

The Law Foundation of South Australia Fellowship

Report of Flynn Wells

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I received a Law Foundation of South Australia Fellowship to support my experience studying a Master of Laws (LLM) at Yale Law School in the United States during the 2022-23 academic year. After I very happily provide a more detailed report on this intellectually and personally enriching experience, I wish also to reflect briefly on the significance of the Fellowship in my case and use this to highlight its ongoing importance for the South Australian legal community more broadly. It is necessary, in this regard, to note for context that I was awarded my Fellowship in November 2022, ie, in the midst of my program of study — a departure from the usual timing owing to the Fellowship not being offered in 2021 (due to the pandemic).

Yale's LLM program is the most exclusive graduate program in law in the world (my cohort comprised 23 students) and at America's top law school, no less. The modest size of the cohort enables intimate engagement and intellectual exchange between students and faculty, a unique dynamic that is fostered and encouraged by Yale's rich tradition of seeking to develop early career academics. As an aspiring scholar myself, this made the LLM at Yale the ideal program for me, and I decided to focus the broad, generalist course of study it offers on the fields of constitutional law and legal theory, as well as on developing my own research agenda, which thus far has centred on applications of constitutional law within the migration setting.

During my first semester (Fall 2022), I took courses on 'Reading the Constitution: Method and Substance', taught by Professor Akhil Reed Amar; '[The] First Amendment', taught by Professor Robert C Post; and 'Social Justice', taught by Professor Bruce Ackerman. Each of these three professors is a towering figure in my field, and it was a distinct privilege to engage

with them in such an intimate setting. Moreover, I felt that their courses complemented each other, each capturing a particular aspect of the practice and study of constitutional law in the United States, together painting a more complete picture. Professor Amar's course traversed the canon of American legal scholarship on constitutional interpretation, which includes much of his own work. On the other hand, Professor Post took a doctrinal approach, using decisions of the Supreme Court of the United States as the raw materials with which to develop his own theory of the rationale(s) and corresponding scope of the First Amendment to the United States Constitution — which protects, among other things, 'the freedom of speech'. Professor Ackerman's course situated some of the debates within the study of constitutional law, such as the legitimacy of judicial review of legislation, within their broader, political theoretical context.

Given my desire to use my learnings at Yale to broaden and enrich my perspective on the study of Australian constitutional law, during my second semester (Spring 2023) I decided to take advantage of the opportunities for engagement with faculty by undertaking directed study. In particular, I wrote an extended term paper under the supervision of Professor Samuel Moyn. My paper returns to the 2020 decision of the High Court of Australia in *Love v Commonwealth*, and seeks to interrogate a claim which might be thought to underpin the approach of the dissenting judges in that case: that the decision of the majority — reducible to the proposition that the Constitution precludes the Australian Government from detaining, or removing from Australia, First Nations people under the Migration Act — is objectionable from the perspective of democracy, that is (so the claim goes), such matters as who should be admitted to Australia's political community are matters for the Parliament, not the Court. My paper draws from the seminal work of American scholar John Hart Ely to consider the nice question of whether such a claim can be resisted on the very premise from which it heads off, namely, the perspective of democracy; indeed, Ely famously argued that it was a necessary role for the

judiciary, within a majoritarian democracy, to protect minorities unable to advance their own interests within the process of pluralist bargaining that can be expected to yield ordinary legislation. Professor Moyn is himself a prominent critic of Ely's work and I benefitted considerably from his perspective and interventions, both as supervisor and, occasionally, interlocutor. Indeed, I also took Professor Moyn's course on the 'Foundations of American Legal Thought', while I continued to work with Professor Amar, one of my professors from the previous semester — reading a syllabus that I developed under his supervision and furthering my engagement with American scholarship on constitutional interpretation.

That, then, covers the intellectual enrichment I enjoyed during my year at Yale, now for the personal enrichment. As I have said, my cohort comprised just 23 students, meaning the intimate character of the academic environment also permeated the social environment. I got to know each of my classmates very well and, as many of us have remarked to each other during the wash-up of our year together, I learnt just as much out of the classroom as I did in the classroom. As the only Australian in my cohort, my cultural horizons were broadened interacting with people from parts of the world I previously had very little knowledge of: Brazil, Argentina, Chile, just to name a few. They will, no doubt, remain friends for life and it will be one of the great joys and privileges of the years to come, visiting and reconnecting with them from time to time.

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It was a great thrill in March 2022 to be offered admission to the LLM program at Yale. This was particularly so given, somewhat paradoxically, it was the only program I could afford. American law schools are notoriously (perhaps infamously) expensive and, by virtue of its relatively small student body, Yale is the only one to offer fully need-based financial aid. Having been unsuccessful in applying for a number of scholarships, I knew I could accept my

offer from Yale and study there. However, enrolling in Yale's financial aid program would mean incurring considerable debt. Hence I was delighted when, months later, I found out I had been awarded a Law Foundation Fellowship, allowing me to withdraw from Yale's financial aid program and return home without crippling debt potentially overshadowing my experience.

This was absolutely critical for me given my present desire to pursue an academic career and, in particular, my ambition to gain my doctorate from Yale (the Doctor of the Science of Law program, or JSD), which, of course, comes with another volley of costly fees. Without the Foundation's support, this ambition simply may have begun to seem unrealistic given the debt I would already have incurred studying an LLM. Allowing for my unavoidable partisanship over the matter, therefore, I want to commend the Foundation for supporting an early career academic. Having been unsuccessful in applying for a number of other scholarships, many of them national in their reach, it is auspicious that the support I ultimately did receive should come from within South Australia. This certainly is not lost on me: on my return to Adelaide at the end of July 2023, I will begin teaching as a Sessional Tutor at Adelaide Law School, The University of Adelaide. I hope to pay back the Law Foundation's investment in me and my career or, as Yale Law School's Director of Graduate Programs, Maria Z Dino, powerfully put it on a number of occasions to my classmates and I, *pay it forward* — to the South Australian legal community more broadly.