



Speech

From logos to likes: Defending reason in justice in the Digital Age

*Stephen Gageler**

Introduction

The title of my presentation is ‘From Logos to Likes: Defending Reason in Justice in the Digital Age’. I think it is rather catchy and rather clever. I wish I had thought of it. I did not. The title was created by explaining the theme to an AI program, asking the program to come up with a title, and then refining the suggestions the program generated. The result is a title that perfectly expresses the theme. The result is also a title that, through the combination of the manner of its creation and the provocative form of its expression, perfectly illustrates that theme.

The theme of my presentation is the relationship of law to reason and of law to passion. It is about the reliance of law on reason. It is about the suppression through law of passion. It is about the vulnerability of law to the resurgence of passion. And it is about the contemporary challenge to the rule of law posed by the resurgence of passion under the influence of information technology.

The theme unfolds in a tale I propose to tell in three parts. Each part is set in a different location and in a different time period. The parts progress chronologically and expand geographically.

As you would expect, Part I is set in Athens in the Classical Age. It is the tale of the emergence of the distinct constitutional function of adjudication: the resolution of grievances through the reasoned application of law to facts to the exclusion of passion. It is the tale of the dawning of the concept of the rule of law. The oracles of the Classical Age in my telling of the tale are Aeschylus and Aristotle.

Part II is set in Western Europe and in North America during the Age of Enlightenment. It is the tale of the allocation of the distinct constitutional function of adjudication to a distinct constitutional branch of government structured to be shielded from forces of passion. It is the tale of the dawning of the modern conception of the rule of law administered by a separated and impartial judiciary. The oracles of the Age of Enlightenment in the tale as I will tell it are many but most to be revered in my telling are Montesquieu and Hamilton.

Part III is set in the present Digital Age. It is not geographically bounded, and I will avoid using illustrations that are place specific. It is the unfolding

* Chief Justice of Australia. This is a lightly edited version of a keynote address delivered at the Global Summit of Hellenic Lawyers entitled *Safeguarding Democracy, Rule of Law, and Justice — Global Challenges and the Role of AI* on 8 July 2025 at Megaron Athens International Conference Centre, Athens, Greece. My thanks to Priyanka Banerjee and Kate Renehan for their creative input and thoughtful critique.

tale of the emergence in this century of information technologies that are fuelling the resurgence of passion and the devaluation of reason on a global scale. To the extent that they are contributing to those effects, those technologies are testing the rule of law and the legitimacy of the judicial branches of government which administer it. There are no oracles of the Digital Age in the tale as I will tell it. If oracles exist, I am not one of them. The standpoint from which I speak is that of a participant in a national system of justice who is concerned to preserve the inherited conception of the rule of law administered by a separated and impartial judiciary in the face of societal changes wrought by technological developments over which I have no jurisdiction and only limited capacity to comprehend. How the current tale will end, I do not presume to predict.

Part I: The Classical Age

Not far from the Acropolis in Athens is the Areios Pagos: the Hill of Ares or the Hill of Mars. There met the original governing council of ancient Athens. In the Classical Age, most of its ancient functions had receded, but it retained the function of trying crimes of murder. The mythological origins of that function were the subject of *The Eumenides*, the last of the plays by Aeschylus in his *Oresteia* trilogy. The Eumenides, or the Erinyes as they were earlier known, were the Ancient Greek goddesses of vengeance who punished men for their crimes. The Romans called them the Furies. To distinguish between the goddesses and the play, I will use the Greek name for the play and will, for the most part, refer to the goddesses by their Roman name — the Furies.

The Eumenides is one of the earliest and most instructive literary depictions of a judicial system. Like much in Greek tragedy and Greek mythology, it tells a simple but profound story which continues to resonate because it communicates a truth about human nature. I will give no more than a summary of the story and will leave out most of the backstory.

In short form, *The Eumenides* depicts the trial of Orestes who has killed his mother Queen Clytemnestra out of vengeance for his mother and her lover having killed his father King Agamemnon on the victorious return of Agamemnon from the Trojan War, for which victory he had sacrificed his and Clytemnestra's daughter, Iphigenia. Upon killing his mother, Orestes has immediately been assailed by the Furies who see it as imperative to exact revenge for this act of matricide. The Furies perform the role of the chorus in the play and speak as a collective voice of outrage.

