The New Pitcairn Islands Constitution: Strong, Empty Words for Britain's Smallest Colony

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THE NEW PITCAIRN ISLANDS
CONSTITUTION:
STRONG, EMPTY WORDS
FOR BRITAIN’S SMALLEST COLONY

Michael O. Eshleman*

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“Limitations of power, established by written constitutions, have
their origin in a distrust of the infirmity of man. That distrust is
fully justified by the history of the rise and fall of nations.”¹

INTRODUCTION

On March 4, 2010, the new Pitcairn Constitution came into
force²—two-hundred twenty-one years to the day after the

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¹ Mott v. Pennsylvania R.R., 30 Pa. 9, 28 (1858).
² Pitcairn Constitution Order, 2010, S.I. 2010/244 (U.K.), reprinted in
THE LAWS OF PITCAIRN, HENDERSON, DUCIE AND OENO ISLANDS, at xxvii–xxix
pn/Laws/index.html [hereinafter LAWS OF PITCAIRN]; Proclamation Appointing
the Day for the Coming Into Force of the Pitcairn Constitution Order 2010,
reprinted in LAWS OF PITCAIRN, supra, at xxx. See generally Anthony H.
Angelo & Ricarda Kessebohm, The New Constitution of Pitcairn: A Primer, 7
jurisdictions’ names says the territory is officially styled the “Pitcairn,
Henderson, Ducie and Oeno Islands” but the shorthand herein “Pitcairn” will
be used; the list also sanctions “Pitcairn Islands” for unofficial use.
KNOWLEDGE & INFORMATION MANAGEMENT TEAM, INFORMATION &
TECHNOLOGY DIRECTORATE, FOREIGN & COMMONWEALTH OFFICE, GEOGRAPHI-
United States Constitution took effect. The British government that enacted it said the Pitcairn Constitution, "enshrined human rights for the first time; provided for an attorney-general; affirmed the authority of the Island Council; updated the role of the governor; and brought the judicial system into the constitution."\(^4\)

The Pitcairn Constitution runs 12,164 words.\(^5\) It is the length of the Alaska Constitution\(^6\) and triple that of the U.S. Constitution.\(^7\) It has 66 articles, one article for every inhabitant on Pitcairn, which has the population of a small village.\(^8\) (The population peaked at 233 in 1937 and today is only 66.\(^9\) The other three islands of the group—Henderson, resources/en/pdf/publications/geographical-names-and-information

\(^3\) Continental Congress Resolution of Sept. 13, 1788, in 34 U.S. CONTINENTAL CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 5355 (Roscoe R. Hill ed., 1936) (setting effective date for U.S. Constitution as first Wednesday in March next, i.e., March 4, 1789). See also Dan T. Coenen, Of Pitcairn's Island and American Constitutional Theory, 38 WM. & MARY L. REV. 649 (1997) (comparing early history of Pitcairn to start of American government under the Constitution, as the Bounty mutiny happened on April 28, 1789, two days before General Washington took the presidential oath).


\(^5\) The Author cut-and-pasted the text, minus the schedule, into a word processor and ran a word count.


\(^8\) 603 PARL. DEB., H.C. (5th ser.) (1959) 1286 (U.K.) (statement of Norman Pannell) (stating Pitcairn’s population is that of a small village).

Ducie and Oeno—are uninhabited.\textsuperscript{10} Many articles are filled with details of the sort generally left by the United States Constitution for statutes but which clutter many state constitutions.\textsuperscript{11} This is typical of British colonial constitutions—long and detailed.\textsuperscript{12} Reading the document shows much is based on European human rights law.\textsuperscript{13}

The rights guaranteed by the Constitution are worded oddly to American eyes, as they are filled with lengthy exceptions that make many of them valueless. What’s worse, Britain’s history with its colonies shows it can and does sweep away rights when it is convenient.


\textsuperscript{11} Compare Pitcairn Island Const. art. 57 (permitting Governor to set terms of public employees’ service), id. art. 48 (setting rules of appellate procedure), and id. art. 37(6) (providing statutes to be divided into numbered sections), with Ala. Const. passim (a logorrheic monstrosity of 365,000 words with miniscule details on everything), Cal. Const. art. 19 (allocating motor vehicle revenues), N.D. Const. art. X, § 7 (providing for tax for hail insurance for crops), and Ohio Const. art. VI, § 6 (providing for tuition credit program). Cf. Jennifer Corrin & Don Patterson, Introduction to South Pacific Law 75–87 (2d ed. 2007) (describing form of constitutions in region).


THE BACKGROUND OF THE 2010 CONSTITUTION

Before the Constitution

Englishmen settled on the island in 1790—these were the mutineers of the Bounty. For the first century of occupation, the islanders were left on their own, occasionally visited by Royal Navy ships whose officers dispensed law and order. Several codes for Pitcairn were drafted by these officers. The


17 See WALTER BRODIE, PITCAIRN'S ISLAND AND THE ISLANDERS IN 1850, at 84–91 (London, Whitaker 3d ed. 1851) (reprinting laws drafted for islanders in 1838 by Capt. Russell Elliott of H.M.S. Fly, microformed on American Culture Series, Reel 80.3 (University Microfilms); Notes of Admiral Fairfax Moresby's Address to the Pitcairn Islanders (May 17, 1853) (giving islanders proposals to change their laws, all of which were adopted), original in The National Archives, London (ADM 1/5618), available at http://evols.library.manoa.hawaii.edu/handle/10524/19431; HARRY L. SHAPIRO, THE HERITAGE OF THE BOUNTY: THE STORY OF PITCAIRN THROUGH SIX GENERATIONS 289–91
first, written in 1838, is sometimes referred to as the island’s first constitution—recall that in Britain the “constitution” is also just a collection of laws.\textsuperscript{18}

Only in 1898 was Pitcairn formally placed under British administration when it was brought within the jurisdiction of the Western Pacific High Commissioner.\textsuperscript{19} (The High Commission was created in 1877 to combat the slave-trade in the South Pacific and lasted 101 years).\textsuperscript{20} Six years later a new code was enforced and in 1940 the High Commissioner promulgated a wide-ranging code for Pitcairn that organized the government and provided for civil and criminal matters.\textsuperscript{21}


In 1952, Pitcairn was established as a separate colony, sharing its governor and administration with the colony of Fiji. After Fiji became independent in 1970, a new fundamental law was issued from London. In the 1990's it was supplemented by additional provisions for courts. These instruments governed the island until the 2010 Constitution.

During the past fifteen years a tremendous mass of legislation has been issued for Pitcairn. This was prompted by a wide-ranging rape investigation on the island that revealed the parlous state of government on the island. It is said “[t]he legal structure . . . changes only in response to crisis” and Pitcairn is no exception. The prosecutions came as Britain was considering reforming territorial governance in general.

**Partnership for Progress: 1999**

The 2010 Constitution grew out of a British project on constitutional reform for its territories that began with a

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26 See LAWS OF PITCAIRN, supra note 2, at xiii–xix (listing all laws enacted from 1952 to 2010 and showing few laws were passed for decades and then many laws were passed in the last fifteen years).
Foreign and Commonwealth Office white paper issued in 1999. That document is full of the usual diplomatic nebulousness; its priorities were: (1) improving the “partnership” with the territories; (2) establishing human rights; (3) regulating the financial sector; (4) proscribing the drug trade; (5) fostering economic development; and (6) protecting the environment. A decade later, the Foreign and Commonwealth Office recommitted itself to the 1999 white paper and said its priorities were “self-determination; mutual obligations and responsibilities; freedom for the Territories to run their own affairs to the greatest degree possible; and firm commitment from the U.K. to help the Territories develop economically and to help them in emergencies.”

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30 U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY, supra note 29, at 3–8. The human rights referred to were these three issues: corporal punishment, the death penalty, and “homosexual acts between consenting adults in private.” Britain has been actively working to abolish the death penalty around the world. U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, supra note 4, at 17–20. Britain is also “at the forefront of international efforts to promote the human rights of LGBT people.” Id. at 33.

While other territories were exploring constitutional reform, Pitcairn’s mayor complained to the United Nations that the island had not been consulted on the 1999 white paper, nor had its goals been explained to Pitcairners.\(^{32}\) (The mayor went to the United Nations, as it has long been monitoring Pitcairn).\(^{33}\) Likewise, a resident of Pitcairn told the House of Commons Foreign Affairs Committee in 2008 that the Foreign and Commonwealth Office had never brought up the subject of constitutional reform on Pitcairn, even though it had been doing so elsewhere for years,\(^{34}\) and issuing many new

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constitutions since the 1999 white paper.35

Following these criticisms, the Foreign and Commonwealth Office reaffirmed its commitment to constitutional reform with these principles:

(a) any modernised constitution must provide a framework for proposals but that was not the case on Pitcairn).

enhanced good governance and human rights protection;
(b) increased Territory self-government is encouraged, but this
must be consistent with the United Kingdom’s continuing
responsibilities for the Territories; these responsibilities include
ensuring good governance, a nonpolitical civil service and police
force, the independence of the judiciary, the maintenance of law
and order, the fulfillment of international obligations, and the
minimisation of contingent liabilities;
(c) there must be evidence that any proposed new constitution
has the support of the people of the Territory concerned; that
evidence should as a minimum consist of the endorsement of the
Territory’s legislative body, as the elected representatives of the
people, but additional means of wider public consultation are
encouraged.36

Some Constitutional Proposals: 2004-2008

Caitlin Ryan, a New Zealand law student, wrote a new
constitution for Pitcairn for her 2004 thesis. It consolidated
into one document all constitutional statutes, orders-in-council,
and island ordinances, making changes in their texts to
promote democracy.37 This document was not used in drafting
the new Constitution.38

In 2008 the islanders were presented with a draft charter
written privately by Leslie Jacques, a New Zealander who
served as the Island Commissioner.39 The Pitcairn government
announced to the press the charter would be in place by April

36 U.K. FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO OVERSEAS
TERRITORIES REPORT, supra note 31, ¶ 11. See also FOREIGN AFFAIRS
COMMITTEE, TURKS AND CAICOS ISLANDS: GOVERNMENT RESPONSE TO THE
COMMITTEE’S SEVENTH REPORT OF SESSION, 2009–10, FIRST SPECIAL REPORT OF
COMMITTEE, TURKS AND CAICOS RESPONSE] (reprinting government’s
statement that “Good Governance has been a key element in the
modernisation of the Territory constitutions over the past decade.”).
37 Caitlin Ryan, TOWARDS SELF-DETERMINATION: A SELF-GOVERNMENT
DOCUMENT FOR PITCAIRN, 11 REVUE JURIDIQUE POLYNÉSIENNE-N.Z. ASS’N COMP.
38 E-mail from Andrew Allen, Head of Southern Oceans Team, Overseas
O. Eshleman (Apr. 8, 2011, 12:04 GMT).
39 COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, supra
note 34, at Ev-134. This proposal was not formally printed and has vanished
from the web; the author has a copy, supplied by Commissioner Jacques.
One Pitcairner complained to Parliament that no real consultation was made with the people and claimed the charter was presented as an ultimatum. A prominent New Zealand legal scholar was highly critical of the proposal:

From a legal perspective, the form and content of the charter is inadequate for it to constitute a founding instrument or charter of the colony. The charter is a collection of suggestions and ideas that are often repetitive and sometimes potentially inconsistent inter se or with international law.

