, and so while judges would be prudent to consider the potential backlash against their judgments, they should not avoid full engagement with the law purely to avoid conflict.

[^top](#)

About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

Submissions

To submit your research to SSRN, sign in to the **SSRN User Headquarters**, click the My Papers link on left menu and then the Start New Submission button at top of page.

Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: sales@ssrn.com

Distributed by

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK

Northwestern University - Pritzker School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)

Email: bblack@northwestern.edu

RONALD J. GILSON

Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)

Email: rgilson@leland.stanford.edu

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

[^top](#)

Links: [Subscribe to Journal](#) | [Unsubscribe from Journal](#) | [Join Site Subscription](#) | [Financial Hardship](#)

Subscription Management

You can change your journal subscriptions by logging into [SSRN User HQ](#). If you have questions or problems with this process, please email Support@SSRN.com or call 877-SSRNHelp (877.777.6435 or 212.448.2500). Outside of the United States, call 00+1+212+4482500.

Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

[Accounting Research Network](#)

[Cognitive Science Network](#)

[Corporate Governance Network](#)

[Economics Research Network](#)

[Entrepreneurship Research & Policy Network](#)

[Financial Economics Network](#)

[Health Economics Network](#)

[Information Systems & eBusiness Network](#)

[Legal Scholarship Network](#)

[Management Research Network](#)

[Political Science Network](#)

[Social Insurance Research Network](#)

[Classics Research Network](#)

[English & American Literature Research Network](#)

[Philosophy Research Network](#)

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact site@ssrn.com for more information.

Individual Membership (for those not covered by a site subscription)

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User Headquarters: <https://hq.ssrn.com/Subscriptions.cfm>

Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to Subscribe@SSRN.com

[^top](#)

To ensure delivery of this eJournal, please add LSN@publish.ssrn.com (**Alloway/Prebble/Stephens**) to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email Support@ssrn.com or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at Site@SSRN.com

[^top](#)

Copyright © 2018 Elsevier, Inc. All Rights Reserved