In the opening scene of the play, Orestes has taken sanctuary from the Furies at the shrine of Apollo at Delphi. There the Delphic oracle commands him to journey to Athens to seek the protection of the goddess Athena. This he does. In Athens, Athena arranges for him to stand trial at the Areios Pagos in what the play depicts as 'the first trial of bloodshed', designed by Athena to set the pattern for 'all time to come' to replace the cycle of blood feuds and revenge of which the Furies were a part. To this end, Athena manages to convince the Furies that the guilt and punishment of Orestes is best determined, on the basis of the testimony of witnesses and with the benefit of argument, by a court comprised of twelve mortals sitting in public. So, the trial of Orestes proceeds. The Furies are his accusers. Apollo is his defender. There

is no dispute about the facts. There is elaborate argument backwards and forwards about the merits. In the result, the twelve members of the court are evenly divided and Athena casts the tie-breaking-vote in favour of Orestes' acquittal. The judgment of Athena seems to reflect her acceptance of the argument advanced by Apollo in Orestes' defence: that to kill your mother is justified if it is payback for your mother killing your father, at least if your father was a king or at least if Zeus tells you to do it.

At this point in the play, the Furies — to say the least — are furious. They claim to have been dishonoured. They proclaim their intention to exact retribution: to torment the people of Athens and to 'scatter venom' throughout the countryside. The response of Athena, who is of course the goddess of wisdom, is one not of confrontation but one of appeasement and inclusion. Without seeking to defeat the Furies or to have them repent of their nature, Athena placates and repurposes them by persuasion. She tells them that they are 'not worsted nor disgraced'. She convinces them by soothing words that they are 'greatly honoured'. She persuades them to 'calm [their] bitter wrath's black inward urge' and she encourages them to take up a place of honour as protectors of the city and of its new system of justice. Thus, the Furies or the Erinyes (whose name is associated with strife) become the Eumenides (the Gracious Ones). They come to be addressed in the play as 'Semnai' (Venerable Ones). The play ends with Athena leading them in procession downwards into the Cave of the Furies under the Areios Pagos.

What is the enduring truth? In the words of Yale Law Professor Paul Gewirtz, the Furies represent 'complex forces of passion, linked at various points in the plays [of Aeschylus] with vengeance, fear, anger, violence, conscience, instinct, the sense of hurt, memories of grief, the primitive, the emotional and nonrational'.¹ The truth I take to be communicated through the play is that the advent of the distinct constitutional function of adjudication did not eliminate those forces of passion. Reason prevailed over passion through persuasion. Passion not only remained but became protector of the society within which reason had prevailed. What happened to the Furies was not that they were vanquished but that they were persuaded to trust reason. As the Gracious Ones, they were encouraged underground. The prospect would remain of the Gracious Ones resurfacing as the Furies were they ever to perceive their trust to be betrayed.

Aristotle signalled the persistence of passion when famously introducing his concept of 'the rule of law' in his *Politics*. The word Aristotle used for 'reason' was 'logos', meaning rational discourse. Hence the AI generated title to my presentation. The word he used for 'passion' was 'pathos', meaning emotion or feeling. The word he used for 'the law' was 'nomos', by which he said he meant a sort of social order.² He described the law as 'passionless'³ and as 'reason unaffected by desire'.⁴ Apparently expressing his ideal of the rule of law, Aristotle said that '[h]e who bids the law rule, may be deemed to bid

1 P Gewirtz, 'Aeschylus' Law' (1988) 101 *Harvard Law Review* 1043, p 1046.

2 Aristotle, tr Jowett, *Politics* (1885), bk I, p 9.

3 Above, p 99.

4 Above, p 102.

God and Reason alone rule'.⁵ In an apparent concession to realism, however, Aristotle added 'but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men'.⁶

As the author of *Constitutionalism and the Separation of Powers*, M J Vile, pointed out,⁷ Aristotle offered no support for the function of adjudication being entrusted to a distinct group of people. The guiding principle of the Athenian constitution was direct participation of all citizens in all functions of government. Aristotle aligned himself with that principle in observing that the same persons might 'act as both a deliberative council and a judicial court' just as those same persons might 'serve as soldiers, farmers and craftsmen'.⁸

The notion that the function of adjudication ought to be entrusted to a distinct group of people who were to be immunised from interference by those performing other functions of government and shielded from the forces of passion which Aeschylus dramatised in *The Eumenides* and of which Aristotle wrote in his *Politics* was not the product of the Classical Age. It was the product much later of the Age of Enlightenment.