CONSTITUTION MAKING: 2009

Pitcairn was one of the few jurisdictions that lacked provisions in its laws for human rights, something which concerned the Foreign and Commonwealth Office. In 2009 the Pitcairn administration said change was coming, but denied a new constitution was in the works, claiming only that the coming changes would bring “European standards of governance and human rights” to Pitcairn. But Britain decided to issue a constitution after all, a document that set[] out, for the first time, rights and freedoms of the individual, provide[d] for an Attorney General and establish[ed] the authority of the Island Council. It clarifie[d] the independent role of the Pitcairn courts and judicial officers, guarant[e]d the

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41 COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, supra note 34, at Ev-134. Cf. FOREIGN AFFAIRS COMMITTEE, TURKS AND CAICOS RESPONSE, supra note 36, at 5 (reporting Foreign and Commonwealth Office’s statement that “[e]ach new Overseas Territory constitution is the result of negotiations between the UK Government and the representatives of each Territory, the circumstances, speed of development and needs of which are different.”).
43 A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 1100 (2001); E-mail from Andrew Allen, supra note 29.

Some “explanatory papers in plain English” were written for the islanders on what constitutions were for and explaining the proposed text.\footnote{E-mail from Andrew Allen, \textit{supra} note 29.} When a draft was submitted to the islanders in September 2009, the Governor’s office explained the need this way:

Why do we need a change? Constitutions are being reviewed or have been reviewed in many other Overseas Territories to bring them up-to-date. The Pitcairn Order 1970 [the former fundamental law] is not very comprehensive. It does not include partnership values. Nor does it set out rights and freedoms of individuals, as most constitutions do. Also, Orders in Council and Ordinances have been passed in recent years to set up a Courts system. We want to consolidate them into the Constitution as is the case elsewhere. We believe modernising the Constitution will benefit the island. Much of this draft is based on the new Constitution of St Helena, Ascension and Tristan da Cunha. We want to work with the community to adapt it to the needs of Pitcairn. Nothing will be imposed, this will be a co-operative process.\footnote{OFFICE OF THE GOVERNOR OF PITCAIRN, \textit{CONSULTATION DOCUMENT FOR CONSTITUTIONAL REVIEW} ¶ 1 (2009), \textit{available at} http://www.government.pn/Consultation\%20document\%20for\%20constitutional\%20review.pdf; see also Letter from Chris Bryant, M.P., Parliamentary Under-Sec’y of State, Foreign & Commonwealth Office, to Chairman, Foreign Affairs Committee, House of Commons (Sept. 15, 2009) (transmitting draft constitution to Parliament and describing need), \textit{available at} http://www.publications.parliament.uk/pa/cm200910/cmselect/cmfaff/memo/overseas/m40102.htm.}

The Commonwealth Foundation—affiliated with the Commonwealth, the London-based international organization of Britain and its former colonies—sent two advisers to Pitcairn to hold a ten-day workshop on Pitcairn to help draft

\footnote{For the establishment of the Foundation, see \textit{COMMONWEALTH PRIME MINISTERS’ MEETING 1965: AGREED MEMORANDUM ON THE COMMONWEALTH FOUNDATION}, 1965, Cmd. 2714 (U.K.).}
the Constitution with the islanders.\(^\text{49}\) Further workshops on human rights were to be held on Pitcairn.\(^\text{50}\) The Commonwealth Foundation has been working to add human rights provisions to British territorial constitutions, though it stated this was \textit{not} a goal for Pitcairn.\(^\text{51}\) Videoconferences were held between a steering committee of islanders and the administration in New Zealand and the Foreign and Commonwealth Office in London.\(^\text{52}\)

After all these discussions, the Island Council unanimously voted for the Constitution before it was enacted as an order-in-council.\(^\text{53}\) (So no “miracle at Philadelphia” for the Pitcairn Constitution).\(^\text{54}\) Orders-in-council, done either under powers granted the Queen by statute or under her royal prerogative, are the usual manner for enacting territorial constitutions.\(^\text{55}\) The Constitution was approved by the Queen as an order-in-council at Buckingham Palace on February 10, 2010.\(^\text{56}\)
“Miracle in SW1?”). It was one of many orders-in-council issued that day that ran the gamut from military pensions, Libyan taxes, to Welsh.\textsuperscript{57}

\textbf{THE CONSTITUTIONAL LANGUAGE}

\textit{Imprimis}

“We the people of the United States, in order to form a more perfect union . . .”\textsuperscript{58} The American Constitution possesses a preamble of unequaled elegance. The St. Helena Constitution gives a legal history of the island—which is at least mildly interesting, as it invokes the cad Charles II and the merchant adventurers of the East India Company.\textsuperscript{59} Pacific constitutions often start with a history or a statement of values.\textsuperscript{60} A particularly vivid example is the Micronesian Constitution; its preamble speaks of how “Micronesia began in the days when man explored seas in rafts and canoes” and the “Micronesian nation is born in an age when men voyage among stars” and vowing the charter would promote “diversity,” “the promise of the future,” and “peace, friendship, cooperation, and love in our common humanity.”\textsuperscript{61}

Pitcairn’s Constitution continues a British tradition of dull constitutions—which inevitably lack the “champagne touch” of the French Republic’s numerous charters.\textsuperscript{62} Pitcairn’s opening is a somnifacient, stating the document’s goals are to secure “good faith, the rule of law, good government, sound financial


\textsuperscript{58} U.S. CONST. pmbl.

\textsuperscript{59} ST. HELENA CONST. pmbl.

\textsuperscript{60} JENNIFER CORRIN, TESS NEWTON & DON PATTERSON, INTRODUCTION TO SOUTH PACIFIC LAW 83–84 (1st ed. 1999).

\textsuperscript{61} MICR. CONST. pmbl. This language was written by the American novelist P.F. Kluge, who was a Peace Corps volunteer in Micronesia. P.F. KLUGE, THE EDGE OF PARADISE: AMERICA IN MICRONESIA 77 (1991). For more on the constitutions in this region, see Norman Meller, On Matters Constitutional in Micronesia, 15 J. PAC. HIST. 83 (1980) (Austl.).

\textsuperscript{62} MCWHINNEY, supra note 12, at 46.
management, . . . and the maintenance of international peace and security and the right of individual and collective self-defense.”

These are some of the “partnership values” between Pitcairn and Britain. Partnership is a voluntary association. But the Pitcairn Constitution was enacted by London—which can change it unilaterally at any time—and reading its terms shows the one-sidedness. By the Constitution’s own terms, none of the “partnership values” are enforceable.

The Rights of Man

The first substantive part of the Constitution is a bill of rights. Most American state constitutions and some foreign constitutions also begin with the rights of the individual.

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63 Pitcairn Const. art. 1(1).
64 Id.
65 Black’s Law Dictionary 1230 (9th ed. 2009).
66 Cf. Democracy Reform for Pitcairn, N.Z. Herald, June 18, 2009, at A8 (quoting Herbert P. Ford, American expert on Pitcairn, saying islanders “have too little freedom to live their lives” as “everything is looked at through the eyes of a Britisher who has been appointed from London, sits [far] from them, and really doesn’t understand all the problems”). Professor Ford commented similarly in 2003: “New Pitcairn laws are being written by people whose concepts are based on the harsh streets of metropolitan cities, not on little Pitcairn Island. Downtown Londoners, or people in Wellington, Sydney or Auckland; those who have written a whole family of new and confusing Pitcairn laws, have no concept of the practicalities of life on Pitcairn Island.” Press Release, Pitcairn Is. Study Ctr., Pitcairn Island Under Martial Law and “Selective Prosecution” Academic Charges (May 27, 2003), available at http://library.puc.edu/pitcairn/news/releases/news27-05-27-03.shtml.
68 Pitcairn Island Const. pt. 2. For the bills of rights in Pacific constitutions, see Corrin, Newton & Patterson, supra note 60, at 85–88. For the impact of the Magna Carta, the English Bill of Rights, and habeas corpus on Pacific bills of rights, see id. at 77–83. For a discussion of modern British territorial bills of rights, see Hendry & Dickson, supra note 34, at 155–60.
Britain, having no written constitution, has a statutory “Bill of Rights” enacted after the Glorious Revolution.\(^70\)

Britain long has included bills of rights in colonial charters.\(^71\) Those in recent constitutions are based on international conventions.\(^72\) The Pitcairn Bill of Rights is based particularly on the European Convention on Human Rights—a document that Britain helped draft, but is not obligated to apply to its territories.\(^73\)

\(^70\) Bill of Rights, 1689, 1 W. & M. sess. 2, c. 2.


The most remarkable thing about the Bill of Rights is how different it is from its American counterparts. American rights are drafted broadly and limitations have occurred in judicial interpretation. The First Amendment to the U.S. Constitution, for example, is forty-five words long, but in the annotated Constitution prepared by the Congressional Research Service, the First Amendment section consumes 258 pages.


74 Cf. Sue Farran, Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific, 52 J. LEGAL PLURALISM & UNOFFICIAL L. 77, 86–89 (2006) (Eng.). The Universal Declaration of Human Rights also has some provisions that are unusual to American eyes, e.g. Article 24 protects the right to paid holidays from work, Article 25 protects the right to welfare, Article 27 protects rights to intellectual property and to enjoy culture, and Article 29 protects the right to develop one’s personality. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GOAR, 3d Sess., U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter Universal Declaration].

75 For a light-hearted look at American Constitutional interpretation, see Paul Horwitz, Our Boggling Constitution: Or, Taking Text Really, Really Seriously, 26 CONST. COMMENT. 651 (2010).

In contrast, the Pitcairnese draftsmen were blunt: the Constitution limits all rights with “a few provisos, a couple of quid pro quos.” There can be no penumbras and emanations of rights, for Pitcairn’s Bill of Rights belongs to the “weasel words” school of drafting. The St. Helena Constitution also describes rights this way, describing them in even more detail than the Pitcairn Constitution, then broadly sweeping them away with limiting language. It puts one in mind of the debates in the Lunar Constitutional Convention, as reported by Robert A. Heinlein: “[I]n writing your constitution let me invite attention to the wonderful virtues of the negative. Accentuate the negative. Let your document be studded with things the government is forever forbidden to do . . . no interference however slight with freedom of press, or speech, or assembly, or of religion, or of instruction, or of communication, or occupation.”

British-drafted constitutions reject this philosophy. Frederick A.O. Schwarz, Jr., an American attorney who served as an Assistant Attorney General of Nigeria just after its 1960 independence from Britain, observed the same approach to draftsmanship in the independence constitution bestowed by the departing British upon Nigerians, who had a Constitution “lacking majesty, [because] it [was] written for lawyers, not for the people.” Schwarz wrote of the Nigerian Bill of Rights:


E.g., ST. HELENA CONST. art. 15 (religion); id. art. 17 (expression).


The rights guaranteed seem to be impressively broad . . . . But though the rights guaranteed are many, the exceptions to the guarantees, concise and prolix, specific and vague, could well render them symbolic rather than real protections and at the same time deprive them of much of their effect as symbols. What is given with one breath is taken with the next as broad right is followed by broad exception . . . . Does it make any difference that those general exceptions are spelled out, in contrast to the guarantees in the United States Bill of Rights . . . ? As the United States Constitution has been construed [by American courts], those absolute and ringing pronouncements come quite close to meaning what the Nigerian Constitution says . . . . If such qualifications would in any event be read in, is it not better to come out with them straightaway? Or, if not better, is it not true that spelling them out does not make any difference?

