Constitutional Shoehorning

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Abstract

Constitutional shoehorning refers to a litigant using a constitutional provision that addresses one type of concern to advance a different type of concern. A litigant that seeks to protect their rights by bringing a challenge under a federal division of powers provision is an example. This article makes three arguments in relation to the concept. First, it is an understudied and distinctive move in constitutional argumentation and adjudication, different from implications and strained interpretations. Although challenges can arise when trying to identify instances of constitutional shoehorning, they are surmountable in most cases. Second, it has both positive and negative attributes. Third, it is an important feature of Australian constitutional law due to the absence of a bill of rights.

I Introduction

For a litigant seeking to protect a particular interest, there is sometimes more than one constitutional path to success.[1] There may be an obvious path. A litigant wants to protect access to their house from a law that purports to restrict access for national security reasons.[2] They could challenge the validity of the law under a constitution's right to shelter. But that path might be foreclosed for any number of reasons. The right might be limited in relation to national security or there might be precedent that suggests the law complies with the right. As a result, the litigant might get creative and look for a less obvious path. They may try to challenge the validity of the law under a provision that is concerned with the allocation of power between the two levels of government in a federation. If a court holds, for instance, that the law exceeds the central government's power to enact laws with respect to defence, the

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1 There may also be non-constitutional paths. For example, it may be possible to succeed on a common law ground when a statutory ground fails: see, eg, *Momcilovic v The Queen* (2011) 245 CLR 1. The focus of this article is on the different constitutional options open to a litigant.

2 The following is a hypothetical example. However, as will be illustrated in Part IV of the article, it bears some similarities to real world examples of constitutional shoehorning in Australia.

litigant may be able to protect access to their house with a provision that appears not to be concerned with shelter.

This article studies the phenomenon of shoehorning one interest into a constitutional provision that appears to be concerned with a different interest. It argues that constitutional shoehorning is a distinct move in argumentation and adjudication, different from, for instance, implications and strained interpretations of provisions. There are challenges in identifying instances of constitutional shoehorning because it requires identifying the concern of the litigant and the concern of the provision. However, the article suggests that these challenges are surmountable in many, if not most, cases. The concept merits discrete analysis because it comes with a unique set of benefits and costs. For example, it assists with the enforcement of constitutional provisions that might otherwise be left underenforced. But it can also make the situation worse for future litigants in analogous positions because the scope of protection for the litigants' interest depends on factors that are not related to that interest.

The article argues that constitutional shoehorning is an important feature of Australian constitutional law. Without a bill of rights,[3] litigants seeking constitutional protection for their rights must generally get creative, with constitutional shoehorning being a prominent form of creativity.[4] We observe, for example, litigants seeking protection for freedom of religion by bringing constitutional challenges under executive spending provisions,[5] litigants seeking protection for Indigenous rights by bringing constitutional challenges under the head of Commonwealth legislative power with respect to 'aliens',[6] and litigants seeking protection from post-sentence detention regimes by bringing constitutional challenges under provisions for the investiture of federal jurisdiction in state courts.[7] As a result, constitutional shoehorning shapes our understanding of whether and, if so, how the *Australian Constitution* protects individuals.

Part II unpacks the concept of constitutional shoehorning, starting with a history of the term and understandings of it in the Australian literature, before explaining how it is different from other constitutional concepts and the challenges in identifying instances of it. Part III evaluates the concept by considering the benefits it brings and the costs it introduces to a constitutional system of government. Part IV provides four case studies of constitutional shoehorning in Australia. The purpose of these case studies is to illustrate how it is possible to identify instances

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3 Even if one is of the view that Australia has a constitutional bill of rights due to the presence of, for example, ss 51(xxxi), 80, 116 and 117, it is at most a partial one that is narrow in scope and substance: Rosalind Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14(1) *International Journal of Constitutional Law* 80, 81.

4 Another prominent form of constitutional creativity in the Australian context is where litigants argue for the creation of an implied rule or principle that results in the protection of their interests. The implied freedom of political communication is the most well known example: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

5 *Williams v Commonwealth* (2012) 248 CLR 156 ('*Williams No 1*'). For further discussion of this case, see below Part IV(B).

6 *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*'). For further discussion of this case, see below Part IV(D).

7 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'). For further discussion of this case, see below Part IV(C).

despite the challenges mentioned in Part II and to demonstrate the benefits and costs set out in Part III.

II The Concept and Its Complications

Constitutional shoehorning refers to the invocation of a constitutional provision directed to addressing one type of concern as a means of addressing a different type of concern. If, for instance, a litigant sought to protect their right to free speech by alleging that a statute violated a procedural provision dealing with the capacity of a legislative chamber to amend proposed legislation that has financial implications, we could say they shoehorned their rights claim into that procedural provision.

The term can be traced back to the United States where it has been used to identify the tendency of structural claims to be shoehorned into individual rights provisions. For example, Pamela Karlan has observed that the Supreme Court has a 'tendency — perhaps [a] need — to frame questions of constitutional structure in terms of claims of individual rights'.[8] The reason, she argued, is the requirement of standing:

> [B]ecause constitutional standing depends on a plaintiff's ability not only to show that she has suffered a 'concrete and particularized' injury, but also that that injury is likely to be 'redressed by a favorable decision,' those lawsuits must involve constitutional provisions that produce remedies for the individualized injury. The upshot is that *questions of constitutional design and structure have gotten shoe-horned into the most individual-centered constitutional provisions*.[9]

Baker v Carr,[10] where 'the Supreme Court held that challenges to state legislative apportionment schemes were justiciable under the "well-developed and familiar" standards of the Equal Protection Clause', and *Caperton v Massey Coal*,[11] where a challenge to campaign financing of judicial election campaigns 'was framed as a case about the constitutional rights of litigants', are cited as examples.[12]

