Queue-Jumping: On Distributive Contestation in the Age of Rights

Katharine G. Young

Draft Paper* for presentation at the
NYU Global and Comparative Public Law Colloquium
Oct. 7, 2015

Abstract

“Queue-jumping” operates as a pervasive rejoinder in distributive contestations involving rights. As a metaphor meant to signal the evasion of notions of basic fairness and order in distributive decision-making, it combines a strong pejorative connotation of the “queue-jumper” with a group-based defense of an agreed-upon system of allocation. Yet, this metaphor hides at least as much as it reveals. This paper traces its usage across substantive contexts and jurisdictions in order to expose assumptions both about systems of distributive ordering in modern society as well as the use of constitutional or human rights as part of – and, often, a challenge to – those systems. My primary case study is the deployment of the “queue-jumping” metaphor in housing rights claims in South Africa; the secondary case studies include its persistent use in contesting health care rights claims in Canada, and in contesting refugee rights claims in Australia. I use these comparisons to show that the complaint of “queue-jumping” veils discrete claims about the nature of the

* This is an early draft of a work in progress. Please do not circulate beyond the colloquium. I look forward to your comments at the colloquium, and invite them, as well, at youngkv@bc.edu.
harm that raise distinct issues in law: the judicialization of social policy, the corruption of legal process, the marketization of scarce goods, and the misappropriation of needs-based criteria. Once these issues are brought to light, they force us to rethink the role of “rights” in distributive contests. Specifically, they problematize the positive/negative divide that often divides analysis of civil and political rights, on the one hand, and economic, social and cultural rights, on the other. By bringing much needed complexity to the notion of “the queue”, the paper explores ways in which general principles of allocative fairness may be both open to contestation and yet supportive of basic claims of rights.

Table of Contents

Introduction
I. The Queue-Jumping Metaphor - Three Deployments
   A. South Africa and the Right to Housing
   B. Canada and Health Care Rights
   C. Australia and Asylum Rights
II. Unpacking the Metaphor: Distinct Connotations of “Queue Jumping”
   A. Judicialization of Politics
   B. Corruption
   C. Marketization
   D. Misappropriation of Needs-Based Criteria
III. Problematizing the “Queue”
   A. Housing Allocations
   B. Health Care Allocations
   C. Asylum-Seeker Processing
Conclusion: Putting the Queue in its Place
Introduction

Ours is the age of rights. In contemporary political discourse, few concepts now rival the discursive moral power of the idea that every person has an inherent dignity and basic rights, which others ought to respect. Since at least the end of the Second World War, the development of a comprehensive international law of human rights, and the corresponding growth in constitutional bills of rights around the world, have buttressed this idea, and expanded it. Laid within its Westphalian frame, the age of rights corresponds with the duty of modern liberal states to respect them. And laid within a more expansive conception of human freedom than the eighteenth century declarations of the “rights of man”, such rights include economic and social rights, as well as civil and political rights, and require the modern state to respect, protect and fulfill them. Unsurprisingly, claims of “rights” – including both “rights-talk” and rights-based litigation – have now entered into contested areas of social policy, such as housing, health care, education, and immigration. These claims include new articulations of the material dimensions of liberty, and the government’s positive role in responding to shortcomings in the enjoyment of that liberty.

---

Into this discursive space has entered a pervasive metaphor in response: the metaphor of “queue-jumping”. This metaphor relies on the image of a “queuing system” for distributive allocations, which can be undermined in a number of ways, including by claims of right. In this distributive context, the relationship between queues and rights is at its most complex: rights are invoked as a means to challenge queues, but rights also rely on queues to be realized. This contradictory relationship – which raises the inevitable tensions between substance and process, informality and formality, and, apparently, negative and positive duties – conceals important questions of justice and reason in modern rights claims.

This paper argues that the straightforward appeal of the “queue” metaphor combines the double virtues of fairness and order: the “queue-jumper” subverts these values when he or she subverts the allocative mechanism in place. The metaphor is suggestive of a breach of formal laws and formal allocations. But, and importantly, it is also recognizable as an evasion of well-understood informal norms, with the queue being an arguably universal, if in some ways culturally variable, template, of ordering under conditions of scarcity. The queue is therefore the vehicle for the realization of the material goods and services at issue in many modern rights claims – in housing in South Africa, for example, or health care in Canada or asylum in Australia. “Queue-jumpers” who claim their rights are therefore perceived to infringe the rights of others.
The queue-jumping metaphor no doubt carries a certain simplistic, visual, spatial appeal. Yet this paper argues that it is a problematic, oftentimes contradictory, trope in rights-discourse, which conceals more pressing challenges underlying rights claims in the modern administrative (welfare or developmentalist) state. A comparative, cross-jurisdictional study of the deployment of the metaphor can help to unpack the connotations and assumptions made about realizing rights when distributions are at stake. Using the primary case study of housing laws and policy in South Africa, as well as the allocation of health care in Canada, and asylum processing in Australia, it proposes a new way of understanding the queue-jumping complaint. A background question is whether there may be common assumptions and connotations in the use of the metaphor despite vastly different systems of ordering, political ideologies, and resources, in South Africa, Canada and Australia, the three case studies on which the analysis draws.

I. The Queue-Jumping Metaphor - Three Deployments

While “jumping the queue” is a recognizable complaint in responding to different challenges to extant systems of ordering, it is the intersection of the complaint with claims of rights that is of interest in this paper. In this respect, it is worth tracking its use in contesting rights claims, in which it now appears so pervasive. This trend is suggestive of two developments: first, the observed increase of “rights talk” in socio-economic domains, such as education,\(^7\) housing or health care; and second, the inevitable tension

\(^7\)This paper does not discuss the right to education, arguably the most universally recognized (in law) of the (as-categorized), economic and social rights. Much of the discussion could certainly be tested in this policy domain. See, e.g., the rigorous examination of justice principles behind the distribution of
that arises when rights claims are made in conditions of explicit scarcity, particularly in relation to the positive obligations on the part of the state to protect, and fulfill, them.

The influence of the discourse of economic and social rights is, like all human rights, culturally and jurisdictionally contingent. Nonetheless, in recent decades, the recognition of issues of access to health care, housing, education, food, water, or social security as involving constitutional or human “rights” has become widespread. Many national constitutions now recognize economic and social rights within their bills of rights; the latest textual survey recorded the inclusion of such guarantees as the rule, rather than the exception, with the greatest number of such rights entrenched in Latin America, and the post-communist states. In ever more countries, the infringement of economic and social rights now give rise to justiciable complaints, either expressly or via the interpretive practice of courts. In international human rights law, the International Covenant on Economic, Social and Cultural Rights, with 164 States Parties, now has its own quasi-adjudicatory mechanism: the treaty’s committee has issued its first ever response to an individual complaint. A growing jurisprudence on economic and social rights is now in

---

educational opportunities, in Mark Kelman & Gillian Lester, Jumping the Queue (1998), and the rights guaranteed at the state constitutional level in the U.S.: []
8 Katharine G. Young, Constituting Economic and Social Rights (2012).
10 Id., (suggesting that one third identify all of their economic and social rights as justiciable, with another third identifying justiciability for some rights only, and others containing only aspirational rights, or containing less than two).
circulation, and informs the arguments and decisions of human rights NGOs, lawyers, governments, and judges, under mechanisms analogous to other human rights.

Despite this growing practice, fundamental questions remain about the legitimacy of “rights claims” in the distributional sphere, foremost of all being the pervasive perception that such rights are “positive rights” that require state action, rather than negative rights that require state restraint. This central positive/negative binary is noteworthy, not only for its longevity (in the fact of extensive and convincing analysis of its shortcomings), but also for the ease in which it accommodates the queue-jumping complaint. In short, queue-jumping appears to be a discourse relating to the appropriate steps to protect “positive” rights. Yet queue jumpers often assert “negative” rights (to be allowed to buy health care, for instance, or to prevent their eviction); and those remaining in their “correct” place in the “queue” can be characterized as enjoying “negative” rights (to be left alone), or “positive” rights to protection. Thus, as will be seen below, this binary is vastly misleading.