Spelling out the exceptions in copious fashion makes the constitutional guarantees much less useful as an educative tool with which to imbue the people with the spirit of liberty. Laws can change attitudes, and none more so than constitutions. But to do so they should be simply expressed. The school child who is taught that the constitution says that free speech is guaranteed with no ifs, ands, or buts is bound to develop a different instinctive reaction toward restrictions of free speech than the school child who is told that free speech is guaranteed except in enumerated situations . . . . Spelling out the exceptions . . . also makes it easier for a legislature to justify a restriction and a little more likely that a court will uphold a restriction of liberty.83


83 Schwarz, supra note 82, at 179–83. The 1960 Nigerian bill of rights is reprinted in Philip J. Kaplan, Fundamental Rights in the Federation of Nigeria, 13 Syracuse L. Rev. 434, 447–52 (1961). Schwarz also discusses an analysis of the Nigerian Constitution made in a lecture by Dean Erwin N. Griswold of Harvard Law School. He says “the prolixity . . . stems from the British tradition of statutory interpretation and legislative drafting. Statutes are construed literally as if they have a ‘plain meaning’ and constitutions, since they are regarded as statutes through they are written for the ages, cannot therefore be left with broad and sweeping language.” Id. at 183. The British drafters grew up in a nation where there is no single instrument called a “constitution” that is a higher law, instead being governed by a series of laws that set up the system, laws which are no different than any others, thus are no harder to amend or abolish than ordinary laws. In contrast, Chief Justice Marshall felt constitutions must be treated differently than statutes: “We must never forget that it is a constitution that we are expounding.”
While a perfectly good bill of rights was proposed for Nigeria, Britain referred the question to its lawyers, who came up with the qualified bill of rights. As a result, the Nigerian courts focused on the exceptions. The president of the Nigerian Bar Association observed that the rights were written to avoid a turf-war between the courts invading the province of the legislature:

While a well-established democratic society can withstand the storms and stresses of such a conflict, it would be dangerous to expect the same result in a developing democratic society, and particularly in a young nation with the complex problems present in the Nigerian situation. Accordingly, when provisions for fundamental rights were first introduced into the Nigerian Constitution, there was a deliberate policy of defining as closely


85 SCHWARZ, supra note 82, at 185–86. See, e.g., R. v. Amalgamated Press (of Nigeria), Ltd., [1961] 1 All Nig. L.R. 199 (Fed. Sup. Ct.) (upholding conviction of newspaper for printing news likely to cause fear and alarm); Dir. of Pub. Prosecutions v. Obi, [1961] 1 All Nig. L.R. 182 (Fed. Sup. Ct.) (finding conviction for sedition for criticizing government did not violate free speech protections of constitution).
as possible, in the Constitution itself, the scope of permissible restriction of those rights. It was hoped that the judiciary in Nigeria would thus be saved from the embarrassment of being accused of usurping the functions of the legislature, since its work would be confined solely to interpreting the Constitution. I am by no means certain that we succeeded in achieving our objective. In the attempt to define the scope of permissible restriction, the exceptions to the rights appeared to take up more space than the rights themselves, and a lawyer in this country, looking at the text of our Constitution, is reputed to have remarked that it was not a Bill of Rights but a Bill of Exceptions! A more serious difficulty is that we have qualified the rights in many places by reference to undefined standards of political behavior in other democratic societies. The phrase which occurs again and again is “nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defense, public safety, public order, etc., etc.”

Exactly the same defects exist within the Pitcairn Constitution. It is hard to see how Pitcairners’ rights will exist in practice, for “[l]ofty abstractions about individual liberty and justice do not enforce themselves. These things must be reforged in men’s heart’s every day,” and the lawyerly language hardly inspires. And how in practice will rights get enforced on an island without lawyers and whose courts are 3,000 miles away in New Zealand?

86 F.R.A. Williams, Fundamental Rights and the Prospect for Democracy in Nigeria, 115 U. Pa. L. Rev. 1073, 1080 (1967). Cf. Elias, supra note 83, at 20 (1959) (stating enforcement of rights was not going to happen without extensive provision of legal aid); Paul, supra note 83, at 858–61 (discussing failure to enforce bills of rights because of lack of bar association support, lawyers trained constitutional law, law books, and other factors, all of which apply to Pitcairn).


88 Sue Farran, The Case of Pitcairn: A Small Island, Many Questions, 11 J. S. Pac. L. 124, 134–37 (2007) (Vanuatu) (“the nature of the rights regime applicable to Pitcairn remains unclear” and “Pitcairn’s rights status and lack of clarity as to how such rights are to be interpreted and applied . . . leaves it vulnerable to rights abuses.”).
Life

The first right in the Pitcairn Constitution is of life, also the first right Jefferson listed in the Declaration of Independence and the second in the Universal Declaration of Human Rights. The Pitcairn Constitution codifies the right to use reasonable force for self-defense, arresting people, and quelling “riot or insurrection.”

Liberty

The second of Jefferson’s rights, liberty, appears in Article 7. “Everyone has the right to liberty and security of person,” is the broad opening, which is then limited by provisions twenty times longer. Liberty can be limited for convicts, breach of court orders, criminal suspects, truant minors, immigration enforcement, and quarantine. Slavery is outlawed—but having convicts labor, a military draft, forcible labor in time of emergency, or work as part of “normal civic obligations” is allowed. The last is a reference to the public work expected of able-bodied islanders for over a century.

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89 Pitcairn Island Const. art. 2(1). Accord Bermuda Const. art. 2; Falkland Islands Const. art. 2; Montserrat Const. art. 3.
90 The Declaration of Independence para. 2 (U.S. 1776) (resolving that “all men are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness”), in 1 Stat. 1 and 5 U.S. Continental Congress, Journals of the Continental Congress, 1774–1789, at 510–15 (Worthington Chauncey Ford et al. eds., 1906).
93 Accord U.S. Const. amend. V; id. amend. VI.
94 Pitcairn Island Const. art. 7(1); accord Montserrat Const. art. 5(3).
95 Pitcairn Island Const. art. 6. Accord U.S. Const. amend. XIII (slavery); Bermuda Const. art. 4; Falkland Island Const. art. 4; Montserrat Const. art. 5; Universal Declaration, supra note 74, art. 4; see Arver v. United States (Selective Draft Law Cases), 245 U.S. 366 (1918) (finding military draft was not slavery under U.S. Constitution).
96 See Local Government Regulations 2010, pt. 5 (Pitcairn Is.), reprinted

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And Property

The third of Jefferson’s rights is not here but the third of Locke’s is: the right to property. But it may be denied “in the public interest.” There is no mention of “just compensation” for that deprivation. The article on property recognizes corporations as “persons;” no other right does so.

Criminal Procedure

Those arrested are to be informed of the charges against them in their language and be promptly arraigned. The writ of habeas corpus is protected—though that ancient phrase is not used. And those falsely arrested are entitled to monetary damages. Ex post facto charges may not be brought—except the Constitution permits retroactive laws to be passed to codify “the general principles of law recognised by civilised nations.” In the 2004 rape prosecutions, for

in LAWS OF PITCAIRN, supra note 2, at 216–18. These provisions have long existed. See SHAPIRO, supra note 17, at 297 (reprinting 1893 law that included the requirement); JAMES SCOTT NEILL, TEN YEARS IN TONGA 164–65 (1955) (discussing labor on public works that substituted for all taxation). The name “public work” was renamed “civic obligations” by the Local Government (Amendment) Ordinance No. 5 of 2010 (Pitcairn Is.). Cf. Butler v. Perry, 240 U.S. 328 (1916) (finding law requiring labor on public works constitutional).

97 PITCAIRN ISLAND CONST., art. 21. Accord MONTSERRAT CONST. art. 17. Cf. BERMUDA CONST. art. 13 (providing no general right to property and a list of exceptions so long as to make any property right meaningless, e.g. constitution enshrines the government’s ability to carry out soil conservation work on private property).

98 PITCAIRN ISLAND CONST. art. 21.


101 PITCAIRN ISLAND CONST. art. 7(2); accord BERMUDA CONST. art. 5(2); MONTSERRAT CONST. art. 6(2).

102 PITCAIRN ISLAND CONST. art. 7(3); accord BERMUDA CONST. art. 5(3).

103 PITCAIRN ISLAND CONST. art. 7(4). Cf. U.S. CONST., art. I, § 9, cl. 2.

104 PITCAIRN ISLAND CONST. art. 7(5).

105 Id. art. 10; accord Universal Declaration, supra note 74, art. 11. Cf. BERMUDA CONST. art. 6(4); U.S. CONST., art. I, § 9, cl. 3. The American prohibition applies only to criminal laws. Calder v. Bull, 3 U.S. (3 Dall.) 386
example, one of the Law Lords found the application of British law to Pitcairn was not an improper retroactive law because the British statute codified common law principles and didn’t create new crimes.\footnote{106}

Trial by jury is a right guaranteed by Magna Carta and confirmed by the Act of Settlement.\footnote{107} It is “an integral and indispensable part of the criminal justice system” of the United Kingdom.\footnote{108} Yet it is absent from the Pitcairn Constitution.\footnote{109} The rape cases in 2004 were tried by judges, not jurors.\footnote{110} (Presumably because the community is so small and the entire population is related to one another).\footnote{111} Also missing are (1798). But some state constitutions forbid all \textit{ex post facto} laws. \textit{E.g.}, N.H. CONST. art. 23 (“Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.”). See also Steve Selinger, \textit{The Case Against Civil Ex Post Facto Laws}, 15 CATO J. 191 (1998).


107 Magna Carta, 1297, 25 Edw. 1, c. 29; Bill of Rights, 1689, 1 W. & M. sess. 2, c. 2. \textit{Accord U.S. CONST., amend. VI; MONTSERRAT CONST. art. 7(2)(g)}


110 \textit{Cf. Claire Harvey, \textit{Islanders on Verge of Mutiny As Sex Trial Outsiders Flood Pitcairn}, THE AUSTRALIAN (Sydney, N.S.W.), July 2, 2004, at 6} (quoting Kari Boye Young, wife of a defendant, saying islanders were upset at the lack of a jury trial: “Britain has given these men British passports but they don’t have the basic rights of every British citizen to be tried by their peers.”); Sue Farran, \textit{The Case of Pitcairn: A Small Island, Many Questions}, 11 J. S. PAC. L. 124, 134–37 (2007) (Vanuatu) (discussing lack of jury on Pitcairn in 2004 cases). \textit{Compare 390 PARL. DEB., H.C. (5th ser.)} (1943) 1634W–1635W (U.K.) (statement of Colonel Oliver Stanley, Colonial Sec’y) (listing the twelve British colonies without trial by jury, including Pitcairn, and stating “in none of these . . . has there ever been any actual right of trial by jury.”), \textit{with NATHAN WELBY FISKE, ALEC: THE LAST OF THE MUTINEERS, OR, THE HISTORY OF PITCAIRN’S ISLAND} 154 (2d ed. 1843) (stating islanders were then conducting trial by jury), \textit{and NEILL, supra note 96, at 157} (stating Pitcairn laws he examined in 1937 provided for jury trials).