In Australia, scholars have observed the process occurring in the opposite direction whereby individual rights claims are shoehorned into structural provisions. David Hume and George Williams observe that one way in which rights are protected in Australia is 'where the effect of a constitutional provision or doctrine is sometimes to protect individuals, but that is not its intention: the protection of individuals is at best a happy coincidence'.[13] Similarly, James Stellios notes that 'the [High] Court on [some] occasions has seen constitutional provisions that at first sight seemed only to be concerned with the distribution of power as providing some sort of constitutional guarantee'.[14] Finally, Geoffrey Kennett argues that one 'method of

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8 Pamela S Karlan, 'Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century' (2010) 78(4) *UMKC Law Review* 875, 877.

9 Ibid 877–8 (citations omitted) (emphasis added).

10 *Baker v Carr*, 369 US 186 (1962).

11 *Caperton v AT Massey Coal Co Inc*, 556 US 868 (2009).

12 Karlan (n 8) 878, 880.

13 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 114.

14 James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 704.

enhancing the protection of rights is to discover guarantees in provisions of the *Constitution* that do not at first sight appear to be concerned with conferring rights'.[15] All three sets of authors cite the High Court's case law on s 109, which is one of the case studies discussed below, as an example.

While the concept is, therefore, familiar in Australia and elsewhere, its complications and implications are understudied. The difficulties in identifying instances of constitutional shoehorning as well as its positive and negative attributes have generally not been considered in detail.[16] The rest of this article is directed to studying these aspects of the concept at greater length.

A *Causes*

Constitutional shoehorning occurs when a litigant faces some impediment to bringing a non-shoehorned constitutional challenge to a government act or law. A litigant wants to protect their rights, but the constitution contains no bill of rights. A litigant wants to stop what they believe to be an exercise of judicial power by the executive arm of government, but they do not have standing to bring a challenge under the separation of powers provisions. A litigant wants to claim the legislature in a federation does not have authority to enact a particular law, but there is precedent that suggests the legislation does fall within the scope of that jurisdiction's authority. They therefore decide to get creative. There are many forms of constitutional creativity. They could, for instance, seek to imply a new rule into the constitution or overturn an unfavourable precedent by proposing a novel approach to constitutional interpretation. Another — and the focus of this article — is to shoehorn their claim into a part of the constitution that addresses a different type of concern.

Constitutional shoehorning is especially likely to occur when courts are willing to entertain arguments in the alternative. When a litigant does not need to pick between possible pathways to success, it is possible for them to make both the more obvious and the less obvious arguments in favour of their position. The main challenge for the litigant is to uncover all the arguments that are plausible and will potentially produce an outcome that protects their interests.

In Australia, the absence of a constitutional bill of rights is a causal factor. There are individuals who will seek constitutional protection for their rights even though the document contains no general bill of rights.[17] Put another way, the absence of constitutional rights does not mean there is an absence of demand for rights protection. That is especially the case if the individual is particularly motivated to vindicate their rights — for example, if they are imprisoned and have little or nothing to lose by prosecuting every possible argument for their release, or if they are particularly passionate about the subject associated with the right. In these circumstances, the absence of a bill of rights requires the litigant to consider how the *Constitution*'s provisions that do not appear to be directed to the protection of rights can nevertheless be used to achieve that outcome.

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15 Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19(3) *Melbourne University Law Review* 581, 585.

16 George Williams and David Hume do note that it is not a particularly stable way of protecting rights, but do not go into detail as to why that is the case: see Williams and Hume (n 13) 114.

17 See, eg, the case studies discussed below in Part IV.

B *Distinctiveness*

One question that potentially arises in respect of constitutional shoehorning is its relationship to other forms of engagement with the *Constitution*, such as implications and strained interpretations. In its sharpest form, the question can be posed as a challenge to the very existence of the concept: is constitutional shoehorning any different from these other forms of engagement? For instance, if a right to a fair trial is shoehorned into a separation of powers provision, one might say the right to a fair trial is now an implied constitutional right.[18] Alternatively, one might say the separation of powers provision has been interpreted in a strained manner to protect that right.[19]

While constitutional shoehorning can overlap with implications and strained interpretations in some circumstances, it does not in other circumstances because they are directed to achieving different objectives. In comparison to constitutional shoehorning, implications and strained interpretations are not necessarily seeking to have a provision (or set of provisions) address a novel type of concern. A litigant seeking to develop a new implication might be seeking to expand the ways in which a provision addresses an existing concern. For instance, if a set of provisions are directed to protecting the integrity of the electoral process, a litigant might seek to imply from those provisions a requirement that the electoral commission be independent from the government. That would not be considered an instance of constitutional shoehorning because it is not seeking to address a different type of concern — the implication of electoral commission independence is also about the integrity of the electoral process. Similarly, if one adopted a strained interpretation of a provision requiring the electoral process to be conducted with integrity to mean that the electoral commission must be independent from the government, it would not be an instance of constitutional shoehorning.

Constitutional shoehorning is also distinguishable from constitutional workarounds. The latter term has been used in the United States and Canada to describe attempts to circumvent limits imposed on government by a constitution — for example, to install a new person as President of the United States before 20 January of the year following a presidential election, which appears to be contrary to s 1 of the 20th Amendment to the *United States Constitution*,[20] or to amend aspects of the Senate of Canada without provincial consent, which appears to be contrary to s 38 of Canada's *Constitution Act 1982*.[21] While shoehorning and workarounds may occasionally overlap, their focuses are different and they are employed by different actors. Workarounds are focused on avoiding constitutional limitations while

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[18] This is one interpretation of the separation of powers in Australia (ie that it has spawned a number of implied constitutional rights): see, eg, George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 185; Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16(2) *Sydney Law Review* 166.