Part II: The Age of Enlightenment

When James VI of Scotland became James I of England towards the end of the English Renaissance, he had in mind that he would adjudicate disputes concerning the rights and obligations of his subjects if and when he chose. The Judges of the common law courts of England (the Courts of King's Bench, Common Pleas and Exchequer), as James I saw them, were the delegates of the King of England. As the King of England, he was entitled to take whatever cases he pleased from the Judges and determine those cases himself. With a nod to Aristotle, James I said that he understood the law to be founded on reason. He asserted that he had reason as much as the Judges.

It fell to Sir Edward Coke, Chief Justice of the Court of Common Pleas, to explain why that was not so. '[T]rue it was', said Coke according to his own report of their encounter in the case of *Prohibitions del Roy*,⁹ 'that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law ... which requires long study and experience, before that a man can attain to the cognizance of it'. Coke records that he went on to explain 'that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace'. According to Coke's report, James I was greatly offended, pointing out that the logical consequence of Coke's argument was that the King of England himself should be under the law, which was 'treason to affirm'. To that Coke reports himself as having bravely responded by quoting the words of Henry of

⁵ Above.

⁶ Above.

⁷ M J Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press, 1967), p 22.

⁸ Aristotle, *Politics*, E Barker (Ed), (1958), bk IV, p 166 cited in Vile (n 7), p 22.

⁹ (1607) 12 Co Rep 64; [1607] 77 ER 1342.

Bracton, written centuries before, that ‘the King must not be under man but under God and the law’.

Coke’s explanation of why the King of England could not arrogate to himself the function of adjudication traditionally performed by the Judges of England was couched in terms of the King’s absence of technical legal expertise. But Coke’s explanation contained within it the seeds of the conception of the Judges forming a distinct branch of government which alone had the function of resolving disputes about legal rights and obligations through the application of a standard and traditional methodology, to the benefit of the King and his subjects alike. This conception was to take root in England over the course of the following century and would be cemented in the legislated guarantees of judicial tenure and remuneration that came to be contained in constitutional settlement which occurred in the aftermath of the English revolution. Though judges were to continue to be appointed by the Crown, they were to hold office not ‘at pleasure’ but ‘during good behaviour’, they were to be removable from office only on the address of both Houses of the Parliament, and their salaries were to be ‘ascertained and established’.¹⁰

Looking at that English constitutional settlement half a century later, the French polymath Baron de Montesquieu abstracted from it his celebrated theory of the separation of powers in his masterwork of the Age of Enlightenment, *The Spirit of Laws*, ‘hailed as the first systematic treatise on politics since Aristotle’.¹¹ Chapter 6 of Book 11 of *The Spirit of Laws* was entitled ‘Of the Constitution of England’. There, Montesquieu famously declared that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers’.¹²

Why should that be so? Professor Jeremy Waldron has fairly observed¹³ that the rationale advanced by Montesquieu was perplexingly obscure. Consistently with Aristotle, Montesquieu had asserted in earlier chapters of *The Spirit of Laws* that ‘[l]aw in general is human reason’.¹⁴ He had posited that, to resist despotism, justice had to be promulgated as law and that the law as promulgated had to be deliberately applied to specific cases.¹⁵ The despot who merely commands, he had said, ‘has no occasion to deliberate, to doubt, to reason; he has only to will’.¹⁶ Against this background, Montesquieu asserted that were the judicial power of applying the law to specific cases joined with the legislative power to promulgate the law, ‘the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator’.¹⁷ Were it joined to the executive power, he asserted, ‘the judge might behave with all the violence of an oppressor’.¹⁸

¹⁰ *Act of Settlement 1700*, 12 & 13 Will III, c 2.

¹¹ Vile (n 7), p 77.

¹² Montesquieu, *The Spirit of Laws* (1984), vol 1, p 185.

¹³ J Waldron, ‘Separation of Powers in Thought and Practice’ (2013) 54 *Boston College Law Review* 433, pp 452–453.

¹⁴ Montesquieu (n 12), p 8.

¹⁵ Above, pp 95–96.

¹⁶ Above, p 40.

¹⁷ Above, p 185.

¹⁸ Above, p 186.