111 Harvey, \textit{supra} note 110 (stating in the rape cases a jury was impossible because everyone is related). \textit{Cf. HENRY HUTCHISON MONTGOMERY,
protections against double jeopardy\textsuperscript{112} and forced self-incrimination.\textsuperscript{113}

There is a right to a fair trial\textsuperscript{114} as well as fair administrative proceedings.\textsuperscript{115} Defendants are presumed innocent.\textsuperscript{116} They have a right to publicly-paid counsel but can represent themselves.\textsuperscript{117} They must be allowed to examine witnesses and call their own.\textsuperscript{118} Upon conviction, prisoners have the right to be treated with “humanity” and “dignity.”\textsuperscript{119} The press can be excluded from trials for basically any reason the court sees fit.\textsuperscript{120}

\textit{Dignity and Other Rights}

The Constitution contains a number of rights unusual to American bills of rights, e.g., the right to an environment that

\textsuperscript{112} Cf. U.S. Const. amend. V; Bermuda Const. art. 6(5); St. Helena Const., art. 10(5).
\textsuperscript{113} Cf. U.S. Const. amend. V; Bermuda Const. art. 6(7); St. Helena Const., art. 10(7).
\textsuperscript{114} Pitcairn Island Const. art. 8; accord Montserrat Const. art. 7. Cf. Universal Declaration, supra note 74, art. 8 (due process of law); id. art. 9 (arbitrary arrest).
\textsuperscript{115} Pitcairn Island Const. art. 20.
\textsuperscript{116} Pitcairn Island Const. art. 8(2). Accord Bermuda Const. art. 6(2)(a); Montserrat Const. art. 7(2)(a); Universal Declaration, supra note 74, art. 11.
\textsuperscript{117} Pitcairn Island Const. art. 8(3)(c). Accord Bermuda Const. art. 6(2)(d); Montserrat Const. art. 7(2)(d); U.S. Const., amend. VI; Gideon v. Wainwright, 372 U.S. 335 (1962) (finding constitutional right to free counsel).
\textsuperscript{118} Pitcairn Island Const. art. 8(3)(d). Accord Bermuda Const. art. 6(2)(d); Montserrat Const. art. 7(2)(d). Cf. U.S. Const., amend. VI.
\textsuperscript{119} Pitcairn Island Const. art. 8(1). Accord Montserrat Const. art. 8(1). Cf. Mont. Const. art. II, § 4 (“The dignity of the human being is inviolable.”); U.S. Const. amend. VIII (prohibiting cruel and unusual punishments).
\textsuperscript{120} Pitcairn Island Const. art. 8(1). Accord Bermuda Const. art. 6(10); Montserrat Const. art. 7(11). Cf. State ex rel. Toledo Blade v. Henry Cty. Ct. of Common Pleas, 926 N.E.2d 634 (Ohio 2010) (discussing the limited circumstances under which American courts can close their proceedings).
is “not harmful”\textsuperscript{121} and the right to human dignity.\textsuperscript{122} The right “to marry and have a family” is guaranteed and the resulting children are given rights.\textsuperscript{123} The government is obligated to provide them a free education—but parents may send their children to private schools.\textsuperscript{124} Both the government and businesses are forbidden to discriminate on the basis of “sex, sexual orientation, race, colour, language, religion, age, disability, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” \textsuperscript{125}

\textsuperscript{121} Pitcairn Island Const., art. 19. Accord British Virgin Island Const. art. 29; Mass. Const. art. 97. Cf. Alaska Const. art. VIII (seeking to preserve environment and natural resources).

\textsuperscript{122} Pitcairn Island Const. art. 4. See also Govind Mishra, \textit{The Concept of Human Dignity and the Constitution of India}, in \textit{Comparative Constitutional Law: Festschrift in Honour of Professor P.K. Tripathi} 353 (Mahendra P. Singh ed., 1989) (discussing Indian experience with similar language).

\textsuperscript{123} Pitcairn Island Const. arts. 15–17. Accord Montserrat Const. art. 10 (marry and have family); id. art. 12 (education); Universal Declaration, supra note 74, art. 12 (family); id. at art. 26 (education). Cf. Ga. Const. pmbl. (stating one of its purposes is to “promote the interest and happiness of the family”); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding procreation to be one of “the basic civil rights of man”); Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding marriage to be another of the “basic civil rights of man”). See also U.K. Foreign & Commonwealth Office, \textit{Human Rights and Democracy}, supra note 4, at 32–33 (discussing British commitment to children’s rights).

\textsuperscript{124} Pitcairn Island Const. art. 17. Accord Montserrat Const. art. 12; \textit{Konstitusiia SSR} (1977) [\textit{Konst. SSSR}] [USSR Constitution] art. 45 (public education to be provided); Alaska Const. art. VII, § 1 (public education to be provided); Ohio Const. art. VI, § 2 (legislature to provide for “a thorough and efficient system of common schools throughout the state”); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 5 (entered into force Mar. 23, 1976) (codifying the right to an education). See also Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) (holding state cannot outlaw private schools).

\textsuperscript{125} Pitcairn Island Const. art. 23. Compare Bermuda Const. art. 12, and Montserrat Const. art. 16 (banning discrimination by government and private businesses open to public), and Mont. Const. art. II, § 4 (“Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”), with Cayman Islands Const. art. 16 (banning discrimination only by government and not by private parties).
The Letter of the Law

An ancient bureaucrat observed the spirit giveth life but the letter killeth.\textsuperscript{126} Here the letter of the law kills. Privacy is protected, for example, but is limited in such a way that one wonders what exactly is covered:

There shall be no interference by a public authority with the exercise of [the right to privacy] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of Pitcairn, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{127}

The rights of freedom of religion, expression, and assembly are likewise guaranteed with a broad opening paragraph and then severely limited with a second.\textsuperscript{128} The expression article reads:

(1) Everyone has the right to freedom of expression. This right

\textsuperscript{126} \textit{Corinthians} 3:6.

\textsuperscript{127} \textit{Pitcairn Island Const.} art. 11(2). The St. Helena Constitution also grants privacy but has an even longer laundry list of exemptions: “(1) Every person shall have the right to respect for his or her private and family life, his or her home and his or her correspondence or other means of communication, and, except with his or her own free consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises. (2) Nothing contained in or done under the authority of any law shall be held to breach this section to the extent that the law in question is necessary in a democratic society (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning [i.e. zoning laws!], the development of mineral resources, or the development or use of any other property in such a manner as to promote the public benefit; (b) to protect the rights and freedoms of other persons; (c) to enable an officer or agent of the Government of St. Helena or any public authority to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or duty or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government of St. Helena or that public authority; (d) to authorise, for the purpose of enforcing the judgment or order of a court, the search of any person or property by order of a court or the entry upon any premises by such order; or (e) for the purpose of preventing or detecting breaches of the criminal, customs or immigration law.” \textit{St. Helena Const.} art. 13. \textit{Cf. Bermuda Const.} art. 7(2).

\textsuperscript{128} \textit{Pitcairn Island Const.} arts. 12–14. \textit{Cf. U.S. Const.} amend. I; \textit{Ohio Const.} art. I, § 11 (“every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right” and explicitly allowing criminal prosecutions for libel).
shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\footnote{PITCAIRN ISLAND CONST. art. 13. See also Neill, supra note 96, at 184 (stating “[g]ossip, through which reputation would suffer, was punishable and was perhaps a wise law in such a small community so cut off from the rest of the world.”); Tim Watkin, Governor Gags Pitcairners, N.Z. HERALD, Oct. 19, 2002, at A10 (stating Governor, during rape investigations, warned islanders gossiping was a criminal offense); BERMUDA CONST. art. 9(2) (outlining laundry list of exceptions).}

And if that limitation wasn’t enough, most of the rights in the Pitcairn Constitution—including freedom of expression, religion, liberty, privacy, marriage, and education—can be suspended during a “public emergency.”\footnote{PITCAIRN ISLAND CONST. art. 24. Cf.Montserrat Const. art. 18–19 (regulations on state of emergency)} That is where the Governor proclaims that “in or affecting Pitcairn, a war or other public emergency threatening the life of the nation” exists.\footnote{PITCAIRN ISLAND CONST., art. 61.} So the Governor simply need issue a proclamation, and he can erase what rights are left.\footnote{Id.} Plus, a “public emergency” means the Governor can also hold people under preventative detention.\footnote{Id. Cf. St. Helena Const. art. 23.} Talk about \textit{silent enim leges arma}.\footnote{See Marcus Tullius Cicero, \textit{Pro T. Annio Milone}, ch. 11 (52 B.C.), in Marcus Tullius Cicero, Pro T. Annio Milone, In L. Calpurnium Pisonem, Pro M. Aemilio Scauro, Pro M. Fonteio, Pro C. Rabirio Postumo, Pro M. Marcello, Pro Q. Ligario, Pro Rege Deiotaro 16–17 (N.H. Watts trans., 1979).}

\section*{The Structure of Pitcairn Government}

The Pitcairn government is \textit{sui generis}, like the island itself. It has all the trappings of a modern Western state—a
constitution, an independent judiciary, auditors, a flag, postage stamps—but there is a very big omission: democracy. But that is not the case on Pitcairn.

Where’s Amy Goodman When You Need Her?

America’s Founding Fathers thought it repulsive that colonies should be ruled by a government they had no say in, contrasting Britain’s actions with how the Greeks and Romans treated their colonies. Since World War II, international law has codified democratic government as a fundamental human right. Questions have been raised about whether Britain legislating for Pitcairn without any democracy on the island violates international law:

This denial of democratic involvement of those subject to such laws would appear to be a contradiction of the rights established in instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Indeed it might be thought that natural justice in a democratic society demands that those who are to be subject to the laws have a voice in their making. The high-handed use of a plethora of Ordinances issued under Orders in Council . . . resonates with “the clanking of medieval chains of the ghosts of the past.”

British Foreign Secretary Robin Cook claimed a decade ago

135 Cf. PACIFIC WAYS: GOVERNMENT AND POLITICS IN THE PACIFIC ISLANDS (Stephen Levine ed., 1999) (providing a nice introduction to all the governments of Pacific jurisdictions from the biggest—Australia, New Zealand—to the smallest—Pitcairn, Easter Island, Palau, Tokelau—with a chapter on each).
136 THE DECLARATION OF INDEPENDENCE, supra note 89.
that Britain’s “Overseas Territories are beacons of democracy.”\(^\text{140}\) Long ago his government declared its policy was for all colonies to become self-governing.\(^\text{141}\) And the Foreign and Commonwealth Office recently stated in its annual human rights report that the rule of law is “more than a set of legal rules that govern society. It encompasses representative government . . . .”\(^\text{142}\)

Traditionally there had been an evolution towards an elected responsible government in British colonies.\(^\text{143}\) Pitcairners operated democratically for over a century on their own; a visiting colonial officer (and attorney) observed in 1937: “[t]hey wanted Pitcairners to rule Pitcairn under the guidance of the Crown.”\(^\text{144}\) Instead of continuing that tradition and strengthening responsible government—which most of Britain’s populated overseas territories today have—Britain has seen to it that there is ultimately no democratic control of Pitcairn.\(^\text{145}\)

The 2009 suspension of democracy in the Turks and Caicos Islands has shown Britain can simply sweep away local control whenever the Foreign and Commonwealth Office chooses to do so.\(^\text{146}\) Even though democracy is a part of the


\(^{141}\) 391 Parl. Deb., H.C. (5th ser.) (1943) 38 (U.K.) (statement of Colonel Oliver Stanley, Colonial Sec’y).

\(^{142}\) U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, supra note 4, at 8.