[19] This is another interpretation of the separation of powers in Australia (ie that Ch III's provisions have been interpreted in a strained manner in cases such as *Kable* (n 7): see, eg, Geoffrey Lindell, 'The Australian Constitution: Growth, Adaptation and Conflict — Reflections about Some Major Cases and Events' (1999) 25(2) *Monash University Law Review* 257, 279.

[20] Mark Tushnet, 'Constitutional Workarounds' (2009) 87(7) *Texas Law Review* 1499, 1499.

[21] *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'); Robert E Hawkins, 'Constitutional Workarounds: Senate Reform and Other Examples' (2010) 89(3) *Canadian Bar Review* 513, 519–20.

shoehorning is focused on the employment of existing — or even the development of new — constitutional limitations. Governments most commonly use workarounds while private persons most commonly use shoehorning.[22] Workarounds rely on the fact that 'the *Constitution* is in some sense at war with itself: One part of the text prohibits something, other parts of the text permit it, and the *Constitution* itself does not appear to give either part priority over the other'.[23] Shoehorning relies on silences in the *Constitution*'s text: although a provision was drafted to address a particular type of concern, it has not been drafted in a way that *confines* it to responding to that concern, allowing a litigant to employ the provision in service of other concerns.

C *Identification*

There will, unsurprisingly, be difficulties in identifying some instances of constitutional shoehorning in practice. There are two concerns that need to be identified, both of which might be uncertain or contested. The first is the litigant's concern. We can only identify an instance of constitutional shoehorning if we have some idea of what the litigant is seeking to achieve or protect. That can generally be inferred with a degree of confidence from their situation. A prisoner challenging the constitutional validity of a law authorising their detention is typically interested in securing their liberty, not interrogating the meaning of 'judicial power' within the separation of powers doctrine. A regional government challenging the constitutional validity of a central government law is typically interested in contesting the law for its impact on federalism rather than its impact on individual rights given that a successful invalidation for the latter reason could be used against it in the future (that is, a regional government will generally have little interest in expanding the scope of individual rights as these rights could be used to invalidate its own laws and acts in the future).

But there will be occasions that defy the typical pattern. There will be individuals who are solely interested in ensuring that the separation of powers is respected. There will be governments that want to see the expansion of rights-based limitations on their own power.[24] These situations will, however, generally be possible to identify by the nature of the claims the litigant is making and the nature of the relief the litigant is seeking.[25] And they will be rare given the time, expense and effort of pursuing litigation other than to pursue one's self-interest. Indeed, as will be discussed below, its rarity is one of the reasons why courts might be inclined to permit constitutional shoehorning. Shoehorning facilitates decisions on constitutional issues that would otherwise go unexamined because there are so few

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22 There are, of course, exceptions. As noted earlier, governments will occasionally want to engage in constitutional shoehorning.

23 Tushnet, 'Constitutional Workarounds' (n 20) 1503–4 (citations omitted).

24 See, eg, the scholarship on why governments introduce bills of rights when no obvious reason (eg the introduction of a new constitution) exists: David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010).

25 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*') is an example of where it is possible to identify the absence of shoehorning from the nature of the relief the litigant sought. For a discussion of this case, see below Part IV(C).

people able and willing to litigate some parts of the constitution since most people would not stand to gain any tangible benefit from a successful challenge.

The second concern or interest that needs to be identified is that addressed by the constitutional provision. This step can be understood as a challenge that arises with respect to either individual provisions or the entire constitution. If with respect to the latter, it is a fundamental challenge to the very concept of constitutional shoehorning because it suggests that it is not possible to assign a concern to any constitutional provision at all.

Beginning at the level of individual provisions, there is likely to be uncertainty or contestation over the concern addressed by at least some parts of a constitution. A provision that appears to protect an individual right because it prohibits government from acquiring property without compensation or from curtailing freedom of religion, for instance, could be understood as a provision that protects the federal division of powers if that prohibition only applies to one level of government rather than all levels of government.[26]

Uncertainty or contestation might also arise from a provision's concern changing over time. Provisions establishing the separation of powers might initially be understood as principally advancing a structural interest — allocating different types of public power to different public institutions to ensure they are exercised in an effective and efficient manner — but, over time, come to be understood as principally advancing an individual interest — protecting individuals from the abuse of public power by preventing concentrations of public power in a single public institution.[27]

Or some provisions might address multiple concerns. The separation of powers example just mentioned might be understood as an instance of a set of provisions having dual concerns. Similarly, a provision that requires the legislature to be chosen by the people could be understood as ensuring the legislature is structured in a particular manner as well as guaranteeing individuals the right to vote.[28] A provision guaranteeing the right to free speech might be understood as advancing both governmental interests — ensuring the people are free to discuss their electoral choices — and individual interests — ensuring the people are free to express themselves as they wish.[29]

These challenges that arise with individual provisions might be said to reveal a more fundamental challenge to the concept of constitutional shoehorning. Unless one adopts an approach to constitutional interpretation that fixes the meaning of a provision in time (for example, originalism),[30] the concern addressed by a

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[26] This is the case for several provisions in the *Australian Constitution*: see, eg, ss 51(xxxi), 116.

[27] See, eg, Stellios (n 14) 324, discussing the High Court's approach to the separation of powers in *A-G (NSW) v Quin* (1990) 170 CLR 1.