Commentators have long noted the “positive” obligations underlying the so-called “negative” civil and political (and property) rights, in the sense that they all require an

---


13 The metaphor of migrations has been popular for comparative constitutional ideas: Sujit Choudhry, Migration as a New Metaphor in Comparative Constitutional Law, in THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., Cambridge Univ. P. 2006). For an analysis of human rights ideas outside of courts, see BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

extensive state apparatus to enforce. Nonetheless, such commentators divide on the question as to whether some act/omission distinction is nevertheless worth retaining in understanding the duty of the state to respect fundamental rights.\textsuperscript{15} The analytical sorting of state duties – to respect, protect, and fulfill – has helped to clarify this distinction.\textsuperscript{16} Again, as we will see, the image of the queue serves to obfuscate this separation. Yet such an image seems an intuitive response to the “line-item” mode of rights argument that is created by the discrete claims of economic and social rights, rather than broader justice-based claims.\textsuperscript{17}

So what is “queue jumping”? To start, let us first define a “queue”. In examining a system of informal norms of queuing, Neil MacCormick offered one definition: “in cases where people seek a service or opportunity that cannot be supplied to everybody simultaneously, each ought to defer to any one and all those who arrived earlier at the point of service or place of opportunity, and each is entitled to go ahead of any who arrived later, and entitled to expect others to observe this, and to respond critically or even obstructively towards people who flout this priority-norm”.\textsuperscript{18} Others have similarly analyzed queues in terms of “first in first out” (“FIFO”), “first come first served”, or “waiting list”, ordering norms.\textsuperscript{19} These include tangible physical queues (common examples being supermarkets, airports, and sports and entertainment ticket-booths), and

\textsuperscript{15} \textsc{CéCile Fabre}, \textit{Social Rights under the Constitution: Government and the Decent Life} 47–9 (2000).
\textsuperscript{16} E.g., Shue, \textit{supra} n 6; see also the adoption of this formulation by the U.N. Committee on Economic, Social and Cultural Rights, General Comment No. XXX; and its drafting into the Sth. Afr. Const., ss 7-8.
\textsuperscript{17} Jeremy Waldron has urged a “bigger picture” approach, rather than what he calls a “line-item” approach. See Jeremy Waldron, \textit{Socioeconomic Rights and Theories of Justice}, 48 \textsc{San Diego L. Rev.} 773, 778 (2011).
\textsuperscript{19} Ronen Perry & Tal Z. Zarsky, \textit{Queues in Law}, 99 \textsc{Iowa L. Rev.} 1595 (2014).
legally enforced, but virtual queues (creditors in bankruptcy claims, public housing applicants, or surgery wait lists). The first type usually involves the suspension of other activities during the passage of time; while the second involves days, weeks or years in waiting, rather than minutes or hours, and the continuation of other activities despite significant queuing costs. The queue, therefore, stands in as a system of physical or virtual ordering which gives priority to the timing of the claim.

If these approaches capture the salient features of queues, what explains the appeal of the queue/queue-jumping metaphor? There are a number of initial explanations. The queue itself enjoys strong psychological underpinnings in notions of equality, the promise of efficiency, and in notions of order and civility. It is a readily understood system of informal norms, a recognizable medium for social integration, and an incubator for developing important virtues such as patience, rule-compliance, and trust. Especially when combined with other distributive criteria, such as desert or need, the queue represents a fair system of allocation whose breach suggests not only a discrete unit of unfairness in allocation, but the jeopardy of the more collective values described above.

---

20 Id. at 1653.
21 Id. (noting complications); Alex Coram & Lyle Noakes, Relative Advantage, Queue Jumping, and Welfare Maximizing Wealth Distribution (U. Mass. Amherst, Working Paper No. 2006-08, 2006) ("In other words if not being able to move up in the queue is bad, having someone push in front may be even worse.").
22 People who have the ability to queue are understood to be “civilized”. See Note in [Africa Today] (author suggesting Africans have not learned to queue).
Indeed, these features suggest that the metaphor of queues and queue-jumping may be as resilient and pervasive as the metaphor of “rights” themselves.26

Yet the description of the metaphor in the abstract leaves many questions open, as my case studies – South Africa and housing rights contestations, Canada and health rights contestations, and Australia and refugee rights contestations – will show. In each case, I provide a map of the queue, the practice of queue-jumping, the perceived queue-jumpers, and of who is understood to be harmed by the practice, followed by a short overview of the housing, health care, or asylum processing system in place. South Africa, as my primary case study, will be the most detailed of the three. The existence of an actual queuing system in each case (despite the misunderstandings about its use) may be suggestive of metonym rather than metaphor – that is, suggestive of a contiguity between the discourse and what it describes, rather than a mere analogy27 – however nothing turns on this distinction. Queue jumping – as metaphor or metonym – tells us more about the popular understanding of allocative systems, rather than the process of allocation itself.

A. South Africa and the Right to Housing

Queue-jumping in South Africa is a discourse centered on the allocation system for state-subsidized housing. The queue is the register of low-income households in need of housing assistance, which was established in the 1994, at the same time as the post-

27 As Oxford English Dictionary defines it, in metaphor, “a descriptive word or phrase is transferred to an object or action different from, but analogous to, that to which it is literally applicable”. In metonymy, “a word or phrase denoting an object, action, institution, etc.,” is functionally replaced with “a word or phrase denoting one of its properties or something associated with it”.

10
apartheid Constitution endorsed a guarantee of the right of everyone to “have access to … housing”.  

State-subsidized housing is delivered based on criteria such as location, special needs, age, along with, importantly, time spent on the “waiting list”. Jumping the queue implies any perversion of the waiting list system, such as through “occupying” vacant lots earmarked for development, or empty houses, and then using anti-eviction rules – and courts – to defend that occupation. At the same time, there is also a perception that “people can pay and jump to the front of the queue”, so the practice is two-fold; both practices are criticized, yet it is only the former that describes the practice of those claiming rights.

Queue-jumpers themselves are understood to be those resident in informal settlements, and often new to the area in which they are “squatting”, often arriving from rural areas in which much dislocation has occurred, or from outside South Africa. The protagonists are therefore poor, desperate emigrants from elsewhere, claiming rights to housing, who are perceived as subverting the waiting list at the expense of other poor, desperate, but patient, applicants. The resulting harm falls on those waiting for housing allocation or

---

32 HUMAN SCIENCES RESEARCH COUNCIL, CITIZENSHIP, VIOLENCE AND XENOPHOBIA IN SOUTH AFRICA (2008) (noting the perception that non-South African citizens are occupying national housing stock, which has been a trigger of xenophobic violence); Tissington, supra note 28, at 71.
support (recorded as some 1.8 million households\textsuperscript{33}), as well as the general public, from the social unrest that comes as a result, and from perceptions of corruption and patronage.

The discourse of queue-jumping is deployed in the media, and by officials and politicians when discussing housing policy. It is worth noting that, while the condemnation of the practice is widespread, the connotations of land invasion and squatting may be different among and across South Africa’s racial and social groupings.\textsuperscript{34} In several constitutional complaints, the government has defended its eviction practices by alleging queue-jumping on the part of the evictees.\textsuperscript{35} The Constitutional Court of South Africa itself has adopted the metaphor, noting that “[o]portunists should not be enabled to gain preference over those who have been waiting for housing, patiently, according to legally prescribed procedures … [t]hey have to wait in the queue or join it”.\textsuperscript{36} Nonetheless, the Constitutional Court has been reluctant to characterize rights claimants as queue-jumpers, arguing that those seeking temporary or emergency housing can be distinguished from those seeking “permanent housing, ahead of anyone else in a queue”.\textsuperscript{37} Similarly, a homeless community, “who have been evicted once, and who found land to occupy with

\textsuperscript{33} Of this national figure, around 25% live in shacks in informal settlements, 45% live in a dwelling or other structure on a separate stand, 12% live in a traditional dwelling and 10% live in a backyard shack: Housing Development Agency (HDA), South Africa: Informal Settlements Status (2012), 47; Tissington, \textit{supra} note 28, at 27.
\textsuperscript{34} \textsc{James L. Gibson}, \textsc{Overcoming Historical Injustices: Land Reconciliation in South Africa} (2009) 77. Wilson’s research and surveys, which generated controversy in South Africa, are suggestive of a different perception of the practices of queue-jumping by race and class – and that white South Africans see it more as a rule of law issue; and others do not. Gibson’s findings have been endorsed. \textit{E.g.}, Theunis Roux, \textit{Book Review}, 45 \textsc{Tulsa L. Rev.} 781 (noting that “[s]upport for Zimbabwe style land reform in South Africa (at two thirds), it turns out, does not mean that black South Africans attach no value to the rule of law, but that support for other values – notably rectifying past injustices – trumps support for the rule of law, at least in relation to land reform.”).
\textsuperscript{36} \textit{City of Johannesburg Metro. Municipality v. Blue Moonlight Properties} 2012 (2) SA 104 (CC) at para 93 (S. Afr.). (per Van Der Westhuizen J).
\textsuperscript{37} \textit{Id.} at para 93.
what they considered to be the permission of the owner where they have been residing for … a considerable period of time” are not “queue-jumpers”, according to the Court.\(^{38}\) Thus, in the Court, the same factors that are relevant to the grant or refusal of an eviction order: the circumstances under which the unlawful occupiers started occupying and erecting their illegal structures on the property, the period the unlawful occupiers have resided on the land in question, the availability of alternative accommodation of land, and the rights and needs of the elderly, children, persons with disabilities, and female-headed households,\(^{39}\) all appear to be relevant to whether occupiers are treated as “queue jumpers” or not (with the implication that “queue jumpers” will not be successful in their rights claim). The Court will also examine whether occupation has occurred on public or private land (as a relevant, although not decisive factor),\(^{40}\) the degree of the housing emergency faced by the unlawful occupiers, “and whether they invaded that land or buildings in a deliberate attempt to disrupt the comprehensive and coordinated efforts of the government to provide access to adequate housing”.\(^{41}\)

These uses of the metaphor must be understood against the background of South Africa’s housing policies. The allocation of housing has been integral to post-apartheid South Africa and its goal of providing redress for the historical, socio-economic and racial

---

\(^{38}\) *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at para 55 (S. Afr.). (per Sachs J.).


\(^{40}\) *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at para 55 (S. Afr.) per Sachs J: (“Unlike private owners, government will generally have other land that it could use to fulfill its obligation in terms of s 26. … Private owners who allow land to become derelict may have no real interest in how it is utilized, while government may have earmarked specific property for housing.”).