\(^{143}\) Compare WIGHT, supra note 55, at 17–34 (discussing typical progression towards democratic control), with HUMPHREY HUME WRONG, GOVERNMENT OF THE WEST INDIES 73–81 (Negro Universities Press 1969) (1923) (discussing how responsible government was eliminated in Britain’s Caribbean colonies in the mid-Nineteenth Century). The Caribbean regression was caused by a series of riots on Jamaica. See generally REPORT OF THE ROYAL COMMISSION ON THE ORIGIN, NATURE, AND CIRCUMSTANCES OF DISTURBANCES IN THE ISLAND OF JAMAICA, 1866, [C. (2d series) 3683], [C. (2d series) 3683-I] (U.K.). The riots were barbarically put down by the royal governor. Ronald V. Sires, Government in the British West Indies: An Historical Outline, 6 SOC. & ECON. STUD. 109, 119–120 (1957) (Jam.).

\(^{144}\) NEILL, supra note 96, at 179.

\(^{145}\) See COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, supra note 34, at 16.

international human rights conventions Britain is so fond of—such as the Universal Declaration of Human Rights—Britain can simply withdraw its adherence to those conventions when it chooses to suspend democracy.\footnote{Universal Declaration, \textit{supra} note 74, art. 1; U.K. FOREIGN \& COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, \textit{supra} note 4, at 114–15 (stating Britain withdrew from Protocol 1 to the E.C.H.R. because its actions otherwise would violate that Protocol); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.} There is no check on the government, as British “courts will not inquire into whether [colonial] legislation . . . [is] in fact for the ‘peace, order[,] and good government’ or otherwise for the benefit of the inhabitants of” a territory.\footnote{R. ex. rel. Bancoult v. Sec'y of State for Foreign \& Commonwealth Affairs, [2008] UKHL 61, [2009] 1 A.C. 453, [50] (appeal taken from Eng.) (Lord Hoffmann).} So long government of, by, and for the people!\footnote{Cf. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), \textit{in} 7 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 17–23 (Roy P. Basler ed., 1953).} The Executive

Executive power is vested in the Queen.\footnote{Cf. Tuvalu Const. art. 51(1) (stating Queen has no powers except those expressly given her).} The Governor is nominally appointed by her—who reigns because Parliament three centuries ago placed her great-great-great-great-great-great-great-grandmother in the line of succession.\footnote{Act of Settlement, 1700, 12 & 13 Will. 3, c. 2, § 1 (settling crown on Sophia, Electress of Hanover, over other members of the House of Stuart); DAVID WILLIAMSON, BREWER’S BRITISH ROYALTY 373–75 (1996) (showing by genealogical charts the descent of Elizabeth II from Sophia, the granddaughter of James I and mother of George I). \textit{See also} Paul Sonne, \textit{Last in Line of Succession, Ms. Vogel Is Glad She Isn’t Queen: Descendant of Sophia of Hanover, She Would Rule Britain if 4,972 Die}, WALL ST. J., Apr. 27, 2011, at A1 (reporting on the woman at the other end of the Act of Settlement).} (This action also arose out of the Glorious Revolution that gave Britain its Bill of Rights). Gubernatorial appointments are in reality made by the mandarins of the Foreign and Commonwealth Office.\footnote{Memorandum of the Foreign \& Commonwealth Office, \textit{in} FOREIGN}
Majesty, for the Foreign and Commonwealth Office is headed by a Member of Parliament, theoretically accountable to his fellow M.P.’s—but not to Pitcairners, since they have no representation at Westminster.153

In contrast, France’s overseas possessions are all represented in Paris in Parliament.154 The Greenlanders and Faroese are represented in the Danish parliament.155 In the Nineteenth Century, when still a Spanish colony, Puerto Rico was represented in Madrid.156 In the Twentieth, the Portuguese colonies were represented in Lisbon.157 All the American possessions have representatives in Congress—albeit with no vote—in continuance of a practice that began with the First Congress.158
Residents of the Dutch possessions in the Caribbean have no representation at The Hague, but the legislature there does not make laws for them as they have local autonomy. This is similar to the relationship between New Zealand and the Cook Islands and Niue, where New Zealand lacks legislative power over either. The Australian external territories—those with a permanent population are Norfolk Island, the Cocos (Keeling) Islands, and Christmas Island—at least have a parliamentary committee dedicated to them and thus some limited voice in the Australian Parliament even if they do not elect their own M.P.’s.

\[159\] Case C-300/04, Eman v. College van burgemeester en wethouders van Den Haag, 2006 E.C.R. I-8055; \[160\] S. TEVEN, EDE over the past two centuries, see also Betsy Palmer, Congressional Research Serv., R40555, Delegates to the U.S. Congress: History and Current Status (2011). For a table showing all statutory provisions authorizing American territorial delegates over the past two centuries, see id. at 11–12.


But in Britain “ultimate legislative authority over the Dependent Territories is vested in the United Kingdom Parliament,” which has none to speak for Pitcairners. The House of Commons Foreign Affairs Committee has repeatedly pointed out that the Foreign and Commonwealth Office does not take oversight of the overseas territories seriously. One reason is the heavy turnover among the leaders of the F.C.O. and its overseas territories division.

Because of their day jobs as ambassador to New Zealand, the unaccountable governors appointed by the unaccountable Foreign and Commonwealth Office bureaucrats in the name of an unaccountable monarch actually delegate the work of administering Pitcairn to a series of New Zealanders hired as Island Commissioners—yet another layer of unaccoun-


163 See American Colonies Act, 1766, 6 Geo. 3, c. 12.

164 491 PARL. DEB., H.C. (6th ser.) (2009) 157 WH (U.K.) (statement of Andrew Mackinlay) (“It has become clear that Governors have been incompetent, because there was no reporting back or flagging up of anxieties and there was poor governance. There was acquiescence through silence to a thoroughly unacceptable situation. We have no way of knowing whether those people are good, bad, or indifferent.”).

165 See Clegg & Gold, supra note 29, at 123.
Making the Laws

The law—and not the Pitcairn Constitution—provides for an Island Council of seven members. It consists of the Mayor, elected to a three-year term; a Deputy Mayor, elected to a two-year term; four councilors, also elected for two-year terms; and another councilor appointed by the Governor. The Governor or a designee is an ex officio member.

Pitcairn laws are styled “ordinances.” The enacting clause is “Enacted by the Governor of the Islands of Pitcairn, Henderson, Ducie and Oeno.” There is a single-subject rule for laws, whose titles must accurately describe the contents. The Governor cannot legislate on certain subjects, such as enriching himself or the changing the currency. The Governor must publish laws, but only as he directs, and send

167 Salt v Fell, [2008] NZCA 128, [2008] 3 NZLR 193 (CA) (discussing the role of the commissioner in litigation between a fired Island Commissioner and the Governor); Salt v Fell, [2006] ERNZ 475, ¶ 5 (N.Z. Emp. Relations Auth.) (earlier incarnation of the dispute); Marks, supra note 27, at 75–77 (discussing the allegiances of Commissioner Salt to the islanders versus his allegiance to Governor Fell).

168 Local Government Ordinance No. 1 of 1964, §§ 3, 6 (Pitcairn Is.) (codified as amended in LAWS OF PITCAIRN, supra note 2, at ch. 11).

169 Id. § 6.

170 PITCAIRN ISLAND CONST. art. 37(2).

171 Id. Laws enacted by Congress begin: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.” Laws enacted by the British Parliament begin: “Be it Enacted, by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows . . . .” An ornate form is from the Isle of Man: “We, your Majesty’s most dutiful and loyal subjects, the Council and Keys of the said Isle, do humbly beseech your Majesty that it may be enacted, and be it enacted, by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows (that is to say):—”


173 PITCAIRN ISLAND CONST. art. 37(4).

174 Id. art. 38.

175 Id. art. 39. Congress initially required laws to be published in newspapers. Act of Sept. 15, 1789, ch. 14, 1 Stat. 68. In 1845, it commissioned the familiar Statutes at Large from Little, Brown & Company. Res. No. 10 of Mar. 3, 1845, 5 Stat. 798. For publication of Pitcairn laws, see Eshleman,
copies to London. The Western Pacific High Commissioner was historically empowered to issue regulations as he saw fit and, once published, these regulations were law unless disapproved by London—but this power was lightly exercised. Pitcairners met in mass meetings to make laws, a practice one Commissioner approvingly compared to Swiss popular democracy.

Under the Pitcairn Orders the “Governor of Pitcairn had[a] law-making role and [was] the only active legislator.” This is still true since everything adopted by the democratically-elected Island Council can be vetoed by an unelected, unseen, unaccountable Governor thousands of miles away. (Lord Chancellor Halsbury said a legislature in its law-making acts as “an ideal person that does not make mistakes,” but are governors likewise infallible?). And the Governor, in turn, can be vetoed by the Foreign and Commonwealth Office, another world away in Whitehall, which can “instruct the Governor in the exercise of his functions; ... disallow ... legislation; and [has] the power to legislate by... Order in

Law in Isolation, supra note 14.

176 PITCAIRN ISLAND CONST. art. 40.

177 British Islands in Western Pacific, 2 J. Soc'y Comp. Legis., N.S. 113, 113–14 (1900) (Eng.). The High Commissioner from 1914 to 1967 had his own gazette, the Western Pacific High Commissioner Gazette, in which laws were published. JERRY DUPONT, THE COMMON LAW ABROAD 1186 (2001); Letter from the W. Pacific High Comm'n Secretariat, Note on the Western Pacific High Commission in Relation to the Gilbert & Ellice Islands Colony ¶ 23 (Feb. 25, 1970), reprinted in U.K. FOREIGN & COMMONWEALTH OFFICE, WESTERN PACIFIC HIGH COMMISSION, supra note 20, at 240.


180 PITCAIRN ISLAND CONST. art. 36(3) (Governor may legislate without consulting Island Council); id. art. 34 (mandating elected Island Council).

One example of such law-making by fiat was the Foreign and Commonwealth Office deciding without any consultation with local governments—or anyone else—to abolish the death penalty in its Caribbean colonies. In stark contrast to the situation for Pitcairners, the St. Helenians have a real legislature that makes laws.

Received Wisdom

English “common law, the rules of equity and the statutes of general application as in force in and for England for the time being shall be in force in Pitcairn.” Early American constitutions contained similar “reception clauses.” Even though English law is in practice impossible to know in the South Pacific, it is common in former British colonies in the

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182 Commons Foreign Affairs Committee, Overseas Territories, supra note 34, at 16 (speaking generally of colonies); Matimak Amicus Brief, supra note 55, at 8–9 (same). See also Pitcairn Island Const. art. 41 (specific power for Pitcairn); U.N. Decolonization Committee, 2011 Pitcairn Report, supra note 73, ¶ 5 (describing retained power); Roberts-Wray, supra note 55, at 227–33 (discussing disallowance of laws). For a discussion of legislating through orders-in-council, see Colin Turpin & Adam Tomkins, British Government and the Constitution 451–60 (6th ed. 2007).


184 St. Helena Const. art. 47 (creating legislature); id. art. 60 (legislature makes laws).


186 E.g., N.Y. Const. of 1777, art. 35. See also 15A C.J.S. Common Law §§ 14, 18–21 (2002) (discussing adoption of common law in the United States); Joseph Fred Benson, Reception of the Common Law in Missouri: Section 1010 as Interpreted by the Supreme Court of Missouri, 67 Mo. L. Rev. 595, 607–11 (2002) (listing all American reception statutes).