[28] This is the case with ss 7 and 24 of the *Australian Constitution*: see *Roach v Electoral Commissioner* (2007) 233 CLR 162.

[29] Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Free Speech* (Oxford University Press, 2021) chs 3–8.

[30] For an explication of the relationship between originalism and history in the Australian context, see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1.

constitutional provision is not determined or even knowable ahead of time — it simply reflects whatever concern the provision addresses from time to time. Say, for example, a litigant is able to use the separation of powers provisions of a constitution to protect their individual liberty. To consider this example to be an instance of constitutional shoehorning assumes that those provisions were unconcerned with individual liberty *prior* to the litigation. But one could adopt an approach to constitutional interpretation that takes no firm view about the concerns of a provision ahead of time.

An alternative way of challenging the very concept of constitutional shoehorning is to suggest that the concerns of *all* constitutional provisions are indistinguishable. For example, one might argue that all constitutional provisions regulate the relationship between the state and the people. Even provisions dealing with the separation of powers and the federal division of powers regulate that relationship by securing the liberty of the people.[31] Alternatively, one might contend that all constitutional provisions regulate the relationship between the institutions of government. Even a bill of rights regulates that relationship by determining which institutions are responsible for the protection of rights — the judiciary, the legislature or some combination of the two.[32] As a result, it is not possible to, for example, shoehorn an individual rights claim into a constitutional provision dealing with the separation of powers because all constitutional provisions are concerned with the allocation of power among institutions.

These challenges to constitutional shoehorning are serious and should not be dismissed lightly. However, there are several responses to these lines of critique that significantly reduce their force. First, starting in reverse order, the last line of challenge comes from a level of abstraction that is too high and thus erases real and important types of difference in constitutional principle. The *immediate* concerns of provisions relating to the separation of powers, the federal division of powers and a bill of rights are very different from each other even if their *ultimate* concerns might be considered similar. A bill of rights is typically concerned with removing particular exercises of public power from government (even if that removal is supervised by one arm of government) while the separation of powers and federal division of powers are not. Instead, the latter are primarily concerned with the allocation of public power within government — horizontally in the case of the separation of powers, and vertically in the case of the federal division of powers. Furthermore, to describe all aspects of a constitution as oriented to a single concern overlooks differences in the historical trajectory, contemporary standing, and conception of the state that these principles reflect. The post-World War II trajectory of bills of rights, their contemporary connection to the legitimacy of a constitution, and the scepticism they express about the legislature's capacity to safeguard individual liberty are very different from not only federalism and the separation of powers but also other aspects

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31 See, eg, MJC Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press, 2nd ed, 1997) 14; Erwin Chemerinsky, 'The Assumptions of Federalism' (2006) 58(6) *Stanford Law Review* 1763, 1787–8.

32 See generally Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94(2) *Michigan Law Review* 245.

of a constitution, such as those concerned with responsible government and 'fourth branch' institutions.[33]

Second, the last line of challenge also erases real and important types of difference in constitutional text and structure. A constitution is divided into different provisions and chapters because those provisions and chapters are directed to different concerns.[34] For instance, the inclusion of a bill of rights, but not a federal division of powers, or the inclusion of a federal division of powers, but not a bill of rights, in a constitutional text is a deliberate decision about the types of issues that the constitution is designed to address. While the subsequent relevance of those initial decisions is a subject of contestation in constitutional scholarship (that is, how closely should courts stick to the text and structure when undertaking constitutional adjudication?), the answer is generally not considered to be zero.

Third, this challenge to the concept of constitutional shoehorning is apt to confuse ends and means. The means by which courts adjudicate cases about the separation of powers and federal division of powers might share more with the means by which courts adjudicate cases about rights than we often think. For example, all types of cases might involve engagement with difficult, contested questions about public values.[35] However, that does not necessarily indicate that the ends are the same. As mentioned above, they are seeking to address different concerns from each other.

Fourth, the challenge that constitutional shoehorning relies on an originalist approach to constitutional interpretation confuses the concept's legitimacy with its existence. Someone who adopts an originalist approach to constitutional interpretation is more likely to challenge the legitimacy of constitutional shoehorning because their view is that a provision's concern is fixed in time. A litigant should not, according to an originalist approach, be able to shoehorn an individual interest into a provision that was drafted to advance a structural interest. Importantly, constitutional shoehorning still exists even if one does not adopt an originalist approach to constitutional interpretation. As mentioned above, provisions are inserted into a constitution *for a reason*. That reason may be difficult to determine and be contested, but a reason — or set of reasons — for a provision does exist from the moment it is added to the constitution. Non-originalists might not be particularly concerned with finding out that reason because they think it is irrelevant to interpretation, but it does exist. Constitutional shoehorning is the act of adding a new reason (or replacing the reason) for the existence of that provision — it signifies, for example, that the separation of power provisions are now concerned with the protection of individual liberty, not just (or no longer) with the efficient allocation of public power. A non-originalist is less concerned with the legitimacy of this change, but that lack of concern does not deny the existence of the change.

Fifth, the contention that constitutional shoehorning does not exist because the concern or interest of a provision can change over time reveals the *presence* of

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33 See generally Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021).

34 Williams and Hume (n 13) 113–14.

35 See, eg, Adrienne Stone, 'Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28(1) *Oxford Journal of Legal Studies* 1.

constitutional shoehorning, not its absence. Constitutional shoehorning is frequently, if not predominantly, the means by which the concern of a constitutional provision changes. If, for example, the separation of powers provisions come to be understood as provisions that protect individual liberty when that was not how they were originally understood, that change generally occurs through litigants bringing court cases shoehorning liberty claims into separation of powers provisions.