\(^{41}\) *Id.*
injustices of apartheid. Registering one’s name for a house is perceived as a “rite of passage”. One commentator describes the “eradication of the housing backlog” as both a political target, and a broader developmental goal. The 1994 White Paper on Housing committed the government to provide housing for all its citizens, mainly through the construction of new houses on greenfield, previously undeveloped land. This scheme has reportedly resulted in the construction of “over 2.7 million homes for South Africans, giving shelter to more than 13 million people”, although those figures are disputed. Who gets a house, where and when, is thus a central terrain of South African politics.

The use of the housing register has been pivotal in these contestations. While the goal of housing provision was initiated in post-apartheid South Africa, many of the housing lists on which the new government relied had already been drawn up during apartheid. In merging these lists and creating new databases, people were asked to fill in a form with details such as ID number, gender, age, and number of dependents, and were given a receipt with the date in which they had registered. The expectation was that this list would work on a “first come first served” basis, and people would be allocated a house

---

43 Discussion with Gauteng NGO, noted in Tissington, supra note 28, at 59 (noting that registering one’s name was “a rite of passage for people when they turn 18”, with no sense of how long they will wait or what options are available to them during this time.
46 RDP refers to the post-apartheid South Africa’s initial Reconstruction and Development Programme of 1994, which transitioned into the Breaking New Ground (BNG) plan in 2004. While the government has reported these figures (available at www.info.gov.au/aboutsa/housing.htm these figures are disputed, with less than 1.44 million state-subsidized properties registered since 1994. See Tissington, supra note 28, at 23.
47 Tissington, supra note 28, at 25.
48 Id. at 25.
when their name made its way to the top. Later, other factors were deemed relevant, such as location; some municipalities also created random selection or “lottery” systems, or discrete application processes for advertised, project-based opportunities. Since 2008, public guidelines have been drawn up to facilitate “fair, equitable, transparent and inclusive selection and housing subsidy application approval processes”, for certain housing applications, although their practical effect has been unclear. Nonetheless, the waiting list, as with other systems of public housing, has continued to be a key mechanism in housing allocations, and a key focus in political contestations.

Into the mix of this legislative and administrative regime has come litigation, and judicial oversight, of the housing programs. Indeed, housing rights claims have vastly outnumbered any of the other economic and social rights as a source of constitutional complaint. In an early case, the Constitutional Court in Grootboom decided that the government had infringed the right to housing, by failing to cater for vulnerable groups in desperate need of housing, as was the claimant, Irene Grootboom, and her community. The Constitutional Court held that the national housing program had fallen short of the constitutional right to housing by failing to “provide for relief for those in desperate need. They are not to be ignored in the interests of an overall program focused on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the

50 Id.
51 Id.
52 Id. at 33 (referring to Department of Human Settlements, Strategy for the Allocation of Housing Opportunities Created through the National Housing Programmes (2008).
53 Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) (S. Afr.).
first instance". Despite this finding of a rights infringement, the Constitutional Court declined to issue an individual remedy, making only a declaration of unconstitutionality that was resolved incrementally by the government over time. The refusal to issue a more substantive remedy to the individual plaintiffs, whose rights were infringed, has been criticized, and yet many within South Africa and abroad have expressed support for the ability of this approach to support long-term, government-led (rather than court-led), reform.

Since *Grootboom*, a number of other anti-eviction and other housing rights cases have been heard by the Constitutional Court, as well as by myriad lower courts. In many cases, courts have ordering negotiated resolutions between the parties (the remedy of “meaningful engagement”) or other procedural methods of redress, rather than issue strong, individual remedies. In *Residents of Joe Slovo*, for example, Justice Yacoob (who had penned the unanimous judgment in *Grootboom*), pressed the relevance of the fact that evictions and relocations were occurring in order to facilitate housing development. Under such conditions, the evictions met the test of reasonableness. Noting

---

54 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 66 (S. Afr.). Priority is given to the needs of the poor: *Housing Act* 107 of 1997 s. 2(1)(a); *Residents of Joe Slovo Community Western Cape v Thubelisha Homes*, [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 350 (S. Afr.).


58 For an examination, see, e.g., LIEBENBERG, supra note 54.

the difficulty in finding for the evictees in that case, Justice Yacoob was implicitly emphasizing the scarcity of housing and fidelity to the existing prioritization of access. This consideration has been criticized, as “inverting the rights entitlements in question in the case, such that the constitutional rights of those not before the Court appear, through the reasonableness test, to ‘trump’ the right to housing of the plaintiffs”. Other members of the Constitutional Court have noted their dissatisfaction with the “either/or” nature of legal title versus the status of “unlawful occupier” in the context of South Africa’s history, and argued for a less “mechanistic” application of property entitlements under a public law, rather than private law, paradigm. On this latter view, the constitutional right to housing is said to usher in (and even compel) a “move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the status quo to a dynamic, typically public-law view of the Constitution as an instrument for social change and transformation.” Yet it is clear that the criticism of “queue-jumping” casts a long shadow over such cases. Before turning to unpack this criticism, let us introduce the use of this metaphor in Canada and Australia.

B. Canada and Health Care Rights

60 JESSIE HOHMANN, THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES 100-02 (2013) (suggesting that the standard of reasonableness moves the right to housing from “a transformative, substantive right, towards administrative oversight of government procedure.” [See also analysis of Kyalami Ridge. 103. And Modderklip]. André J. van der Walt, The State’s Duty to Protect Property Owners and the State’s Duty to Provide Housing: Thoughts on the Modderklip Case, 21 S. Afr. J. Human. Rights 144, 147 (2005).
63 Residents of Joe Slovo Community Western Cape v Thubelisha Homes, [2009] ZACC 16; 2010 (3) SA 454 (CC), Sachs J, para 348; see also Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at para 15 (S. Afr.) (citing Van der Walt (1997)); First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance [2002] ZACC
Queue-jumping in Canadian political discourse takes place in a very different context from South Africa. Rather than a public housing program, the metaphor is used to describe a subversion of the public health care system. The queue is the waiting list established for this publicly-funded care: services deemed “medically necessary” under the Canada Health Act, whose scarcity requires some mechanism for distribution for patients in need.\(^{64}\) Jumping the queue is the act of “purchasing” hospital or physician services outside of the list, such as accessing cataract surgery through a private clinic,\(^{65}\) or otherwise subverting the planned distribution system, such as through accessing the H1N1 vaccine outside of the government approved priority system based on especially vulnerable people.\(^{66}\)

Queue-jumpers are therefore deemed the especially privileged, and/or political influential, in society, those who put a dollar value on their health care, and can act out on

---

\(^{64}\) Canada Health Act, R.S.C. ch. C-6 (1985) (support for “medically necessary” hospital care and “medically required” physician services.

\(^{65}\) A report by the federal Health Ministry on compliance under the Canada Health Act found that “in 2008-9, the most prominent concerns with respect to compliance under the Canada Health Act remained patient changes and queue jumping for medically necessary health services at private clinics”: Health Canada (2009), at 1. Media report in Canada provide examples of “both the success of these private clinics in attracting affluent patients and the consternation of the Canadian public with these clinics. A June 18, 2007 Montreal Gazette news story (“Monro M. Layton Accused of Hypocrisy for Visiting Private Clinic”) criticized Jack Layton, leader of the New Democratic Party, for “jumping the queue” and undergoing hernia surgery at a private clinic. The same story reported that the president of the Canadian Autoworkers union had jumped the queue to get an MRI of his leg.” DONALD A. BARR, INTRODUCTION TO U.S. HEALTH POLICY: THE ORGANIZATION, FINANCING, AND DELIVERY OF HEALTH CARE IN AMERICA (2011)[House of Commons debates, 6521].

\(^{66}\) E.g., Karen Howlett, Anna Mehler Paperny & Dawn Walton, Private-clinic patients jump the line for flu shot, THE GLOBE AND MAIL, Nov. 02, 2009. During the H1N1 flu epidemic of 2009, public health agencies in Toronto and Vancouver were reported to have given several thousand doses of the H1N1 vaccine to private clinics that only treated patients who had paid an ‘annual membership fee’, thus allowing those affluent patients to jump the queue to obtain their vaccines.
that choice, accessing services over others in the wait list, by exiting the program.\textsuperscript{67} The victims of queue-jumping are imagined, not only as the (actually quite small\textsuperscript{68}) proportion of people in the waiting list at any one time, but the long-term sustainability of the “single-tier” model of health care financing in Canada, since evading the queue is perceived as undermining the resources and solidarity that supports public health care. In this respect, queue-jumping undermines the universalist ideals espoused in the Canada Health Act: a statute which “holds a talismanic power over progressive Canadians, and is viewed as the Magna Carta of universal health care”.\textsuperscript{69} The queue is, therefore, recognized as universal: exit from it connotes a breakdown of the justification for public health care, and a break away market.\textsuperscript{70}

Defenders of privatized access to health care do not, of course, see the practice in “queue-jumping” terms. The most well-known manifestation of this defense involved the constitutional challenge mounted by a doctor, Dr. Jacques Chaoulli, and a patient, Mr. George Zeliotis, on the ban by Quebec on private health insurance. Their claim, that the prohibition on private health insurance infringed the right to life and security of the

\begin{footnotesize}
\textsuperscript{67} Alberta launched a Health Care Preferential Access Inquiry in 2012, which found, in the words of the Commissioner, Mr. Vertes, “incidents of improper preferential access … several systemic issues that could foster and environment conducive to such improper access,” However, the inquiry did not find “specific evidence that anyone had been medically harmed” as a result of queue-jumping.: Carrie Tait, \textit{Queue-jumping common in Alberta health-care system, inquiry finds}, \textit{THE GLOBE AND MAIL}, Aug. 21, 2013.