Pacific for English law to apply after independence. The Cook Islands received it as it stood on January 14, 1840, the date New Zealand was established as a colony. And the United States in its administration of the Trust Territory of the Pacific Islands initially imposed English common law and statutes as they stood on July 3, 1776.

But English law historically only applied as it fit local circumstances; e.g., in 1769, the Kings Bench found “[a]n act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom . . . let alone to a remote overseas colony or possession.” A century and a half ago, the Governor of Norfolk Island opposed a move to apply outside law on that island for reasons that are true of Pitcairn today:

The habits and modes of thought of the islanders are so different from those of Englishman, the circumstances of the colony are so unique, that I confess I should be sorry to see the laws of England or of New South Wales, either civil or criminal, adopted in the aggregate as the laws of Norfolk Island. Were this done . . . the islanders would be subjected to a legal system, which having been framed to suit a state of society altogether different from that which it is proposed to apply it, would probably be found to be a variance with their feelings and habits, and of the bearing of which upon all their relations with each other they would be utterly ignorant.

189 COOK ISLANDS CONST. art. 77; Cook Islands Act 1915 § 615 (N.Z.).
190 TRUST TERR. CODE § 22 (1952).
The Courts

The Constitution mandates a Supreme Court—the trial court—and a Court of Appeals, while additional lower courts may be created by law—and one has been, a Lands Court. Appeals can be made from the Court of Appeals to the Privy Council in London. Such appeals to outside courts are not unusual in the region, e.g., the Cook Islands, Kiribati, Niue, and Tuvalu still allow appeals to the Privy Council, while Tokelau appeals go to New Zealand and Nauru appeals go to Australia.

The Pitcairn courts are not obligated to sit on Pitcairn. In 2000 they were allowed to sit in Pitcairn, Britain, or elsewhere in “Her Majesty’s dominions.” And in 2002 Britain and New Zealand concluded a treaty to allow Pitcairn trials on Kiwi soil. This is comparable to the British Indian Ocean


193 Pitcairn Island Const. art. 43(1); Lands Court Ordinance No. 8 of 2000 (Pitcairn Is.) (codified in Laws of Pitcairn, supra note 2, at ch. 15). Cf. Corrin & Patterson, supra note 11, at 337–94 (detailing formation and jurisdiction of South Pacific courts).

194 Pitcairn Island Const. art. 43(2).


196 Pitcairn Island Const. arts. 43(4), 46(1), 50(3).


Territory Supreme Court, which can sit in the United Kingdom; the Supreme Courts of the Australian territories of the Cocos (Keeling) Islands and the Coral Sea Islands, both of which can sit in their respective territories or elsewhere in Australia; and America’s Wake Island Court of Appeals, which can sit on Wake, in Hawaii, or in the vicinity of Washington, D.C. In 2002 Pitcairn law was changed to permit its courts to sit anywhere in the world. Yet seven hundred years ago the Magna Carta outlawed the abuse that forced litigants to attend wandering courts. This is unusual today: the only other recent instance of a civilian court sitting in a foreign nation is the Pan Am 103 trial. While American courts-martial can sit anywhere, the only American civil tribunals beside a few

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201 Magna Carta, 1297, 25 Edw. 1, c. 29, art. 17 (“The common pleas shall not follow [the King], but shall be held in some certain place.”).


consular courts to sit outside American territory were the United States Court for China and the United States Court for Berlin, both of which went out of business decades ago.

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205 The Court was created by the U.S. High Commissioner for Germany by High Commissioner Law No. 46 of April 28, 1955, Allied Kommandatura Gazette 1056, reprinted in United States, as the U.S. Element, Allied Kommandatura v. Tiede (U.S. Ct. Berlin 1979), 86 F.R.D. 227, 261–65. The Court declared it was “established pursuant to the powers granted to the President by Article II of the United States Constitution.” Tiede, 86 F.R.D. at 237; see U.S. CONST., art. II, § 2, cl. 1 (“The President shall be Commander in
The Governor has sole power to appoint judges and judicial officers. There is no residency requirement for judges.


206 PITCAIRN ISLAND CONST. art. 52. “Judicial officers” are magistrates and the court registrars, i.e., clerks. Id. art. 61.
This is typical both in the Pacific\textsuperscript{208} and for British colonies.\textsuperscript{209}

The independence of colonial judges from the government has long been a consideration for Britain.\textsuperscript{210} Pitcairn too protects its judges. Their salaries may not be decreased.\textsuperscript{211} Judges hold office until age seventy-five, but they may be removed for incapacity or misbehavior if the removal has been sanctioned by the Privy Council.\textsuperscript{212} A judge’s office may not be


\textsuperscript{208} COOK ISLANDS CONST. art. 53(2); SAMOA CONST. art. 68(2); SOLOMON ISLANDS CONST. art. 80(2); TUVALU CONST. art. 124. CORRIN, NEWTON & PATTERSON, supra note 60, at 99 (stating most judges of higher courts in the Pacific come from abroad).

\textsuperscript{209} See ARTHUR BERRIEDALE KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS 273–79 (1909).

\textsuperscript{210} ELIAS, supra note 55, at 64–69.

\textsuperscript{211} PITCAIRN ISLAND CONST. art. 53; accord U.S. CONST. art. III, § 1.

abolished without his consent.\textsuperscript{213}

\textit{The Attorney General}

The Attorney General, an office newly created with the Constitution, is also appointed by the Governor for either a fixed term or until a mandatory retirement age.\textsuperscript{214} His salary may not be diminished.\textsuperscript{215} He can be removed only for incapacity or misbehavior, and then only after an investigation by a tribunal of three judges of Commonwealth countries.\textsuperscript{216} Previously, the Governor had a \textquoteleft legal adviser,	extquoteright but this position was for decades an informal one, there being no statutory provision for it.\textsuperscript{217} In 2000 an ordinance gave the Legal Adviser the same powers as the Attorney-General would have in England.\textsuperscript{218}

Donald A. McLoughlin, an Australian lawyer in the British colonial service in Fiji, was appointed a Judicial Commissioner to try a divorce on Pitcairn in 1958 and thereafter served as Legal Adviser to the Governor of Pitcairn, even after he retired home to Perth, thousands of miles from the Pitcairn administration in Auckland.\textsuperscript{219} His successor, Paul Treadwell,
took over in 1979 but did not visit the island in his quarter century of service. The Attorney General today is Paul Rishworth, a law professor at the University of Auckland.

**Bureaucracy**

Constitutional provisions for public employees are common in the Pacific. The Governor can make appointments to the public service. Public officials serve at the pleasure of Her Majesty. The Governor determines the conditions of their employment. The Governor is to hire independent auditors to review the public accounts. (Britain’s government has expressed concern about auditing government finances, but does not seem to have been particularly active in actually performing these audits in the overseas territories). The U.S. Constitution requires accounts be published—but this language is unenforceable. The Governor may also appoint

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Pitcairn, on Meeting with Donald A. McLoughlin, Pitcairn Legal Adviser (Nov. 4, 1970), PCR 7–3355. This is why the colophon of the 1974 edition of Pitcairn laws, compiled by McLoughlin, states it was issued from Wembley, Western Australia.


E.g., Kiribati Const. arts. 98–105; Nauru Const. arts. 68–70; Niue Const. arts. 57–60.

Pitcairn Island Const. art. 56(1).

Id. art. 57.

Id. art. 58. See also Michael Wood, Field Trip to Pitcairn, 89 CHARTERED ACCT. J., Apr. 2010, at 12 (N.Z.) (reporting on Pitcairn’s auditors).


U.S. Const. art. I, § 9, cl. (“a regular statement and account of the receipt and expenditures of all public money shall be published from time to time”); United States v. Richardson, 418 U.S. 166 (1974) (holding citizens have no standing to enforce this clause).
an ombudsman to conduct independent investigations. 229

The Governor is to have a seal. 230 Officials can resign by writing the appointing authority. 231 The Pitcairn Constitution provides for the oaths of office. 232 One oath is provided in the American Constitution—that of the President—while the others are set by statute. 233 The first law enacted under the United States Constitution was on oaths. 234 (Naturally, the second levied taxes). 235 Some state constitutions provide for oaths, notably Kentucky’s requirement that public officials swear they haven’t been dueling. 236 And like the United States Constitution, Pitcairn’s protects those opposed to swearing. 237

**BRITAIN’S TRACK RECORD**

Over the last fifty years, Britain has an accumulated an appalling record as to the rights of its colonies’ citizens. The articles in the Pitcairn Constitution guaranteeing freedom of travel and British citizenship in particular are remarkable in

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229 **PITCAIRN ISLAND CONST.** art. 59. Cf. Commissions of Inquiry Ordinance No. 6 of 1999 (Pitcairn Is.) (codified in LAWS OF PITCAIRN, supra note 2, at ch. 8).


232 **PITCAIRN ISLAND CONST.** sched.


234 An Act to Regulate the Time and Manner of Administering Certain Oaths, Act of June 1, 1789, ch. 1, 1 Stat. 23.


236 Ky. Const. § 228 (all officeholders—including lawyers—must swear this).

237 **PITCAIRN ISLAND CONST.** sched.; U.S. Const. art. VII, cl. 3 (“oath or affirmation”).
light of that record.\textsuperscript{238} A major problem for colonial citizens is that in 1968 the Commonwealth Office—the former Colonial Office—was subsumed into the Foreign and Commonwealth Office, thus subordinating the interests of Britain’s colonies and their residents to diplomats’ desire for good relations with foreigners.\textsuperscript{239} An astute summary was submitted to the Foreign Affairs Committee of the House of Commons:

The tiny communities of the [fourteen] Overseas Territories have very limited representation in the apparatus of the UK Government. Unlike France, they have neither a ‘Ministry of the Overseas Territories’ to advocate their interests, nor any representation or official observers within the Houses of Parliament. Although they have very specific needs, communities such as Pitcairn . . . do not have the capacity to staff permanent UK delegations to represent their interests. Consequently, the Overseas Territories have very little voice in Westminster and have been frequently overlooked. The FCO thus has a crucial role to play in representing their interests to other Departments across the entire breadth of Government activity.\textsuperscript{240}

\textbf{The British Indian Ocean Territory}

In 1965 the British created a new colony, the British Indian Ocean Territory, to lease the Territory’s islands to the
United States for a military base.\textsuperscript{241} In exchange, Britain was able to buy American-made submarine-launched ballistic missiles at a discount.\textsuperscript{242} The islands are used for American espionage and the “extraordinary rendition” torture program.\textsuperscript{243}


\textsuperscript{243} JAMES BAMFORD, BODY OF SECRETS: ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY FROM THE COLD WAR THROUGH THE DAWN OF A NEW CENTURY 163-65 (2001); Don Van Natta, Jr., Questioning Terror Suspects in a Dark and Surreal World, N.Y. TIMES, Mar. 9, 2003, § 1, at 1; Dana Priest & Barton Gellman, U.S. Decrees Abuse But Defends
The British forcibly expelled the entire population of the islands and has since forbidden them to return. When the


exiles in recent years won judicial decisions finding their expulsion unlawful and giving them a right to return, the Foreign and Commonwealth Office simply had the Queen overturn the courts by fiat.\(^{245}\) (As Yakov Naumovich might say: “What a country!”).\(^{246}\) The B.I.O.T. Constitution decreed by Her Majesty in 2004 states nobody has the right to live or be in the Territory—especially not the native-born population.\(^{247}\)

The people of Tristan da Cunha were forced by nature to leave their island and Britain did what it could to stop them from returning.