Sixth, disagreement or uncertainty over the classification of individual instances of constitutional shoehorning does not necessarily undermine the existence of the concept. Very few, if any, constitutional concepts are entirely free from contestation and doubt. In Australia, for example, there is considerable disagreement as to whether freedom of political communication is an implied right or a limitation on power — and if that distinction makes a difference[36] — and whether it is an impermissibly strained interpretation of the constitutional text.[37] These controversies do not undermine implied rights and strained interpretations as cognisable constitutional concepts.

In the case of constitutional shoehorning, many of the challenges to individual provisions refer to peripheral cases in one of two senses. Some are peripheral cases in the sense that they rarely occur in practice. Going back to an example mentioned above, it is, for instance, not the norm that an individual right applies to one level of government in a federation, but not the other.[38] Others are peripheral cases in the sense that they only complicate limited instances of constitutional shoehorning. The claim that the right to free speech has dual concerns (individual and governmental) only complicates constitutional shoehorning in respect of those specific concerns (that is, it is difficult to claim that individual liberty has been shoehorned into the right to free speech because individual liberty may have always been a concern addressed by that right). But it does not complicate the identification of constitutional shoehorning in relation to other concerns connected to the right to free speech. If, for example, a subnational government uses the right to free speech to protect the federal division of powers, that is still an instance of constitutional shoehorning because, unless there is clear evidence to the contrary,[39] it is unlikely that the right to free speech was initially inserted into a constitution to protect the federal division of powers.

III Evaluating the Concept

As mentioned above, one's view of the legitimacy of constitutional shoehorning is likely to vary with one's view of the appropriate approach to constitutional interpretation. If one adopts an originalist approach to constitutional interpretation,

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[36] See, eg, Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

[37] See the discussion in Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9 ('Constitutional Implications Revisited').

[38] Most apply to both levels of government, either expressly or as a result of judicial interpretation. Incorporation of the United States Bill of Rights so that it applies to the states is the most well known example of the latter: see *Chicago, Burlington & Quincy Railroad Co v City of Chicago*, 166 US 226 (1897); *Gitlow v New York*, 268 US 652 (1925).

[39] Except, of course, in the edge case mentioned immediately above where the right applies to one level of government, but not the other.

constitutional shoehorning is likely to be more objectionable because it can be used to circumvent the original meaning of the constitutional text.[40] For example, if a constitution's framers made the deliberate decision not to include a bill of rights in the constitution and then the provisions related to the separation of powers and federalism are used to shoehorn large numbers of rights into the constitution, these acts of constitutional shoehorning are arguably contrary to the constitution's original meaning.[41] By contrast, if one adopts a non-originalist approach to constitutional interpretation (for example, a textualist or 'living tree' approach), the fact that a particular outcome might be contrary to a deliberate decision of the framers will be of less or even no concern.[42]

It is, however, not just people who adopt originalist approaches to constitutional interpretation that might have concerns with constitutional shoehorning. If one thinks the constitution should be read as a coherent whole, constitutional shoehorning is objectionable if it renders the constitution less coherent. For example, if a constitution expressly grants persons the right to a jury trial in criminal cases, but expressly denies that right in civil cases, shoehorning a right to a jury trial in civil cases into provisions dealing with the separation of powers would arguably be inconsistent with reading the document as a coherent whole. It is using one part of the constitution to allow what another part of the constitution disallows. By contrast, if one places more emphasis on the meaning of each individual provision, these types of outcomes will be of less concern.[43]

One's view on constitutional shoehorning is also likely to vary with one's view on the types of shoehorning that predominate in a particular jurisdiction. If, for example, constitutional shoehorning is predominantly used to expand protection for individual rights in a system that has no bill of rights, a person who thinks it is appropriate for courts to protect rights is likely to view this development more favourably than a sceptic of rights-based judicial review.[44] Or, in a system with a bill of rights, if constitutional shoehorning is predominantly used to expand the enforcement of structural provisions,[45] a person who thinks the judiciary should be enforcing these structural provisions is likely to view this development more

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40 It is important to note that there are a variety of approaches to originalism, some of which permit significant departures from historical understandings of the constitutional text: see, eg, Jack M Balkin, *Living Originalism* (Harvard University Press, 2014). For an example of an originalist critique of one of the case studies discussed below in Part IV, see James Allan, '"Otherness" and Identity Politics in Constitutional Law', *IACL-AIDC Blog* (Blog Post, 21 January 2021) <https://blog-iacl-aidc.org/cili/2021/1/26/otherness-and-identity-politics-in-constitutional-law>.

41 Goldsworthy, 'Constitutional Implications Revisited' (n 37); Allan (n 40).

42 For an overview of the 'living tree' interpretation, see Vicki C Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2005) 75(2) *Fordham Law Review* 921.

43 A debate of this nature occurred in relation to the interpretation of heads of federal legislative power in Australia: should the limitations in one head of legislative power be interpreted so as to limit the scope of other heads of legislative power? See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

44 It is possible to observe, for example, criticisms of constitutional shoehorning in Australia that draw on arguments that the country should not have a bill of rights: see, eg, Allan (n 40).

45 As is the case in the United States: see Karlan (n 8).

favourably than a person who thinks they should be enforced through the political process.[46]

The remainder of this Part seeks to evaluate the positive and negative attributes of constitutional shoehorning in a way that does not depend on one's approach to constitutional interpretation. The purpose of this analysis is not to express a view on whether courts should or should not permit constitutional shoehorning — some of the attributes do not even relate to how courts should decide cases — but instead to highlight the concept's normative importance — that it has both very real advantages and disadvantages. While each attribute will not necessarily be present in each instance of shoehorning, their existence will be demonstrated by the case studies discussed in Part IV.