\textsuperscript{69} Colleen M. Flood Aeyel Gross, \textit{Litigating Health Rights in Canada: A White Knight for Equity?, in THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY} (Colleen M. Flood & Aeyel Gross eds.) 79, 84; see also Chaoulli v. Quebec (Att’y Gen) [2005] 1 SCR 791 (Can.) para 15 (suggesting the principles of access underlying Canadian Health Act have ‘become a hallmark of Canadian identity. Any measure that may be seen as compromising them has a polarizing effect on public opinion”, per Deschamps J). Roy J. Romanow, Comm’n on the Future of Health Care in Canada. \textit{Building on Values: The Future of Health Care in Canada} (2002) [hereinafter Romanow Report] had suggested that it enjoyed an “iconic status that makes it untouchable by politicians”.

\textsuperscript{70} E.g., “the growing infrastructure of privatized care may threaten the public system”.
\end{footnotesize}
person, under both s. 1 of Quebec’s Charter of Human Rights and Freedoms, and s. 7 of the Canadian Charter of Human Rights and Fundamental Freedoms, was partly accepted by the Supreme Court of Canada. By a 4-3 majority, the Supreme Court accepted that the health care financing system “forced patients to endure long wait times in the public system, putting their life and personal security in jeopardy” in violation of the Quebec Charter, although only three accepted that an infringement of the Canadian Charter had occurred, thus limiting the national effect of the judgment. The legislative ban on private health insurance was held to infringe the negative rights of Quebeckers, and was overturned. The dissent, on the other hand, noted the inevitability of waiting lists; that “rationing occurs on the basis of clinical need rather than wealth and social status” and that “who should be allowed to jump the queue”, in “a public system founded on the values of equity, solidarity and collective responsibility”, “can and should be addressed on a case by case basis”.

The Chaoulli decision has been criticized as representing an unwarranted judicial intervention in social policy – summed up in one prominent comment as “worse than Lochner”. Under this view, the Supreme Court of Canada committed many of Lochner’s judicial mistakes – overreaching in the judicial role; enacting a theory of economic libertarianism, and, when read in comparison with other contemporary Charter

---

72 Canadian Charter
73 Chaoulli v. Quebec (Att’y Gen) [2005] 1 SCR 791 (Can.).
74 Chaoulli v. Quebec (Att’y Gen) [2005] 1 SCR 791 (Can.), para 224.
75 Sujit Choudhry, Worse than Lochner?, in ACCESS TO CARE, ACCESS TO JUSTICE: THE LEGAL DEBATE OVER PRIVATE HEALTH INSURANCE IN CANADA 75 (Colleen M. Flood et al. eds., 2005).
decisions implicating economic and social rights, suggesting a bias in favor of middle class claimants, over earlier unsuccessful claimants. Added to these criticisms is the quality of the empirical evidence relied on by the majority, in concluding that the presence of a parallel private sector would not necessarily undermine the equality of the public health care regime: as based on a “crude international comparison of health systems” and “amateur judicial tourism”.

Nonetheless, as Colleen Flood has documented, the fact that Chaoulli established only a “negative” right, which was deeply contextualized to the Quebec system, has limited its effect. Similar prohibitions in other provinces remain in force. Moreover, the form of remedy issued in the Chaoulli case – a declaration against the impugned legislation – provided Quebec “with some room for policy maneuver”. In 2006, the province passed an amending statute that addressed the time spent on wait lists. This statute empowered the Health Minister to identify and circumvent long wait lists by implementing alternative procedures, and established a specific market for the sale and purchase of insurance for hip, knee and cataract surgeries. In this latter context, Quebec has also instituted a mechanism by which demand for private health insurance is kept low, by guaranteeing public admission within six months.

76 Auton v. British Columbia (Attorney-General) 2004 SCC 78; Gosselin v. Quebec (Attorney-General) 2002 SCC 84; see Choudhry, supra note 74.
78 Choudhry, supra note 74.
79 Flood, supra note 76, at 95.
81 Some have suggested, however, that the support given to private ownership of clinics and hospitals in this act could form the foundation of a two-tier system for medically necessary care. Daniel Cohn, Chaoulli Ten Years On: Still about Nothing? (unpublished paper prepared for the 2015 Canadian Political Science Association Annual Meeting, Ottawa).
Thus, ten years after the Chaoulli decision, very little appears to have changed. The provincial single-payer universal health insurance plans have continued intact, in large part because any constituency for reform – either private life and health insurance firms, or politicians – appear to have had little incentive to challenge it. Nonetheless, the language of “queue-jumping” continues to be levied against perceived challenges to the universal system, and to broader instances of defiance against the single payer system.

C. Australia and Asylum Rights

In Australia, the queue-jumping metaphor has been a central trope in political debates, deployed by those that support the restriction of access to asylum processing, especially by asylum seekers arriving by boat. The queue is understood to represent the waiting list for the grant by the Australian executive of temporary or permanent visas, based on humanitarian grounds, which are circumscribed by quota. In this political discourse, the practice of queue-jumping is presented as the act of arriving in Australia by boat, forcing the processing of a refugee claim in front of other refugees who have registered with the United Nations High Commissioner for Refugees in camps or other sites abroad.

The queue-jumpers are therefore understood to be desperate people escaping persecution and/or seeking protection (in the last ten years, mainly those from Afghanistan and Iraq). When processed, most asylum seekers have been found to be “genuine” refugees, thus invoking Australia’s obligations under the Refugee Convention. The harm of queue-

---

82 Cohn, supra n 80.
jumping is attributed both to the refugees waiting patiently in camps abroad, as well as the general system of orderly control of Australia’s immigration system. References to “border control” and “border security” are frequently made,\(^{83}\) and the policy to deter “queue jumpers” by “turning the boats around” has deep populist appeal.\(^{84}\)

To be sure, a nation’s immigration policy is substantively distinct from its housing or health care policies, and the beneficiaries are often perceived to be in tension.\(^{85}\) Yet the image of the queue has been ubiquitous to it. Indeed, it is impossible to overstate the resonance of the queue-jumping metaphor in this context, by the Australian media, politicians and public officials (although expressly not by courts). The epithet is used “to pillory [the] opponent’s sense of fairness” and “to denigrate the underserving and disorderly claims for protection” of asylum seekers arriving by boat.\(^{86}\) In this respect, the metaphor invokes the particular hostility directed to boat arrivals (in a nation with no land borders), as opposed to other modes of entry. A long preoccupation of Australian policy, this hostility has increased in the latest, most recent phase of arrivals,\(^{87}\) and indeed, the issue of boat arrivals was pivotal in the re-election of John Howard after the infamous

\(^{83}\) Indeed, in recent times, tying immigration policy to national security has been ubiquitous: see the recently introduced Border Force Squad, introduced by former Prime Minister Tony Abbott (September 2015).

\(^{84}\) Fiona H. McKay, Samantha L. Thomas & Susan Kneebone, ‘It Would Be Okay if They Came through the Proper Channels’: Community Perceptions and Attitudes toward Asylum Seekers in Australia, 10 J. OF REFUGEE STUDIES 1 (2011).


\(^{87}\) Boat arrivals have occupied a particular place in Australia’s politics, and have come in three distinct phases: from the first arrivals from Vietnam in the 1970s (small numbers - accepted), to the second in the 1990s, and the last, latest, and particularly virulent discourse. See, e.g., Phillips and Spinks, Boat Arrivals in Australia since 1976: Background Note (2010).
Tampa incident in October 2001. The two major parties in Australia now agree on a policy of refusing entry to those who arrive by boat, in a policy context which is invariably viewed as under executive control.

Australia is a party to the Refugee Convention 1951 and its Protocol, the central tenet of which is that “refugees”, as defined, have certain rights, including the right not to be “refouled” or returned to a country in which they face persecution by reason of one of the five Convention grounds. Indeed, Australia was one of the key states involved in the design of this Convention, and has legislated its obligations under the Migration Act 1958; its acceptance of refugees numbers some thirteen thousand per year. This is a small number compared with other countries, on a per capita or geographical measure.

In light of the virulence of the populist discourse against “queue jumpers”, Australia has adopted a system of mandatory detention of asylum seekers, and now processes the claims “off-site” through expensive administrative arrangements outside of Australia, such as in Nauru or Papua New Guinea. In these arrangements, all people seeking to arrive in Australia by boat are intercepted and taken to external sites – any asylum seekers found to be genuine refugees under these processes are not permitted to be resettled in Australia. The motivation for this scheme is expressed as a way of “stopping

88 DAVID MARR & MARIAN WILKINSON, DARK VICTORY (2005); FRANK BRENNAN, TAMPERING WITH ASYLUM: A UNIVERSAL HUMANITARIAN PROBLEM (2003).
89 Ref. current Liberal Party and ALP policy.
91 Crock, supra n 90.
92 Migration Act 1958, DETERMINATION OF PROTECTION (CLASS XA) AND REFUGEE HUMANITARIAN (CLASS XB) VISAS 2014 (Section 39A).
the boats”, and removing the incentives that people may have to risk travel to Australia, by refusing any visa at the end of the voyage. At the same time, the Australian government has committed itself to increasing its quota of humanitarian and protection visas, particularly in light of the recent surge in numbers from Syria. Thus, while the size of the queue for entry into Australia has been increased in light of certain events, those who seek to access the queue outside of its terms of entry – namely, boat arrivals – are then barred from it.