Two aspects of Montesquieu's thinking about judicial methodology have proven to be of general and enduring significance. The first is that adjudication is done deliberately. It is the process of deliberation and reasoning by reference to the circumstances of the particular case which sets apart the judicial branch from the political branches and promotes both the legitimacy of the judiciary and the stability of law and society. The second aspect is that judges in applying the law do not give effect to their private views but rather the public state of the law.¹⁹ In another respect, Montesquieu saw a lesser role for judges to act as creators and custodians and champions of the public state of the law than that which had come to be accepted in the common law tradition epitomised by Sir Edward Coke in his interaction with James I. To Montesquieu, judges needed to be 'no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour'.²⁰ Consistently with this sentiment, Montesquieu did not advocate for the separated judicial power to be reposed in a distinct branch of government constituted by permanently appointed professional judges. His preference was for judges to be impersonal and 'invisible'. To this end, he advocated for adoption of the Athenian precedent of the function of adjudication being reposed in citizen assemblies.²¹

Notwithstanding Montesquieu's own preference for the separated judicial power to be reposed in citizen assemblies according to the Athenian precedent, Montesquieu's theory was very soon adapted to the end of explaining and advocating for the existence of a separated judicial branch of government both by Sir William Blackstone writing in his *Commentaries on the Laws of England* and by Alexander Hamilton writing in *The Federalist Papers*.

According to Blackstone,²² it was in the 'distinct and separate existence of the judicial power in a peculiar body of men, nominated ... but not removeable at pleasure, by the crown, [which] consist[ed] one main preservative of the public's liberty which [could not] subsist long in any state, unless the administration of justice be in some degree separated both from the legislative and also from the executive power'. Parroting Montesquieu but with a softer English accent, Blackstone explained that, were the judicial power joined with the legislative power, 'the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe'.²³ 'Were it joined with the executive', he said, 'this union might soon be an overbalance for the legislative'.²⁴

From the perspective of Hamilton, writing with post-revolutionary fervour in support of the Federalist plan of the *Constitution of the United States*, the question '[w]hy has government been instituted at all?' admitted of a very simple answer '[b]ecause the passions of men will not conform to the dictates

19 Above, pp 187–188.

20 Above, p 194.

21 Above, p 187.

22 W Blackstone, *Commentaries on the Laws of England* (1983), bk 1, ch 7, p 259.

23 Above, p 259.

24 Above, pp 259–260.

of reason and justice, without constraint'.²⁵ In this respect Hamilton supported James Madison who wrote that '[i]n all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob'.²⁶

Hamilton argued that the existence of a permanent and independent judicial branch of government interpreting and enforcing a written constitution as higher law was indispensable to the maintenance of constitutional constraint over the politically accountable branches of government who were made vulnerable to passion through the electoral process. Famously, he argued that 'the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution ... [having] neither FORCE nor WILL, but merely judgment'.²⁷ Quoting Montesquieu directly, Hamilton declared that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers'.²⁸ But going beyond anything that Montesquieu had said, Hamilton argued that a permanent and independent judicial branch of government was 'equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community'.²⁹

The Age of Enlightenment, of course, merged into the Age of Revolutions. When Hamilton and Madison wrote of 'passion' and 'ill humors' they were referring to social forces which they knew from observation and experience to be capable of resulting in civil unrest from which even a separated and dispassionate judicial branch of government could not be wholly immune. Only a few years before they wrote, the Chief Justice of the Court of King's Bench, the great Lord Mansfield, had been targeted by a riotous mob in London. Mud had been thrown in his face, and his house had been burnt to the ground.

Despite the growth of parliamentary democracy in the form of representative and responsible government which underlay the relatively stable political environment that prevailed in the Australian colonies during the movement towards federation a century or so later, the framers of the *Australian Constitution* were attentive to the lessons of that earlier age in providing for 'the judicial power of the Commonwealth' to be vested in a national system of courts which were together to form a distinct branch of

25 A Hamilton, 'No XV' in *The Federalist Papers: A Collection of Essays, Written in Favour of the New Constitution as Agreed upon by the Federal Convention, September 17, 1787* (2021) 76, p 81.

26 J Madison, 'No LV' in *The Federalist Papers: A Collection of Essays, Written in Favour of the New Constitution as Agreed upon by the Federal Convention, September 17, 1787* (2021) 313, p 315.

27 A Hamilton, 'No LXXVIII' in *The Federalist Papers: A Collection of Essays, Written in Favour of the New Constitution as Agreed upon by the Federal Convention, September 17, 1787* (2021) 439, p 440.