A *Positive Attributes*

On the positive side, constitutional shoehorning contributes to the enforcement of constitutional limits and thus aligns with the rule of law idea that no one, including the state, is above the law.[47]

When the state acts, it must comply with *all* requirements of the constitution, not just those that are most directly or obviously implicated. A legislature that enacts a law restricting a person's speech must respect not only any limitations imposed by the right to free speech (if one exists) but also any limitations imposed by the separation of powers (to the extent they exist). Constitutional shoehorning is simply a method by which this fundamental principle is realised. When a litigant seeking to protect their free speech tests the constitutional validity of the law by questioning its compliance with the separation of powers rather than the right to free speech, they are contributing to the enforcement of *all* constitutional limits.

Importantly, constitutional shoehorning helps ensure compliance with those constitutional provisions that might not otherwise be tested in court. The direct addressees of some constitutional provisions, especially those provisions regulating the relationship between public institutions, sometimes have little interest in testing potential violations in court. Take, for example, a provision that requires legislative supervision of executive spending. In a system of responsible government, members of the legislature may not be particularly eager to ensure executive compliance with those provisions for both immediate political reasons (for example, they do not want to be seen to be standing in the way of money going to particular groups in society) as well as more long-term structural reasons (for example, members of the opposition political party will benefit from the lack of supervision when they next form government). Or take a provision that regulates the making of agreements between levels of government in a federation. The governments may have little interest in ensuring the provision is enforced if they consider it to be more efficient

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[46] On the debate between political and judicial mechanisms for the enforcement of constitutional structures, see the scholarship on process-based theories of federalism: eg Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government' (1954) 54(4) *Columbia Law Review* 543; Saikrishna B Prakash and John C Yoo, 'The Puzzling Persistence of Process-Based Federalism Theories' (2001) 79(6) *Texas Law Review* 1459.

[47] See, eg, Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67, 78–80.

to reach agreements in an informal manner — irrespective of the rules — and because litigation may lead to public disclosure of sensitive information about the political bargains that are struck as part of the agreement-making process.

Some private persons — individuals as well as non-government organisations — might have a greater desire in seeing these limits observed. But in some legal systems, they may struggle to establish that they meet the procedural requirements that must be satisfied to bring a direct, standalone challenge (such as standing). It may be difficult, though not always impossible,[48] for a person to demonstrate they have a sufficient interest in compliance with a provision requiring, say, legislative supervision of executive spending or intergovernmental agreements to be made in a particular manner.

Constitutional shoehorning can be a way of ensuring constitutional provisions of this nature are observed. It enables litigants with a sufficient interest in the outcome of the case — that is, standing — to bring these types of challenges. A protestor seeking to challenge the constitutional validity of a law providing for their imprisonment will have standing, even if the separation of powers rather than the right to free speech is the basis of that challenge. A farmer seeking to challenge the constitutional validity of a law providing for the expropriation of their farm will have standing, even if the basis of that challenge is not the right to property but provisions regulating the making of the intergovernmental agreement pursuant to which the expropriation took place. Part IV of this article discusses several examples from Australia where this dynamic is observed. Karlan's article, mentioned above,[49] discusses several examples from the United States where it has occurred, noting that challenges based on structural provisions are shoehorned into challenges based on rights provisions because it is difficult for litigants to establish standing under the former.

B *Negative Attributes*

The value, and indeed necessity, of constitutional shoehorning should not, therefore, be underestimated. But the technique is not without its costs, three of which will be introduced here.

1 *Partiality*

First, constitutional shoehorning can introduce forms of partiality into the law that are difficult to justify from the perspective of the interest that has been protected through the act of shoehorning. Take, for example, the interest of individual rights protection. When an individual right is protected directly (that is, without any constitutional shoehorning) by means of a bill of rights, the adjudicative process and final outcome will turn on factors that are rationally related to the right and are therefore capable of reasonable justification. Most commonly, the case will turn on whether the limitation on the individual's right is proportionate to the end the state is purportedly pursuing.[50] The outcome will thus be determined by considerations

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[48] See, eg, *Pape* (n 25) discussed below Part IV(C).

[49] Karlan (n 8).

[50] For an overview of the most common inquiries in proportionality analysis, see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

such as the severity of the limitation on the right, the strength of the reason for limiting the right, and whether the state had a way of pursuing that reason that was less restrictive of the right. While the individual might not accept the outcome if they are unsuccessful and while the court may reach conclusions on these considerations that we consider erroneous, the inquiry is one rationally related to the right and is reasonably justifiable. The considerations are connected to the right — its scope, its importance, etc — as well as the strength of the reasons, and the means chosen, for limiting that right.

By contrast, when an individual right is protected by means of constitutional shoehorning, the adjudicative process and final outcome will turn on factors that may bear little or even no relationship to the right. Take, for example, an individual seeking to challenge their detention using the separation of powers doctrine.[51] The case may turn on whether the detention was authorised by a member of the judiciary or a member of the executive because the question for the court might be whether the correct arm of government exercised the power. In this scenario, the person's susceptibility to detention could turn on the definition of 'court' or 'judicial power' rather than on their culpability, the severity of the detention or the purpose of the detention. Or take a parent seeking to challenge government funding of religious activities in state schools using the federal division of powers rather than a freedom of religion guarantee.[52] The case will turn on whether the funding falls within an area of legislative competence assigned to the central or regional level of government. Thus, the parent's success will turn on the definition of a particular subject area assigned to a particular level of government (for example, does the funding amount to 'benefits to students'?) rather than on whether the funding program amounts to state endorsement of a religion or interferes with the free exercise of religion.