Tristan da Cunha

In 1961 the entire population of Tristan da Cunha was evacuated to England after the island’s volcano erupted. The Colonial Office had plans decades before to shut the island down and the eruption provided them with a way to do so. Once in England, the Colonial Office tried to break up the community, refused to consider the islander’s requests to return, and actively worked to keep them in Britain, paternalism run amok. Upon their return, the Colonial Office forcibly established an socialist economy reminiscent of coal mines’ company stores that kept the people at the mercy of the government—and then tried to prevent anyone from leaving.

The Falkland Islands

Across the South Atlantic, the Foreign and Commonwealth Office had similar misguided ideas about the Falklands. The Colonial Office had similar misguided ideas about the Falklands. The


250 Id. at 218 (Colonial Office tried to disperse the community throughout England); id. at 231-44 (Colonial Office efforts to thwart the islanders’ return). See also Peter Andreas Munch, Culture and Superculture in a Displaced Community: Tristan da Cunha, 3 ETHNOLOGY 369, 374-75 (1964).

251 MUNCH, supra note 249, at 269-70 (economic situation); id. at 285 (keeping islanders from leaving). See also Peter Andreas Munch, Development and Conflicting Values: A Social Experiment in Tristan da Cunha, 72 AMER. ANTHROPOLOGIST, n.s. 1300, 1313-17 (1972).

252 Many law review authors, afraid to take a stand on anything, have mealy-mouthed politically-correct footnotes about how the Argentines call them the “Malvinas,” the United Nations uses “Falklands/Malvinas,” the English claim is open to debate, etc., etc., etc., so they will use both names so as not to cause offense to the legions of militantly nationalistic Argentine readers of American law reviews. E.g., Miguel Antonio Sánchez, Self-Determination and the Falkland Islands Dispute, 21 COLUM. J. TRANSNAT’L L. 557, 557 n.1 (1983) (citing 1964 report of U.N. decolonization committee, a body which is a forum for dictatorships to attack Britain and the United States); Michael J. Levitin, The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention, 27 HARV. INT’L L. J. 621, 621 n.1 (1986); Roberto Laver, The Falkland/Malvinas: A New Framework for
Foreign and Commonwealth Office for years negotiated to give the Falkland Islands to Argentina. Never mind the British population in sole possession there since 1833 adamantly opposed the move and the fact that the Argentine claim to title is fantasy.

In the 1960s the Foreign Office’s spokesmen evaded giving straight answers to Parliament when questions were raised about the negotiations and the refusal to hold a referendum in the Falklands to record the islanders’ views. The islanders

Dealing with the Anglo-Argentine Sovereignty Dispute, 25 Fletcher F. World Aff. 147, 147 n.1 (2001). This author calls the Falklands because that is their name.


250 Parl. Deb., H.L. (5th ser.) (1968) 990—95 (U.K.); 761 Parl. Deb., H.C. (5th ser.) (1968) 1866-75 (U.K.); Falkland Islands, 16 Keessing’s
issued a public appeal at the time: "Is our tiny community to be used as a pawn in power politics?" The Foreign Office in 1980 admitted in Parliament that it was working to hand the islanders to Argentina. Even though the defense budget was increasing, the government at the same time withdrew the sole naval presence in the region, *H.M.S. Endurance* to save money.

Argentina took the hint Britain was not interested in the Falklands and invaded in 1982, generating a debate in the Commons full of visceral fury at the Foreign and Commonwealth Office. One M.P. correctly stated the very idea the striped-pants brigade was negotiating with the "criminal" regime in Buenos Aires—a ruthless military dictatorship that had "disappeared" thousands of its citizens—"make[s] any normal Englishman’s blood . . . boil." The

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Foreign Secretary was forced by an angry House of Commons to immediately collect his cards.261 A few years later, in his memoirs, he was unrepentant, continuing to insist that saving money for London and getting along with foreigners trumped the islanders’ fervent desire to remain British.262

**Anguilla**

Another place with similarly loyal British citizens was Anguilla. “Anguilla is the only former colony to ever revolt against independence [and its people] are possibly the only rebels in history ever to have carried off a successful rebellion without killing anybody.”263 It is a prime example of how, when it comes to its colonies that anything Britain says is temporary and can be revoked at any time when it suits Britain.264

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261 United Kingdom, 28 Kessing’s Contemporary Archives 31537, 31538 (1982) (Eng.) (reprinting Carrington’s resignation letter).


264 For the Anguillan Revolution, see generally Report of the Commission of Inquiry Appointed by the Governments of the United Kingdom and St. Christopher-Nevis-Anguilla to Examine the Anguilla Problem, 1970, Cmd. 4510 [hereinafter Report of the Commission on
Britain in the 1950s set out to join its colonies in the Caribbean into a vast West Indian Federation, notwithstanding the lack of a common geography, history, politics, laws, or institutions. This was to save Britain money while it looked to get rid of the islands, the Federation being a prelude to independence.

Such plans had been afoot since the Nineteenth Century.

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267 See generally Wrong, supra note 143, at 145–70; Phillips, supra note 264, at 1–16; Lloyd Braithwaite, *Progress Toward Federation, 1938–1956*, 6 Social & Econ. Stud. 133 (1957); Paul Knaplund, *Federation of the West
But Jamaica—the largest part of the Federation in terms of area, population, and financial resources—realized that it would be picking up most of the costs of new government, be subservient to a capital a thousand miles away in the Lesser Antilles, and get few benefits from federation. So Jamaica quit the Federation months before it was to become independent in 1962. The Federation immediately collapsed and Britain had to plan a different future for the small islands.

Anguilla had been connected to St. Kitts and Nevis for decades because all three were British and in the general vicinity of one another, notwithstanding the fact that (1) Anguilla was separated from the other two by seventy miles of ocean and several French and Dutch islands and (2) had nothing in common with St. Kitts and Nevis. When Britain spun the three off in February 1967, Anguilla found itself yoked to the distant islands as part of an “associated state.”


See generally Wallace, supra note 266. For background, see West Indies, 13 Keeling’s Contemporary Archives 18558 (1961) (Eng.); West Indies, 13 Keeling’s Contemporary Archives 18578 (1961) (Eng.); West Indies, 13 Keeling’s Contemporary Archives 18813 (1961) (Eng.).


West Indies Act, 1967, c. 4 (U.K.); St. Christopher, Nevis, and
Anguilla wanted nothing to do with St. Kitts.\textsuperscript{273} Anguilla for decades had been completely neglected by the Colonial Office and the government on St. Kitts, a situation that left Anguilla longing for roads, electricity, water, telephones, schools, and the Twentieth Century.\textsuperscript{274} Because conditions had been so awful there for so long, a mass exodus abroad had taken place; at the time of the revolt there were more Anguillans living in Greater New York City than on Anguilla.\textsuperscript{275}

Anguillans were at the mercy of St. Kitts Prime Minister Robert Llewellyn Bradshaw—a militant trade unionist partial to uniforms, Rolls Royces, flogging, and being called “Colonel”—who regularly made remarks about Anguillans as warm and fuzzy as those Cato the Censor made about the Punii.\textsuperscript{276} And it wasn’t just talk. To name just one indignity:


\textsuperscript{276} Brute Farce and Ignorance, \textit{SUNDAY TIMES} (London), Mar. 23, 1969, at 13 (discussing flogging and the Rolls and quoting Bradshaw’s statements on destroying Anguilla); 7780 \textit{PARL. DER.}, H.C. (5th ser.) (1969) 1150–1 (U.K.) (statement of Viscount Lambton) (recounting Bradshaw’s antics); \textit{id.} at 1542–44 (statement of Bernard Braine) (recounting thuggish use of power by
Anguilla had a telephone system, but Bradshaw had it dismantled.\textsuperscript{277} In the legislature, Anguilla got only one vote in the ten-member legislature, while St. Kitts, with seven votes, totally dominated it and Nevis.\textsuperscript{278} (The people of Nevis were also unhappy about the shotgun marriage to St. Kitts).\textsuperscript{279}

Britain ignored repeated warnings that Bradshaw and Anguilla were in a toxic relationship.\textsuperscript{280} Four months after Britain spun St. Kitts-Nevis-Anguilla off, Anguillans voted 1,813 to 5 to secede from it.\textsuperscript{281} This was Bradshaw’s excuse to declare a state of emergency throughout the nation and have his political opponents jailed.\textsuperscript{282} The Anguillans wrote two constitutions and proceeded to elect their own government, all

\textsuperscript{277} \textit{Westlake}, supra note 264, at 27.
\textsuperscript{278} \textit{St. Christopher-Nevis-Anguilla Const.} of 1967, § 24.
\textsuperscript{279} \textit{E.g., Fred Phillips, West Indian Constitutions: Post-Independence Reform} 131 (1985) (Phillips was Governor of St. Kitts-Nevis-Anguilla during the Anguilla crisis).
of which was ignored by Britain.\footnote{283 United Press Int'l, Anguilla Vote to Break the Old Ties, THE TIMES (London), Feb. 8, 1969, at 6 (noting constitution adopted). For reprints of the two constitutions Anguilla adopted during the interregnum, see REPORT OF THE COMMISSION OF INQUIRY, supra note 264, at 88–89, 98–111.}

distributed leaflets written in the best newspeak stating the new dictator was their “friend” and insisting, “[i]t is not our purpose to force you to return to an administration you do not want.”

Britain was rightly ridiculed for this absurdity. After a lengthy impasse, the island got its own constitution in 1971, even though it was still part of the St. Kitts-Nevis-Anguilla “associated state.”

Comparisons of Anguilla to Rhodesia, excerpted as Why Anguilla Operation Cannot Be Repeated in Rhodesia, The Times, Mar. 20, 1969, at 8. For background on the Rhodesia question, see SOUTHERN RHODESIA: DOCUMENTS RELATING TO THE NEGOTIATIONS BETWEEN THE UNITED KINGDOM AND SOUTHERN RHODESIA GOVERNMENTS, NOVEMBER, 1963–NOVEMBER, 1965, Cmdn. 2807; Rhodesia, 16 KEESING’S CONTEMPORARY ARCHIVES 20747 (1965) (Eng.); Rhodesia, 16 KEESING’S CONTEMPORARY ARCHIVES 21023 (1965); Rhodesia, 15 KEESING’S CONTEMPORARY ARCHIVES 21087 (1965) (at 21094–95 is the Rhodesian declaration of independence, which uses verbatim swaths of the one written by Jefferson); Rhodesia, 16 KEESING’S CONTEMPORARY ARCHIVES 21247 (1966); Rhodesia, 16 KEESING’S CONTEMPORARY ARCHIVES 21755 (1966).


completely separate in 1980. This was possible only because Bradshaw had died. The legality of that action was contested because the 1967 law that created St. Kitts-Nevis-Anguilla required the approval of its legislature for any division of the associated state and Britain had ignored this requirement. Court action challenging the separation failed because of the doctrine of Parliamentary sovereignty—the 1980 law trumped the 1967 one because Parliament can do anything it likes. This is keeping with Bagehot's famous claim that the Queen would have to sign her own death warrant if Parliament approved


The example of the Turks and Caicos Islands further shows how all promises made to colonies are meaningless. The 1976 Turks and Caicos Islands Constitution provided for a parliamentary government. In 1986 the Governor (appointed from London) named a commissioner to investigate allegations of corruption. The previous year the premier and a cabinet minister had been charged by the United States with drug trafficking. While the corruption inquiry was ongoing, democracy was suspended. (Some democracy: only 7,000

“belongers” out of a population of 36,000 residents were even eligible to vote). The corrupt attorney general was deported. A new constitution was issued and representative government was restored in 1988.