28 Above, p 441.

29 Above, p 444.

national government which they labelled ‘The Judicature’. Edmund Barton highlighted the importance of establishing an apex court that could consider constitutional questions ‘in the peaceful and calm atmosphere of a court, not under surroundings of perturbed imagination or of infuriated party politics.’³⁰ John Downer argued that the judiciary would act as the ‘protector of the Constitution ... which is to be in a calm ether of its own — removed from party strife and political passion’.³¹ Henry Bournes Higgins referred to the aim of making the court and its judges ‘as independent of any man’s favour and any man’s hate as we possibly can’.³²

Part III: The Digital Age

Let us then take stock, as we come at last to the Digital Age. Law has been equated with reason and has displaced passion as the means of resolving complaints of injustice. The function of adjudicating complaints of injustice according to law has been recognised as a distinct function of government and has been exclusively assigned to a distinct branch of government separated from other politically accountable branches of government. That separate judicial branch of government has neither force nor will but only judgment. Though reason has prevailed, passion has not been vanquished. It has been subdued by persuasion. It stays on to be channelled to and through the political branches of government. The potential also remains for lingering passion to confront directly the separated judicial branch of government, were trust ever to be lost in reason and were the judgments of the judicial branch ever to be perceived as unjust.

My predecessor in the office of Chief Justice of Australia, Sir Gerard Brennan, hinted at this underlying vulnerability of the judicial branch of government to loss of trust in reason and to perceptions of injustice in a speech he once gave to a gathering of Australian judges on the topic of judicial independence. Channelling Hamilton in the course of emphasising the need for the maintenance of public confidence in the performance by the judiciary of its distinctive function of adjudication, Sir Gerard said this: ‘The judiciary, the least dangerous branch of government has public confidence as its necessary but sufficient power base. It has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom [it serves] have confidence in the exercise of the power of judgment’.³³ That, in retrospect, is a very big proviso.

Sir Gerard spoke those words in 1996, at the dawn of the Digital Age as I have defined it as the World Wide Web was just beginning to be used by the public. His reference to ‘public confidence’ may have seemed straightforward enough based on past experience. The whole concept of the public and of

30 *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, p 25.

31 *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 1 February 1898, p 361.

32 *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 28 January 1898, p 280.

33 G Brennan, ‘Judicial Independence’, speech delivered at the Australian Judicial Conference (2 November 1996).

maintaining the confidence of the public was in the process of becoming much more complicated. Whereas it may have earlier been true, as the French sociologist Gabriel Tarde observed, that the public is all of the people ‘sitting in their own homes scattered over a vast territory, reading the same newspaper’,³⁴ that was no longer the world even as Sir Gerard spoke. The people sitting in their own homes scattered over a vast territory had begun to sit at their computers and to read from different websites selected on the basis of their individual preferences.

The very next year, Marshall Van Alstyne and Erik Brynjolfsson, both Professors at the Massachusetts Institute of Technology, produced a working paper entitled: ‘Electronic Communities: Global Village or Cyberbalkans?’.³⁵ The thesis presented in the working paper was that the capacity for the Internet to link geographically disconnected people and to help them share information of mutual interest was not an unambiguously positive societal development. On the one hand, it had the potential to ‘bridge gaps and unite communities’. On the other hand, it also had the potential to ‘fragment interaction and divide groups by leading people to spend more time on special interests and by screening out less preferred contact’. Presciently, they explained:

Because the Internet makes it easier to find like-minded individuals, it can facilitate and strengthen fringe communities that have a common ideology that are dispersed geographically. Thus, particle physicists, oenophiles, Star Trek Fans, and members of militia groups have used the Internet to find each other, swap information and stoke each others’ passions. In many cases, their heated dialogues might never have reached critical mass as long as geographic separation diluted them to a few parts per million. Once like-minded individuals locate each other, their subsequent interactions can further polarize their views or even ignite calls-to-action.³⁶

Social media did not then exist. When it surfaced in the early 2000s, it took polarisation to new levels. Social media has enabled each person to express their opinion and allowed greater connection with others. The problem is that the connection has been within echo chambers created by the algorithms underpinning social media platforms. Those echo chambers have tended to reinforce those same opinions to the active exclusion of others and have tended to warp the factual premises of those reinforced opinions into themselves having the status of mere opinions rather than facts. The upshot has been described as a ‘Cambrian explosion of bubble realities’.³⁷ The impact of one person’s opinion on other persons’ opinions through social media, whether it be the result of 15 minutes of Internet fame or longer lasting influence, has also been fostered less through persuasion than through the manipulation of emotion. The focus of what is communicated has shifted from information to ‘content’. To have the greatest number of followers and level of engagement, the social media influencer has to appeal to the broadest user base as quickly as possible. Influence comes with the flashy headline, the

³⁴ G Tarde, *On Communication and Social Influence*, T Clarke (Ed) (1969), p 278.