If successful, the end result might be, for instance, that a person cannot be subject to preventative detention, but only if the order is made by a 'judge'. Or that the central government cannot fund religious activities in state schools, but the regional governments can. These partial rights are justifiable from the perspective of the doctrine into which they have been shoehorned (that is, the separation of powers or the federal division of powers), but they are difficult to justify from the perspective of the interest the litigant sought to protect. A person might rightly ask: why does a person's freedom from preventative detention depend on the office of the person who orders the detention rather than, say, the threat the detained person poses to the community? Or why can a central government encroach on the separation of church and state as long as the encroachment amounts to a '[benefit] to students'?

Importantly, the end result does not merely affect the litigant that brought the case. If that were the case, one might respond to the above questions by stating that it is simply a risk the litigant assumed when they made a shoehorned argument before a court. Instead, constitutional shoehorning has downstream effects on other people. A successful shoehorn may *worsen* the protection offered to individuals in analogous positions in the future because the scope of protection depends on factors that are

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51 See below Part IV(C).

52 See below Part IV(B).

not related to the interest that litigants want protected. The degree of protection the interest receives is not determined by the importance of that interest or the importance of the reason for limiting that interest, but instead by some unrelated factor such as the definition of 'court' or the definition of 'benefits to students'. Put another way, constitutional shoehorning is particularly vulnerable to producing decisions that do not enhance rights even though the original litigants initiated the proceedings to enhance rights.

Take the individual seeking to challenge their detention using the separation of powers doctrine. If a court concludes that the individual's detention is unconstitutional because the form of detention (for example, preventative detention) was not 'judicial' and thus the power to order their detention was invalidly conferred on the judiciary, this outcome may pave the way for the legislature to give the exact same power to a person who is not a judge (for example, a Minister). The separation of powers doctrine may allow, and even *require*, preventative detention to be imposed by persons who are not judges, sitting in institutions that are not courts. This result makes the situation worse for future individuals in an analogous position because the detention will now be ordered by a person who enjoys fewer guarantees of independence and impartiality than a judge, sitting in an institution that has fewer due process protections than a court. People will still be subject to preventative detention, but by order of a member of the executive rather than a member of the judiciary.

Or take the parent seeking to challenge government funding of religious activities in state schools using the federal division of powers. If they succeed in arguing that the law is invalid because it does not confer 'benefits to students', this outcome may pave the way for even more state funding of religious education services to meet the definition of 'benefits' or it may prompt the legislature to choose an alternative, less transparent way of funding those services. For future individuals seeking to protect the separation of church and state, the end result might be worse if it leads to a much larger funding program or funding that is subject to fewer accountability checks.

Challenges to laws that limit rights on the basis that the laws violate a bill of rights are also vulnerable to legislative override and circumvention. The claim is not that non-shoehorned challenges are protective of individuals and shoehorned challenges are not. Instead, the claim is that shoehorned challenges introduce partiality into the law and that partiality is not connected to the interest the litigant is seeking to protect. This partiality has consequences not only for the litigant that brought the case, but also for future individuals in similar circumstances with similar interests in need of protection.

2 *Complexity*

A second concern with constitutional shoehorning is that it renders the law more complex and less accessible. It compresses different legal rules and principles into single provisions, which makes them more difficult to understand. A right to vote that, through shoehorning, comes to protect the right to free speech, the drawing of electoral boundaries, the independence of the electoral commission, the composition of the legislature, the timing of elections, the right to enter one's country of

citizenship to vote, and so on, becomes a conceptual quagmire. This complexity can have constitutional consequences, rendering the judiciary more vulnerable to criticism that it has engaged in 'activism'[53] by increasing the disparity between doctrine and text. In this regard, the potential downsides of constitutional shoehorning are similar to the potential downsides of drawing constitutional implications.

Constitutional shoehorning makes the scope of a person's rights more difficult to understand, especially for non-lawyers. When protection for the separation of church and state is determined by a guarantee of freedom of religion, its scope will be determined by, as mentioned above, factors such as the degree of interference with the free exercise of religion and the reason for the interference with religion. While a layperson is unlikely to know the law's precise content and limits, it is likely that they can work that out without great difficulty and engage in debate with other persons about the state of the law. By contrast, when protection for the separation of church and state is determined by the federal division of powers, it becomes much harder for a layperson to work out what the law does and does not protect as well as what the law should and should not protect. Not only does the scope of protection now depend on non-obvious factors such as the definition of federal provisions such as 'benefits to students', it also becomes contingent in non-obvious ways. For example, the central government can provide funding of religious education services to state schools, but only if the money is first distributed to regional governments. Furthermore, a person cannot argue, for instance, that the law should provide greater protection for the separation of church and state because of its importance to a free society since that consideration is irrelevant to the scope of protection.

3 *Lawyers versus Clients*

A third concern with constitutional shoehorning that builds on the previous two is that it privileges technical acumen over substantive concerns. Constitutional shoehorning is an exercise in legal creativity — finding an indirect method of protecting an interest when the direct path is foreclosed for some reason. As a result, it rewards technical skill in finding novel yet plausible legal arguments rather than the ability to substantiate the merits of the underlying interest. That means constitutional shoehorning is apt to reward the lawyer more than the client. If a case of constitutional shoehorning succeeds, the lawyer unquestionably wins as they will be acknowledged as having successfully crafted a creative new legal argument. But the client may very well lose. Even if they win the case, their victory is especially vulnerable to being pyrrhic because the reason for success is not the reason they brought the case. If the state can address the reason for success, the underlying interest — the reason the litigant brought the case — is still vulnerable to state abrogation. Once again, the claim is not that non-shoehorned cases never result in pyrrhic victories or that shoehorning cases always do. Legislatures can and do overturn and circumvent successful challenges to laws limiting rights brought under

[53] On the consequences of criticising courts on this basis, see Tania Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

a bill of rights.[54] But constitutional shoehorning is particularly vulnerable to this sort of mismatch because the reason for decision does not necessarily bear any relationship to the interest the litigant is seeking to protect.