The 2006 Constitution, issued as part of the general review of colonial charters, provides for a democratically elected parliamentary government as well as trial by jury. Soon after the new charter came into force renewed allegations of pervasive corruption were made, a state of affairs common in the Caribbean. The Foreign and Commonwealth Office fought any investigation. But a judge retired from the English Court of Appeal was appointed; he confirmed the accusations. The judge blamed the Foreign and

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300 Clegg & Gold, supra note 29, at 124.
305 COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, supra note 34, at 67.
Commonwealth Office:

This state of affairs follows decades of the FCO’s stewardship, or lack of it, in the exercise of its ultimate constitutional responsibility for the probity and efficiency of the Territory’s governance. The FCO now has direct control, yet seemingly considers that that does not carry with it financial responsibility to lift its charge out of the administrative and financial mire into which it has allowed it to fall.  

While there were serious problems with corruption, the British exercised an extraordinary remedy. Britain suspended democracy in 2009 and has never restored it. It declared an intention to hold elections in July 2011, but these elections have been postponed indefinitely. At the 2011 meeting of the U.N. Decolonization Committee, representatives of the islands spoke of the “interim dictatorship” imposed by Britain and the complete lack of accountability of their...
One speaker noted the number of corrupt members of the British Parliament recently sent to prison in the parliamentary expenses scandal, yet democracy was not suspended in the United Kingdom because of those crooked legislators.


London’s Daily Telegraph exposed the corruption after it sued under Britain’s Freedom of Information Act, 2000, ch. 26, to obtain files of legislators’ expense claims. Corporate Officer of the House of Commons v. Info. Comm’r, [2008] EWHC 1084 (Admin), [2009] All E.R. 403. The paper used the documents as the basis of scores of stories from May 8, 2009 to date; its editions in May and June 2009 have several articles in nearly every single issue. E.g., The Extraordinary Week in Politics That Changed Parliament Forever: Expenses Disclosures in the Telegraph Have Already Claimed Six MPs, Including the Speaker, But It Is Merely the Beginning, DAILY TELEGRAPH, May 23, 2009, at 8; The System Exposed: Tricks of the Trade, From Shifting ‘Second Homes’ to Profiting After Taxpayer-Funded Renovations, DAILY TELEGRAPH, May 8, 2009, at 2. The paper has continued its coverage, e.g., Mark Hughes, Moran Charged with 21 Fraud and Forgery Offences, DAILY TELEGRAPH, Sept. 7, 2011, at 7 (stating four members of the Commons and two members of the Lords went to prison for their embezzlement and Margaret Moran was latest M.P. charged); Martin Evans, You’re a Benefits Cheat, Judge Tells Peer As He Jails Him over Expenses, DAILY TELEGRAPH, July 2, 2011, at 6 (reporting on the fraud committed by Lord Hanningfield); John Bingham, Morley Goes to Prison Blaming Downfall on ‘Powerful No. 10 Enemy’, DAILY TELEGRAPH, May 21, 2011, at 1 (reporting minister in Tony Blair’s government stole £31,000 from public by false claims); Robert Winnett, This Rotten Parliament: Half of MPs Guilty of Over-Claiming Expenses, More Than £1m Must Be Paid Back, DAILY TELEGRAPH, Feb. 5, 2010, at 1. For summaries of the issues, see ANDREW RAWNSLEY, THE END OF THE PARTY 645–52 (2010); MEMBERS ESTIMATE COMMITTEE, REVIEW OF PAST ACA PAYMENTS: FIRST REPORT OF SESSION, 2009–10, H.C. 348 (reporting hundreds of members of the Commons had been overpaid on their official expenses); MEMBERS ESTIMATE COMMITTEE, REVIEW OF PAST ACA PAYMENTS: SUPPLEMENTARY REPORT, SECOND REPORT OF SESSION, 2009–10, H.C. 450 (further report on same). For a typical example of the recent corruption, see STANDARDS & PRIVILEGES COMMITTEE, CONDUCT OF MR. DEREK CONWAY: FOURTH REPORT OF SESSION, 2007–8, H.C. 280 (reporting on M.P. who put his son, a full-time college student, on his office payroll in a do-nothing job). For suggestions on reform, see U.K. COMMITTEE ON STANDARDS IN PUBLIC LIFE,
Citizenship

In 1981, Parliament stripped British citizenship from the people of its colonies. One motivation was the government did not want the millions of people in Hong Kong, who it “perceiv[ed] as a liability rather than an asset,” to be able to use their British citizenship to move to Britain instead of being forced to become subjects of the People’s Republic of China when the British lease on the territory expired in 1997. Thus the law was seen as racist in many quarters, just as the 1961


315 E.g., 421 Parl. Deb., H.L. (5th ser.) (1980) 875–88 (U.K.) (statement of the Archbishop of Canterbury) (discussing these charges); W.S.C.,
immigration act that limited colonial citizens’ ability to move to Britain was also viewed as racist because it chiefly worked to keep black West Indians from migrating.\footnote{316}

The newly minted “British overseas citizens.”\footnote{317} Especially since not all colonials were treated equally. The Falkland Islanders, whose government had been trying to get rid of them, got their citizenship back after the Argentinians were expelled.\footnote{318} And the Gibraltarians had a special status all along.\footnote{319} But only in 2002 did all the 200,000 stateless colonials regain their British citizenship.\footnote{320}

Grain of Salt

On top of all this, recent House of Lords decisions further erode what protections citizens have. One decision held the British government cannot be held liable for the actions it has its colonial governments carry out under the fiction that the colonial governments have an independent existence and will, the judges refusing to pierce the corporate veil, as it were.\footnote{321}


\footnote{317} E.g., U.K. Foreign & Commonwealth Office, Partnership for Progress and Prosperity, *supra* note 29, at 17 (discussing concerns of St. Helenians).

\footnote{318} British Nationality (Falkland Islands) Act, 1983, c. 6 (U.K.).


\footnote{320} British Overseas Territories Act, 2002, ch. 8 (U.K.); U.K. Foreign & Commonwealth Office, Partnership for Progress and Prosperity, *supra* note 29, at 19 (giving population). See also *id.* at 16–19 (discussing citizenship for territories’ inhabitants); Hendry & Dickson, *supra* note 34, at 197–209 (same).

\footnote{321} R. ex rel. Quark Fishing, Ltd. v. Sec’y of State for Foreign &
Others held that the British government is neither obligated to legislate for the benefit of the colony nor to preserve democracy.\textsuperscript{322} With this dismal record—combined with the judges’ refusal to stand up to the government—all guarantees Britain makes to its colonial citizens should be viewed with the utmost skepticism. Time and again, expediency has trumped principle.\textsuperscript{323}

CONCLUSION

The circumstances of Pitcairn’s founding have fascinated the world since its settlement became known. Its two centuries of legal and social history are one and the same.\textsuperscript{324} Supposedly, “[f]rom [Pitcairn’s] petty history the philosopher of another planet could reconstruct the whole of human society.”\textsuperscript{325} Any why not, for Pitcairn “presents so many fascinating and fundamental questions about the existence and nature of legal systems, justice, and the law.”\textsuperscript{326}

For years, colonial officers gave little attention to the island. Their handling of Pitcairn and the other colonies was “a national disgrace,” taking actions to push them away from the sceptered isle and treating colonials as second-class

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\textsuperscript{323} Cf. Margaret Thatcher, Speech to the 52d Annual Conservative Women’s Conference, London (May 26, 1982), \textit{in MARGARET THATCHER, IN DEFENCE OF FREEDOM: SPEECHES ON BRITAIN’S RELATIONSHIP WITH THE WORLD, 1976–1986}, at 74–75 (Prometheus Books 1987) (1986) (“To those—not many—who speak lightly of a few islanders beyond the sea [i.e. the Falklanders] and who ask the question, ‘Are they worth fighting for?’ let me say this: right and wrong are not measured by a head-count of those to whom the wrong has been done. That would not be principle but expediency.”).


\textsuperscript{325} 5 A. WYATT TILBY, THE ENGLISH PEOPLE OVERSEAS: AUSTRALASIA, 1688–1911, at 268 (1912).

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There was for decades an obsession by British officials with minutiae—the form of good government, rather than the practice, e.g., visiting officials were perturbed that the government files were not in perfect bureaucratic order.  

Now Pitcairn has an elaborate constitution, a type of document “framed for ages to come and . . . designed to approach the immortality as nearly as humanity can approach it.” The Pitcairn Constitution will soon undergo its first test. In a pending case against the island’s former mayor, his counsel is making challenges to the entire system of Pitcairn government. One issue is the claim that the current regime violates the English Bill of Rights, adopted in 1688. “A one-person legislature [i.e. the Governor] is anathema to self-determination” and “[m]aking the Governor . . . the legislature creates something worse than a one-party state: it creates a no-party state,” says the challenge. Another recent attempt to challenge the government a small island whose administration included undemocratic elements—the Crown Dependency of Sark in the Channel Islands—went all the way to the U.K. Supreme Court without success this new challenge is an uphill battle even though Pitcairn’s situation is far more egregious than Sark’s.


328 E.g., H.E. Maude, Pitcairn Island: A General Report Based on Eight Months Residence in the Island During 1940–41; With Suggestions for the Future Welfare of the Community, June 6, 1941, ¶ 16 (Maude was colonial officer who visited to rewrite the laws), original in Western Pacific Archive, Auckland, PCR 5–2198.


While the Pitcairn Constitution can be swept away by London at any time, the theory that a constitution is a written document is a legal fiction. The idea that it can be understood by a study of its language and the history of its past development is equally mythical. It is what the Government and the people who count in public affairs recognize and respect as such, and what they think it is. More than this it is not merely what it has been, or what it is today. It is always becoming something else, and those who criticize it and the acts done under it, as well as those who praise, help to make it what it will be tomorrow.334

Words on paper do not enforce themselves and when those words are enforced by Britain, one thinks of Justice Scalia's observation that every banana republic has a bill of rights.335

NOTE ON SOURCES

“P.P.” indicates the British Parliamentary Papers, some of which have been filmed by Chadwyck-Healey in its House of Commons Parliamentary Papers Series. The cite “61 P.P. (1897) 161, MF 103.499–500” means the document was at page 161 of volume 61 of the Sessional Papers—akin to the U.S. Congressional Serial Set—for the 1897 session of the House of Commons, and the document is on microfiche numbers 103.499 and 103.500 of the Chadwyck-Healey edition.336


336 See also FRANK RODGERS, A GUIDE TO BRITISH GOVERNMENT PUBLICATIONS ch. 8 (1980) (discussing Sessional Papers); PERCY FORD &
The author has deposited with the Thomas Hale Hamilton Library at University of Hawaii in Honolulu copies of a file submitted in the 2006 Privy Council appeal from Pitcairn. It has thousands of pages of historical documents on Pitcairn. The documents are cited as “PCR” (Privy Council Record) with the page numbers in the record. The file is online at: http://evols.library.manoa.hawaii.edu/handel/10524/19431.