II. Unpacking the Metaphor: Distinct Connotations of “Queue Jumping”

The three case studies – housing rights in South Africa, health care rights in Canada, and refugee rights in Australia – demonstrate different uses of the same metaphor, with different understandings of the “queue”, how it is evaded, and who is harmed by the evasion. Yet their comparative analysis helps to shed light of the different values at stake in thinking about rights in terms of queuing distributional systems, and challenges to that system. This comparison is made at the level of discourse, rather than the underlying legal systems or socio-economic policy area.94 South Africa, Canada and Australia have all inherited the English common law system, and yet their legal systems can be distinguished on many relevant grounds – the legal recognition accorded to rights being the most pertinent. South Africa’s post-apartheid Constitution recognizes the most expansive list of constitutional rights, including justiciable economic and social rights; Canada’s Charter of Rights and Freedoms recognizes primarily civil and political rights.

94 The methodology of comparative constitutional law has been growing in sophistication, and multidisciplinarity. I develop a justification for this paper’s methodology in a separate paper: Unruly Comparisons, draft work-in-progress.
at the constitutional level; Australia’s human rights regime is, at best, a patchwork of statutory protections, with the emphasis on parliamentary scrutiny rather than judicial review. Together, these systems have been described as “dialogic”, or “weak-form”, insofar as the courts and legislatures are understood to share a role in enforcing rights.95 While this shared enterprise is highly relevant to the relevance of the popular discourse studied in this paper, the emphasis taken here is on the elements of that discourse rather than on institutional differences. Similarly, the comparative differences of welfare or developmentalist states, that align with different levels of public resources (taxable revenue, and GDP), but also, importantly, different attitudinal beliefs in redistribution political culture, and social and racial cleavages,96 are relevant to the comparison, but are not foregrounded here.

Moreover, as well as the three countries, the three socio-economic policy domains offered for comparison – housing, health care, and immigration – are highly disparate, insofar as they involve, anywhere, differently placed beneficiaries (by class, race and nationality), differently placed decision-makers (municipalities and bureaucracies at the housing level; medical associations, professionals, and bureaucracies at the health care level; and international organizations and bureaucracies at the immigration level); stakeholders (industries, others), and different statutory and administrative frameworks.97 Nonetheless, this paper brackets the differences within each domain to unpack similarities and differences in the queue-jumping complaint.

96 Varieties of capitalism literature; Fraser & Gordon, infra note 99.
97 See, again varieties of capitalism, ESPING-ANDERSON THREE WORLDS OF WELFARE CAPITALISM.
My contention is that distributive allocations, made in conditions of scarcity, are popularly, and often intuitively, understood in terms of queues. If Charles Reich’s earlier analysis of the modern welfare state brought to light a “new property”, where government largess was understood as creating new forms of wealth, upon which he argued beneficiaries should be able to form some sort of reliance, we might say that, in purporting to guarantee individual freedom, “progressively”, the modern human-rights respecting state also creates queues. Reich’s analysis was directed to the rights or statuses that the government had already provided, which, he argued, should be subject to procedural safeguards before removal. We might say that queues – or a person’s place in them – are rights-in-waiting, where a change in allocative priority is perceived as a wrong.

Queues can, of course, be analyzed at a strictly material level, like rights themselves. For example, the origins of social protections are closely associated with societal, economic and political transformations – industrialization and the rise of capitalism, urbanization and population growth. These transformations have resulted in changing conceptions of law, like that proposed by Reich. While these same processes continue to occur, under

---

98 Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich preferred the term “public interest state” but predicted a welfare state was emerging in the U.S. *Id.*

99 The ICESCR requires States Parties to “progressively realize” economic, social, and cultural rights. See ICESCR, *supra* note 2, at art. 2(1). This is in contrast with obligations to “respect” (immediately), civil and political rights under the International Covenant on Civil and Political Rights. ICCPR, *supra* note 2, at art. 2.

100 Giving rise to Goldberg v. Kelly, procedural protections for welfare recipients, entitlement to a hearing [and retrenchments]

101 KARL POLANYI, *THE GREAT TRANSFORMATION* (1944); Francis G. Castles et al., *Introduction, in The Oxford Handbook of the Welfare State* 3 (Francis G. Castles et al. eds., 2010); [Cyber and Dietz, Law and Economic Development.]
the newer conditions of globalization and development, they are also accompanied by a technological surge in the capabilities of government, and the ability to account for everyone, even prospective applicants, in a way previously impossible.¹⁰² That there may be the technology available to create a housing rights register in South Africa, or a health care distribution list in Canada, or (most unlikely) an international register for every refugee that can be strictly controlled by Australia,¹⁰³ lends credence to the discourse of queues.

A metaphor is, of course, not a monolithic concept, and harbors many meanings. It stands in the place of words and engenders many narratives, some of them conflicting. But for a metaphor to “stick”, as a trope of socio-political discourse, it must have immediate intuitive appeal and a cognitive reference point for many.¹⁰⁴ It is thus worth exploring why this is the case, and what is suggested, by the metaphor’s comparative uses. In this section, I posit four separate complaints: of queue jumping via courts, via markets, via corruption and via the deliberate creation of need. As well as giving content to the fairness and/or orderliness claims of queues, these connotations unsettle any straightforward claim that recognizing “positive” rights (or positive obligations) at issue in the queue jumping complaint.

¹⁰² In this way, the rise of indicators is, I suggest, related to new forms of surveillance. For analysis of the former, see, e.g., GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS (Kevin E. Davis et al. eds., 2012).

¹⁰³ With its sea borders, and geographical position, Australia is one of the few countries in which the ability to achieve near perfect control of immigration is a credible goal. Of course, the “queue”, must be administered outside of Australia, although the discourse never entertains a realistic analysis of the capacities of the United Nations High Commission for Refugees or any other global administrative process.

¹⁰⁴ See, e.g., the analysis of successful metaphor in MALCOLM M. FEELY AND EDWARD L. RUBIN, JUDICIAL POLICY MAKING IN THE MODERN STATE 238. For a similar “keyword” analysis, see Nancy Fraser and Linda Gordon, A Genealogy of Dependency: Tracing a Keyword in the U.S. Welfare State, 19 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 309 (1994).
A. Judicialization of Politics

The first target of the queue-jumping criticism is the use of courts. When rights claimants – qua queue jumpers – bring their claims to courts, they are seen as jumping a queue devised elsewhere (by provincial bureaucracies, in South Africa’s case, or by medical experts, in Canada, or by politics and diplomacy, in Australia). Thus, this complaint accords with common understanding of the way in which the adjudication of rights is understood to “judicialize” the complex political decisions that go into the basic question of distribution and redistribution. While judicialization is a criticism that is also made about civil and political rights, it is in the area of economic and social rights that it receives its strongest force. This criticism has been a main source of the long-standard argument against the “justiciability” of economic and social rights, and its strands relate to the distortion of public debate, the usurpation by the judiciary of the role of the elected branches, the inevitable vagueness and indeterminacy of such rights, and the uneven access to the courts as between the poor and middle class. In these terms, queue-jumping becomes a shorthand complaint about accessing courts to deliver rights that have not been decided during legitimate, and accountable, political debate.

105 See, e.g., Canada, [Roach, The Court Party and the Charter.]
109 Octavio Ferraz, Texas Law Review; Landau; Cross, supra note 97.
This is a criticism that has been fully internalized by courts in South Africa. While the introduction of liberal constitutionalism and judicial review was central to the post-apartheid compromise and settlement,110 and the centrality of courts was accepted for the realization of economic and social rights,111 courts have repeatedly felt the need to address the queue-jumping critique. One of the central architects of the new bill of rights, Albie Sachs, has suggested that ways must be found to ensure that those who are successful in their claims for economic and social rights are not those “with the sharpest elbows (and the best lawyers)”.112 In the lower courts, they have done so by defending their choice of review and remedy (usually structural interdicts) in general terms.113 In the Constitutional Court, where these orders have been repeatedly repealed, the Constitutional Court has sought to avoid pitting constitutional rights against each other (the most pertinent example being a refusal to balance the right to property against the right to housing114), and avoid individual remedies.115

In Canada, the original debates against according the Supreme Court judicial review of rights under the Canadian Charter have been resuscitated in the “queue-jumping” guise. The dissent written in the Chaoulli judgment is illustrative. Despite the fact that the decision explicitly referenced queue-jumping as those who access the scarce medical resources outside of the public wait list, it was a dissent focused on the proper role of

---

111 [Haysom, Mureen, cf Dennis Davis]
113 [Mitra Ebahl, describe terms.]
115 (Here I will analyze the Kyalami Ridge, Grootboom, Modderklip and Blue Moonlight cases).
judges and the principle of deference. Although the dissenting judges made a series of comments about the need for support for the principles of universal health care in Canada (which no party had contested), their opinion was taken up mainly with the urgency of keeping courts out of social questions, and involved with legal questions only. Such debates have continued to surface and are unresolved in Canada. The early Charter cases involving support for positive obligations under the right to life in Canada have not been developed, there is a preference for “dialogic” remedies, which avoid the perception of individual remedy. Indeed, unsuccessful cases in court have sometimes changed public opinion in the long run, particularly in the health care scenario.