³⁵ M Van Alstyne and E Brynjolfsson, ‘Electronic Communities: Global Village or Cyberbalkans?’ (Working Paper, 1997).

³⁶ Above, p 5.

³⁷ D Harris and A Shull, *Generative AI, Democracy and Human Rights* (2025).

sensationalist yet distorted retelling, and even the false but pithy narrative. The stirring of passion has become inherent in the act of communication.

Some twenty years after the paper by Alstyne and Brynjolfsson, a study published in 2018 by Jennifer Kavanagh and Michael Rich of the RAND Corporation pointed to the existence and acceleration of a phenomenon which the authors labelled ‘Truth Decay’ which they explained to be rooted in deep-seated, if not innate, human characteristics of cognitive bias and emotion, to have been observable in previous periods but to have been exacerbated in this century by influences which included social media and polarisation more generally.³⁸ Kavanagh and Rich defined ‘Truth Decay’ as a set of four interrelated trends: an increasing disagreement about facts and analytical interpretations of facts and data; a blurring of the line between opinion and fact; an increase in the relative volume, and resulting influence, of opinion and personal experience over fact; and lowered trust in formerly respected sources of factual information.

Translated to the themes of my presentation, these same trends can be said to be the blurring of reason and passion, the devaluation of reason, and the amplification of passion. None of these trends can be good for the maintenance of public confidence in the rule of law administered by a separated and impartial judiciary. If the judiciary has nothing but judgment, and if judgment is founded on reason, the reason once perceived as the unique strength of the judiciary is increasingly being revealed to be an inherent weakness of the judiciary. To make matters worse, that the lessening of public confidence in the judiciary through the devaluation of reason and the amplification of passion is occurring at the same time as the same forces of passion are contributing to political imperatives that are increasingly driving political branches of government into conflict with judicial branches and in turn blurring the public perception of the distinction between the judicial and political branches by increasingly being seen to draw judiciaries into the political fray.

The recent emergence and exponential development of generative artificial intelligence has thrown the distinction between reason and passion into sharper relief still. For present purposes, we can think of generative AI as artificial reason which simulates human reasoning, but which is computer-generated. As anyone who has experimented with ChatGPT or even has just asked a question of Google of late can attest, generative AI is simulating human reasoning with dramatically increasing reliability.

Asked to adjudicate a dispute between humans, generative AI can simulate judicial reasoning. It can engage in a sophisticated process of induction and deduction drawing on vast arrays of legal data including openly accessible published reasons for judgment in cases decided by human judges across multiple jurisdictions dating back hundreds of years. It can do so quickly. And it can do so cheaply.

A judgment produced by generative AI is perhaps the paradigm of what Montesquieu advocated to be the role of the judge where law is administered in accordance with a predetermined set of rules without human moderation.

³⁸ J Kavanagh and M Rich, *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* (2018).

The fact that such a judgment can be produced by generative AI quickly and cheaply requires us to reconsider the explanation given by Sir Edward Coke to James I of the peculiar nature of adjudication according to law. Adjudication according to law remains the product of artificial reason. But artificial reason is no longer capable of acquisition only through long study and experience. Artificial reason, at some level, is available to anyone who has an iPhone.

The challenge generative AI presents to our inherited conception of the rule of law administered by the judiciary as a separate branch of government is therefore existential. If computer-generated artificial reason is readily available to all, what is the point of retaining an entire branch of government the existence of which has until now been justified on the basis that it has only reason which it employs to produce only judgment?

Conclusion

Though generative AI was used to help create the title to this presentation, generative AI has not been used to produce the conclusion. If there is an answer to the question I have posed, I believe it needs to be found at a profoundly human level.

Finding the answer may well require reassessment of the balance between reason and passion traditionally been struck in explanations of the justification for the rule of law and of the nature of adjudication handed down to us from the Classical Age and the Age of Enlightenment. Looking again at the processes traditionally employed to adjudicate disputes according to law through the exercise of human judgment, perhaps the role of reason has been elevated too highly and perhaps the significance of passion has been insufficiently recognised and accommodated.

Defending reason in justice in the Digital Age may well occur through acknowledging and reclaiming that element of the humanity of our inherited system of justice which does not lie in reason alone — through engaging again with the Furies and seeking to regain their trust.