In Australia, while the refugee issue has been so charged in the partisan-political context, perceptions of the appropriate role of courts, and the use of courts to defend the rights of asylum seekers, have been central to the controversies. Initially, the Federal Court of Australia was an active defender of the rights of asylum seekers under the Refugee Convention and its implementing legislation. The Federal Court had made repeated awards overriding the denial of protection visas from the administrative tribunals below;

116 Chaoulli dissent. Binne and LeBell JJ – would require courts to determine scope of health services and length of wait times – para 163
117 E.g., right to assisted suicide decisions in Canada. Discuss. Most in Canada negative rights – ie. Not interfere with one’s ability to access abortion, consume marijuana, or obtain medical assistance for suicide in face of germinal illness or unbearable suffering.
118 Positive obligation – on life, liberty etc. s. 7. – Gosselin (Arbour and ‘Heureux-Dube dissent),(Flora), … falls within jurisdiction of executive rather than judicialry.; cf Eldridge, s. 15, equality.
119 Little Sister Book and Art Emporium v. Canada (Minister of Justice [2000] 2 SCR 1120, para 258 (Can.) Iacobucci K., dissenting (“Declarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government. However declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuring need for subsequent litigation to ensure compliance” (Cited Flood, 90), see also Roach, preferred remedy for health rights
120 Flood, supra n*.
121 E.g., Crock, supra n*.
122 Crock, supra n *, 60.; Note also the discipline from the Minister to the Refugee Review Tribunal in 1997, forbidding the ‘re-invention’ of the definition of refugee.
and hearing arguments against the developing policies of mandatory detention and offshore processing. However, their role was circumvented by the introduction of a series of privative clauses, which operated to restrict their jurisdiction in such cases.\textsuperscript{123} At this point, the High Court of Australia became the main source of appeal in immigration decisions. Its judgments – particularly in the controversial Tampa incident, but also in cases involving the acceptance of indefinite detention in Australia – have arguably been influenced by perceptions of the appropriate limits to the judicial role.\textsuperscript{124} In cases in which the courts have explicitly recognized the discourse of “queue jumping”, they have rejected it as a consideration to go into merits determinations.\textsuperscript{125}

The answering trope to this discourse lies in the characterization of judicial review in constitutional democracy – that is, that courts are appropriate charged with adjudicating rights, and that a successful claim is the correct application of extant queuing principles, rather than the subversion of them. While it is clear that such justification is less likely to be required in civil and political rights cases (where successful rights claims are more easily understood as protecting the rights of everyone),\textsuperscript{126} there are, of course, queues established by such claims as well – think of \textit{Board of Education v. Brown II}, for example. Nonetheless, answers to this complaint vary in their emphasis on the substance of rights, or the procedures for protection, such as how the protection of discrete and insular minorities,\textsuperscript{127} or other forms of liberty-protecting measures,\textsuperscript{128} or the astute design

\begin{itemize}
\item \textsuperscript{123} Id. Simon Evans, Note, Immigration Law, in Australia, 1 \textsc{International Journal of Constitutional Law} 123 (2003).
\item \textsuperscript{124} Crock, \textit{supra} n&.
\item \textsuperscript{125} \[\text{Refs].}\]
\item \textsuperscript{126} Condorcet’s theorem but complicated through the litigation context – cf. Sen, supra n.]
\item \textsuperscript{128} Dworkin, although cf. Sovereign Virtue; compare with Michelman.
\end{itemize}
of remedies, can circumvent these critiques.¹²⁹ On the more procedural end of these theories, lie conceptions of “destabilization rights”,¹³⁰ as perhaps the most explicit challenge to extant queuing systems.

B. Corruption

The second trope within the queue-jumping complaint - “queue jumping” as corruption – is important to unbundle from the arguments addressing courts, although insofar as the judicialization criticism is suggestive of entirely indeterminate rights, and arbitrary decision-making, they are both related to a concern with the integrity of the rule of law. Nonetheless, the queue-jumping as corruption complaint is associated only tangentially, in our case studies, with those claiming rights. Instead, it is the perception that a person is gaining illegitimate access to goods and services, in a context in which access may be a legal privilege, but one subject to waiting and other criteria. The corruption takes the forms of money payments to officials or others, or other forms of illegitimate influence.

In South Africa, allegations and perceptions of corruption have beleaguered the housing delivery system, which has been administered by provinces in ways open to abuse.¹³¹ It is thus a criticism that is targeted at government administrators, at the same time as various

¹³¹ There is a current shifts from provincial departments to accredited municipalities: see Tissington, supra note 28.
measures have been set up to control inappropriate land squatting.\textsuperscript{132} During the auditing of one list, for example, “it was discovered that 50% of beneficiaries ID numbers were invalid, while 65% did not match the applicants’ records.\textsuperscript{133} The discourse takes place against the backdrop of a recognized problem with official corruption in South Africa, which is widespread and widely reported.\textsuperscript{134}

Allegations of queue jumping as corruption would seem to be far afield in the more stable democracies of Canada and Australia; nonetheless the sense of an inappropriate subversion of general principles is apparent in each system, such as during the H1N1 vaccine scandal in Canada,\textsuperscript{135} where hockey players were given preference for access to a vaccine, before people deemed especially vulnerable and thus placed in priority in the medical wait list. In Australia, the perception of boat arrivals as “illegals”, who pay people smugglers to arrive by boat,\textsuperscript{136} is tied to both ideas of system corruption, as well as market.

It is an open question as to whether queues are peculiarly open to corruption, as opposed to other forms of political distribution. Certainly, attempts to replace queuing systems with lotteries, or randomized placements, are also besieged by administrative difficulties.\textsuperscript{137} Nonetheless, the perception of queue jumping as corruption is a

\begin{itemize}
\item \textsuperscript{132} Id. These practices are monitored by Anti-Land Invasion Units, which draw on the rhetoric of the “queue” to justify evicting people from the land, houses or buildings they occupy.
\item \textsuperscript{133} Id. at 61 (citing Gauteng Department of Local Government and Housing, ‘A Call to Update Your Details on Demand Database’, Press release, May 21, 2009).
\item \textsuperscript{134} Margot Rubin, \textit{Perceived Corruption in the South African Housing Allocation and Delivery Programme: What It May Mean for Accessing the State}, 46 J.ASIAN AND AFR. STUD. 488 (2011).
\item \textsuperscript{135} [Alberta inquiry, \textit{supra} n 67.]
\item \textsuperscript{136} Note the commentary on UNHCR processes
\item \textsuperscript{137} [Eg, in South Africa]
\end{itemize}
particularly corrosive one. Whether they be in housing, or health care, or immigration, queues distribute scarce goods, and in doing so, enact the kind of “tragic choices” that Philip Bobbitt and Guido Calabresi have analyzed. In such choices, the values of honesty and equal treatment must be especially safeguarded, since honesty and fairness represent the “structural premises designed to moot, or at last set the terms of, any particular ordering of preferences”. When they are undermined (by corruption, or by the perception of it), the present ordering or goods and opportunities is undermined, but so, too, are future attempts to do so.

C. Marketization

The third connotation of queue-jumping relates to the availability of market access to the good or opportunity in question. Indeed, for political theorist Michael Sandel, the subversion of queues is as a quintessential example of the growing role of markets in society. He emphasizes the associations between queue-jumping and privilege: “It has long been known that, in fancy restaurants, a big tip … can shorten the wait on a busy night”. Queue jumping by purchase adds to “the advantages of affluence” and consigns “the poor to the back of the line”.

Economists have favoured both queues and the permissibility of queue jumping, for the reason that combining the two forms of allocation can be efficient. In principle, the queue

---

139 MICHAEL SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012) 17
140 Id., 20.
allocates goods according to willingness to wait whereas markets allocate goods according to willingness to pay. It follows that the queue discriminates against those with less time while the market discriminates against those with less money.\textsuperscript{141} In economic theory, then, a queuing system, which operates with a secondary market (for, e.g., scalping), can be defended on efficiency grounds.

The use of dollars to provide access outside of the queue is the main trope in our Canadian example.\textsuperscript{142} Health care specialists note that, with a growing demand and infrastructure of private care, the public system may be threatened.\textsuperscript{143} It will be recalled that the main criticism of Chaoulli was the method by which the Supreme Court upheld a challenge to a universal social program, in which the legal and practical inability to opt out of waiting lists – that is, the mandated queue – was a central requirement. Nonetheless, the regulation of physicians seeking to provide privately funded care outside of the system, or of patients seeking access, is both difficult, and, suggests Colleen Flood, politically thankless in recent years. Patients have paid to access private health care services abroad, thus weakening the argument against allowing internal private services in Canada.\textsuperscript{144} And patients rights litigation has been replicated across other litigation in other provinces, such as Alberta and British Columbia, with Chaoulli being seem as “the first battle in a larger campaign” to create opportunities for private financing of medically necessary care.\textsuperscript{145} The queue-jumping metaphor is utilized as a progressive defense of

\begin{footnotes}
\footnotetext[141]{Id., 32.}
\footnotetext[142]{Lisa Gregoire. \textit{Alberta's hybrid public-private 'third way'}, 174 CMAJ: CANADIAN MEDICAL ASSOCIATION JOURNAL 11 (2006).}
\footnotetext[143]{See arguments in Chaoulli; Romanow Report, supra note 68.}
\footnotetext[144]{Note case.}
\footnotetext[145]{Flood, supra note at 83.}
\end{footnotes}
universal health care amidst the “common perception that Canadians face unacceptable wait times for health care, and that the panacea is to allow private financing of medically necessary care”. Thus, perceptions of the illegitimacy of queue-jumping in this context are mixed. As the consumerist orientation of the modern state increase, the legitimacy of queue-jumping in this sense, by market, may become more acceptable, and the metaphor may lose its local resonance.

In South Africa, the market for an earlier place in the public housing queue is often inseparable from the corruption criticism (just as, in Australia, the payment of people smugglers is seen as a sign of corruption); nonetheless, there is an additional role for the market, which takes place when those who have been allocated subsidized houses (who are prohibited from selling their home for 8 years) pass on the houses to those who can pay a higher amount. These sales, which often go unregistered, fuel community perceptions of corruption in allocation, but also press upon fears of “downward raiding” of public housing by richer individuals who have the means to pay. According to utilitarian principles of welfare and choice (that is, sale on the basis of the utility of individual buyers and sellers), these sales may appear perfectly legitimate.

As Sandel notes, markets may have their appropriate place in social allocations, however he suggests corruption may occur when markets are based on inappropriate goods. He gives the example of the line-standing industry on Capitol Hill, which is an extension of the lobbying industry. The public is given the opportunity to stand in line to participate:

---

146 Id.
nonetheless, professional line-standers are hired by lobby groups, who sell those places to industry. This practice, suggests Sandel, is not illegal, nor is it non-transparent, but “degrades Congress by treating it as a source of private gain rather than an instrument of public good.”\textsuperscript{148} This is, Sandel suggests, an indication that “market values are corrosive of certain goods but appropriate to others”.\textsuperscript{149} The appropriate question in this respect is whether substantive claims of “rights” help to draw this distinction. Certainly, in this respect, any presumption that a negative conception of the obligations correlative with rights is more important than positive ones must be interrogated.

\textbf{D. Misappropriation of Needs-Based Criteria}

Finally, there is a sense in which queue-jumpers are those who have misappropriated otherwise legitimate criteria – of desert, for example, but especially in the context of housing, health care, or refugee rights, of need – and are therefore moving up the system of allocation illegitimately. Again, there are links to perceptions of “corruption”, but the argument is separate and has a particularly disempowering effect on rights claimants.

First, in South Africa’s example, the queue-jumper is the homeless person, or squatter, whose very neediness and vulnerability grounds their claim for housing, or to the anti-

\textsuperscript{148} \textsc{Sandel}, supra n 8. 34–35.
\textsuperscript{149} \textit{Id.} at 35. “The existence of socially acceptable limits to queue-jumping suggests a widespread public acknowledgment that there are spheres of culture where the queue is recognized as a better way to distribute resources than the market. The court hearing, the doctor’s surgery, and the supply of aid in an emergency, for example, remain situations where the queue still seems the fairest and, indeed, the only appropriate means of allocation. But these socially constructed limits—the hegemonies of queuing ethics—remain fluid.”
eviction protections accorded by the state.\(^{150}\) In a sense, the queue-jumper is perceived as racing to the bottom of the needs-based hierarchy in order to be first served. There is an assumption of active agency by the queue-jumper, and a selfish disregard for others who are waiting patiently in the system. In the Australian case study, the boat arrivals are perceived as risking life and limb inappropriately, rather than waiting their turn. While there is literature in international refugee law that suggests asylum seekers are denied their agency,\(^{151}\) the hypothesis here is that it is at the moment that they assert agency that their claims become so unpopular.

This criticism is directed to individuals, but it also has collective appeal. For example, in South Africa:

“If an organized community takes initiative, or wins a court case, then the public system is not very adept at being responsive to a departure from the ‘waiting patiently’ (for your name to come up on a waiting list) mentality. It could be said that this mind set has actually disempowered people over the last fifteen years or so, as it has undermined some community’s ability or will power to get on with it themselves. In contrast, some of the social movements stand in contrast to this (‘nothing for us without us’)”\(^{152}\)

\(^{150}\) Prevention of Illegal Evictions Act of 1998 (PIE Act) §§ 4, 6 (S. Afr.).


\(^{152}\) Royston & Eglin, supra note 30, at 4-5.
In this way, the waiting list stands in as a “tool of political and social control”\textsuperscript{153} in housing delivery, no less than in asylum claims. In this way, queue-jumping may be seen as a “blame frame” that is used by those who must be passive in the face of inequities of others;\textsuperscript{154} but one that is peculiarly hostile to the political agency exercised by unpopular groups – in comparison with common tropes of “welfare queens” or “dependents”, which invoke passivity, rather than agency, as the source of blame.

\textit{III. Problematizing the “Queue”}

There is thus, as we have seen, a number of differently perceived wrongs – by courts, administrators, markets, or claimants – that give rise to the queue-jumping complaint. Yet a discourse of rights – focused on duties on the state to respect, protect, and fulfill them – would signal certain avenues for redress. The queue is maintained as a respectable, transparent, mechanism for distribution, but is dispensed with in respect of exceptional needs, much like an ambulance is allowed to bypass others vehicles and traffic signals. Even informal queuing systems internalize some criteria for permitting queue jumping, and, depending upon the stakes involved, the criteria may be notably

\textsuperscript{153} Tissington, \textit{supra} note 28., at 58. There is a related fear by some that the ‘so-called database’ may be used as evidence in court to evict people by claiming that people are “queue-jumping”. \textit{Id.} at 62.

\textsuperscript{154} Jon D. Hanson & Kathleen Hanson, \textit{The Blame Frame: Justifying (Racial) Injustice in America}, 41 HARV. C.R.-C.L. L. REV. 413 (citing in particular Melvin J. Lerner & Dale T. Miller, \textit{Just World Research and the Attribution Process: Looking Back and Looking Ahead}, 85 PSYCHOL. BULL. 1030 (1978); (social psychology of understandings of fairness that is upheld through blaming victims of inequities and excuses perpetrators or passive observers).
lax. Nonetheless, if too many exceptions are made, support for the queue is eventually undermined. In this way, rights and queues have a parasitic, but contradictory, relation.

Yet it will be seen that the focus on queues conceals many of the more important questions about the socio-economic distributions at stake. In this sense, instead of providing a straightforward mechanism for distribution in conditions of scarcity, and providing order to such distribution, the queue serves to distract from highly relevant – and political – questions of rights, access to material goods and services, and distributive justice. This [developing] section examines how, in cases of housing, health care, and refugee claims, the queue obfuscates rights at the same time as it draws attention to them.

There are, for example, initial questions made about the production of scarce resources (how many houses? how much health care? how many humanitarian visas?) that involve population-wide, resource decisions that are rendered invisible to those focused on “the queue”. These we might call the first order decisions, which are left uncontested. There are also other issues, and competing beneficiaries, that are avoided by a focus on queues, such as, for example, mortgage subsidies in housing, social determinants and health, or

---


156 E.g., Calabresi & Bobbitt, *supra* note 128 (noting that, in confronting any decision about a scarce good, society must first ‘decide how much of it will be produced, within the limits set by natural scarcity, and also who shall get what is made’, triggering a ‘succession of decision, rationalization, and violence’. Id. at 19.
entrants who overstay their visas.\textsuperscript{157} In such cases, the queue offers a category of thought – supported, if not imposed, by the state\textsuperscript{158} - which obscures the stakes of distributions and the effect on rights.

\textit{A. Housing Allocations}

Discourses on the right to housing can become dominated by perceptions of a housing queue, and of opportunistic breaches of this queue. And yet the queue is the veritable tip of the iceberg in the distributive and redistributive decisions that are made about the allocation of public-subsidized housing. The housing waiting list represents a small fraction of the decisions made about housing, and can only represent the number, in South Africa just as elsewhere.

As a right, housing represents a safe and secure space that shields one from the elements and provides refuge from external physical threats. Housing provides a material base from which to build a livelihood and take part in the life of the community. And it provides a space where psychological needs can be met.\textsuperscript{159} But the right to housing can be realized by a fixed dwelling – the right to a house – or a service – the right to accommodation (with some security of tenure).\textsuperscript{160} There is an irrepressible social aspect

\textsuperscript{157} Such questions also apply to the structure of private law: see, e.g., Duncan Kennedy and Frank Michelman, \textit{Are Property and Contract Efficient?}, Hofstra Law Review: Vol. 8: Iss. 3, Article 10 (1980) (and issue avoided in South Africa: see e.g., van der Walt, \textit{supra} n.\textsuperscript{..}

\textsuperscript{158} Like Pierre Bourdieu, we may simply find out that “one of the major powers of the state is to produce and impose … categories of thought that we spontaneously apply to all things of the social world – including the state itself”. Pierre Bourdieu, \textit{Rethinking the State: Genesis and Structure of the Bureaucratic Field}, 12 SOC.THEORY 1 (1994).

\textsuperscript{159} HOHMANN, \textit{supra} note 59 at 4-5.

\textsuperscript{160} Housing, in welfare State Handbook.
of the right to housing – that is, the spatial relationship of the home to other houses, workplaces, schools, shops, and web of social relations is important.\textsuperscript{161} The notion of a queue limits all of these possibilities.

Indeed, it also limits claims. The discourse of housing rights can extend to the issue of women’s exclusion from holding property rights,\textsuperscript{162} or of the restitution interests of internally displaced persons.\textsuperscript{163} Advocates of the right to housing take issue with forced evictions, but equally on the other, myriad, forms of insecurity of tenure, and of population pressures and movements.\textsuperscript{164} None of this is addressed by the focus on the queue.

For example, in South Africa, since at least 2001, there has been a decline in state-subsidized housing delivery and a shift towards informal settlement upgrading and the provision of subsidized rental housing. In situ housing projects or area-based projects result in changing the criteria for allocations, making location a more important criteria than waiting time. In temporal terms, waiting lists are turned to after a housing project is identified for development, and has been developed, thus diminishing the importance of the list in first-order decisions. Added to this are the other unavoidable political realities:

\textsuperscript{161} JIM KEMENY, HOUSING AND SOCIAL THEORY 159 (1992); HOHMANN, supra note 59 at 27 – particularly important in resettlement, where alternative accommodation has been constructed for evictees or those subject to voluntary relocation. See also Kyra Olds, The Role of Courts in Making the Right to Housing a Reality throughout Europe: Lessons from France and the Netherlands, 28 WIS. INT’L L. J. 170, 190.

\textsuperscript{162} HOHMANN, supra note 59 at 39 (noting small attention to housing in CEDAW “women’s exclusion from the home as a matter of law and the simultaneity of this exclusion with women’s profound connection to the home in ideology and practice”).

\textsuperscript{163} Id. at 1.

\textsuperscript{164} Id. at 23
there are area-specific upgrading agendas;\textsuperscript{165} housing implementation is supply driven;\textsuperscript{166} and the strategy of creating “mixed” neighborhoods is a recognized feature for creating long-term stability and sustainability of housing projects.\textsuperscript{167}

Moreover, the waiting list itself creates its own problems of administration: it does not cater for the growth and split of families over time; and it accommodates other special needs or other criteria in often uncertain ways; there are practices of “multiple” waiting lists,\textsuperscript{168} and “gaps” in the purportedly transparent program have been reported in terms of identifying beneficiaries, screening beneficiaries, deploying the appropriate criteria, and educating beneficiaries.\textsuperscript{169} In the large province of the Western Cape, for example, more than half of the households on the waiting list who are living in informal settlements have been on the list for five or more years.\textsuperscript{170} Housing allocations are thus the mirror side of evictions policies. These latter decisions are made on the basis of a “special cluster of legal relationships” between the municipalities and the residents of its jurisdiction, which “possess an ongoing, organic and dynamic character that evolves over time”.\textsuperscript{171} In such cases, a “one-fits-all solution in eviction cases is not only unworkable but also unacceptable”.\textsuperscript{172}

\textsuperscript{165} Royston & Eglin, supra note 30, at 58.
\textsuperscript{166} Tissington, supra note 28, at 59.
\textsuperscript{167} Mixed Neighbourhoods and Cities article
\textsuperscript{168} Rubin, supra note 124; Tissington, supra note 28, at 77.
\textsuperscript{169} For example, priority is also generally reserved for a special needs category - such as the disabled, child-headed households, the aged, and destitute military veterans - with each housing project reserved some percentage (such as 5%, in Gauteng’s case) for households in this group.
\textsuperscript{170} Tissington, supra note 28, at 27-8.
\textsuperscript{171} Residents of Joe Slovo Community v. Western Thubelisha Homes, 2010 (3) SA 454 (CC) (per Sachs J at para 343. – ie. Right to electricity. See LIEBENBERG, supra note 54.at 564.
\textsuperscript{172} Blue Moonlight Properties, para 64. Masipa J. Liebenberg, joinder, 566
In a representative example, the Alexandra Renewal Project in Johannesburg departed from the waiting list approach to a “block-by-block” allocation strategy, with a result that “reprioritized limited resources from one poor group to another… The housing waiting list approach meant that it would be primarily old residents who were on the waiting list who would benefit, but the block by block approach changed this completely by benefiting primarily shack dwellers and excluding and frustrating those who had been on the waiting list”. Moreover, of course, the decisions to switch to informal upgrading or alternative tenure arrangements are also made in the context of deciding how many houses are being built: a first order decision that is recognized, but a less constant source of complaint.

B. Health Care Allocations

The allocation of health care is similarly oriented to a myriad of decisions that are hidden by the queue-jumping metaphor. Indeed, the metaphor panders to the bias in thinking about health in curative, treatment, terms. Yet as analysts are quick to point out, the background questions of inequality, and the social determinants of health – access to education, food, water, etc – play a largely role in determining the justice of the overall system and its distribution of health.

---

174 Tissington, supra note 28, at 68 (citing interviews).
In Canada, the health care wait list is a fractional component of the decisions made about the realization of health rights. Three issues, arguably more central to the realization of such rights, relate to the decision as to what is, and what is not, included in the publically financed system; as well as how the large private market is regulated, and how the social determinants of health are addressed. First, the demarcation of what should be publically funded “medically necessary” hospital care and “medically required” physician services is annually negotiated at the provincial level, by Health Ministries and Medical Associations, but these negotiations are primarily limited to costs rather than what aspects of care and services are to be included or excluded. This preserves the status quo, a default.176 Secondly, despite perceptions to the contrary, Canada is only nominally a “single payer” system, with 30% of health care privately financed, and 65% of Canadians holding private insurance for such services as prescription drugs and dental care.177 Thus, when not deemed medically necessarily, treatment is “left largely to the free market to determine who has access, leading to serious inequalities in access and quality of care”, in areas like access to pharmaceuticals, and dental care. “Peering beyond the boundaries of what is deemed, somewhat arbitrarily, to be medically necessary, one finds profound inequalities, with vulnerable populations denied access or receiving sub-standard care”.178 Thirdly, the question of public spending across a range of social services vital to health, such as the provision of water and sanitation, is barely registered as a health-related decision. These social determinants are thus missed.

176 Flood, supra note at 83 at 79; Aeyal Gross, Is there a Human Right to Private Health Care?, 41 J.L. MED. & ETHICS 138, 143 (2013) (“in every country there is in reality a two-tier system, but the specter of ‘an unacceptable two –tier system’ may be significantly lessened if a comprehensive range of health care services in included in the publicly funded basket and if it is ensured that the quality of services is at a level acceptable to the majority of society”)
177 Flood, supra note 83 at 79 (providing comparative examples).
178 Id. at 81.
Why Canadian debate over equitable access to health care centers not on these issues (the lack of comprehensiveness of public coverage, inadequate regulation the private sector, and broader socioeconomic inequalities) but instead on aspects of the “single-payer” system is another feature of the resonance of the queue jumping metaphor and its intrinsic appeal.

C. Asylum-Seeker Processing

In Australia, the queue can be seen to obscure the fact that “states allow for more mobility across their borders than they prevent”.179 This section will draw on data to show how many of the first order decisions on immigration are made outside of the refugee debate; just as many of the applicants for asylum are produced, not by the attractiveness of the good in question (access to Australia), but by “push” factors such as civil war, conflict and poverty.180 Nonetheless, the grounds for distributional decision making in this context are very different from the bounded contexts of access to national housing or health care, discussed above. [This requires development.]

Conclusion: Putting the Queue in its Place

179 VIGNESWARAN, supra n *, 109.
180 A case study of the attempts to produce a European-wide response to the surge in asylum seekers from Syria, as against individual country’s determinations, may be included here.
In the age of rights, the queue is seen to represent a system in which legitimate claims are ordered, and rendered orderly, by a recognizable system of allocation. And yet when people seek to access their human and/or constitutional rights, through making claims upon the state, they are often perceived as “queue-jumpers” who are contravening the norms of the queue, conflicting with extant allocative schemes, and dislodging the claims of others waiting for the same resources and opportunities. Rights in modern states both give rise to queues, and yet are invoked discursively to both unsettle present queues, and to admonish those who attempt to do so.

This contradictory result may be seen as distinct from the perceptions of the liberty-affirming politics that arise by claiming and litigating other human rights: one person’s guarantee of free speech is thought to assist the free speech of others, not unsettle or rival it. It was TH Marshall’s thesis that a grant of social rights would lead to an ever-widening protection for the social rights: such that one person’s guarantee of social security would lead to the social security of others. But in the queue jumping discourse, one person’s recognition of right can do precisely the opposite. There are a range of reasons why this is the case. This paper has sought to unsettle the metaphor of “queue jumping” in the three examples of housing rights in South Africa, health care claims in Canada, and asylum claims in Australia. This has revealed very different complaints housed by the metaphor: against courts, administrators, markets and claimants themselves. These complaints – of judicialization, corruption, marketization and a misappropriation of needs-based criteria of allocation – have been unbundled and addressed. A sophisticated

---

discourse of rights, with correlative duties to respect, protect, and fulfill, is a potential rejoinder, to co-exist with basic principles of administrative fairness and administrative law. Yet to treat the queue at face value is to overlook its deceptive appeal. The first order distributional decisions that force some in queues and allow some to exist outside of them, are also appropriately part of our understanding of rights. Of course, one may question the pursuit of rational answers to metaphoric conceptions arguably immovable by logic. Yet I suggest that analytical attention can explain the different sources of the power of the metaphor, and therefore different sources of redress.