IV Constitutional Shoehorning in Practice

One of the reasons constitutional shoehorning occurs in Australia is the absence of a constitutional bill of rights. Without one, individuals seeking to challenge the constitutional validity of a government act or law for infringing their rights must generally, but not always,[55] use some provision that does not appear to be concerned with the protection of individual rights. This Part considers a number of examples of the technique in practice.

A *Legal Certainty*

In 1981, Mohamed Metwally, a student at the University of Wollongong, lodged a complaint under New South Wales anti-discrimination legislation that the university had discriminated against and victimised him on the ground of his race. A tribunal upheld the complaint and ordered the university pay damages to Mr Metwally. While these proceedings were under way, the High Court held, in a case unrelated to Mr Metwally, that provisions of the New South Wales law were invalid under s 109 of the *Australian Constitution* for indirect inconsistency with Commonwealth racial discrimination legislation.[56] Shortly after the High Court's decision, Commonwealth Parliament amended the racial discrimination legislation to provide that it did not intend to exclude the operation of state legislation on the same topic, and that this intention was to have retrospective effect.[57]

This amendment appeared to clear the way for Mr Metwally to succeed against the university. It is well established that Commonwealth Parliament can enact legislation that indicates the Commonwealth law's intention is to not preclude the operation of compatible state legislation.[58] It is also well established that Commonwealth Parliament can enact legislation with retrospective effect.[59] The university therefore had to get creative. It argued that s 109 operates as a limitation on Commonwealth legislative power, prohibiting Commonwealth Parliament from enacting legislation that has the effect of retrospectively reviving a state law that has been held to be invalid under s 109. The argument is a particularly creative one because s 109 is not framed as a limitation on Commonwealth legislative power. Instead, it is framed as precisely the opposite — an affirmation of Commonwealth

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54 Indeed, bills of rights can be designed to allow legislative override: see generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

55 Section 75(v) of the *Australian Constitution* is an example of an exception since it is arguably intended to protect an individual right — namely, the right of access to a court to bring certain types of legal challenge.

56 *Viskauskas v Niland* (1983) 153 CLR 280.

57 *Racial Discrimination Amendment Act 1983* (Cth) s 3, inserting s 6A of the *Racial Discrimination Act 1975* (Cth).

58 See, eg, *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)* (1977) 140 CLR 236.

59 See, eg, *R v Kidman* (1915) 20 CLR 425.

legislative power — by declaring that Commonwealth law shall prevail over state law to the extent of any inconsistency between them.[60]

In *Metwally*, a bare majority of the High Court accepted the university's argument.[61] A crucial reason for this conclusion was their view that the provision also functions as a protection of the people against legal uncertainty about which law they must obey. Gibbs CJ wrote that

> Section 109 deals with 'a matter of prime importance' in the constitutional framework … Its provisions are not only critical in adjusting the relations between the legislatures of the Commonwealth and the States, but of *great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe.*[62]

Deane J stated that s 109 'serves the equally important function of *protecting the individual from the injustice of being subjected to* the requirements of valid and inconsistent *laws of Commonwealth and State Parliaments on the same subject*'.[63] His Honour went on to describe the provision as conferring a 'constitutional right' on individuals to ignore state laws that are inconsistent with Commonwealth law.[64]

Several aspects of the decision are notable for the purposes of this article. First, it demonstrates the existence of constitutional shoehorning even if one does not take an originalist approach to constitutional interpretation. Prior to the Court's decision in *Metwally*, s 109 was understood as a provision concerned with the operation of the federal system of government — it regulated the relationship between Commonwealth and state legislative power by determining which law prevails in the event of an inconsistency. There was no suggestion that it conferred constitutional rights on individuals.[65] Following the Court's decision in *Metwally*, the Court and commentators now acknowledge that the provision has two concerns — federalism and individual protection.[66] Therefore, if a litigant today seeks to protect their rights by relying on s 109, it might not be accurate to describe that as an act of constitutional shoehorning because one can argue that it already addresses the protection of rights. But constitutional shoehorning is the process by which it came to acquire this second concern — from a litigant taking a provision that did not appear on its face or from its history to deal with individual protection and arguing that the provision does, in fact, deal with this concern.

Second, the decision demonstrates how constitutional shoehorning can produce a partial right. The vice of the law in *Metwally* was the fact that it purported to apply retrospectively. All members of the Court accepted that the Commonwealth Parliament could state that a particular law does not intend to cover the field and, as

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60 A point that was made by the Solicitor-General for New South Wales (*University of Wollongong v Metwally* (1984) 158 CLR 447, 450–1 (Gaudron QC) (during argument) ('*Metwally*')) as well as members of the minority: see, eg, at 462–3 (Mason J), 486 (Dawson J).

61 Ibid.

62 Ibid 457–8 (emphasis added).

63 Ibid 477 (emphasis added).

64 Ibid.

65 See, eg, John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901) 939.

66 See, eg, *Dickson v The Queen* (2010) 241 CLR 491, 503–4 [19] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); Williams and Hume (n 13) 114.

a result, could prospectively bring about a revival of a state law that had been held to be indirectly inconsistent with a Commonwealth law.[67] The distinguishing characteristic of the law in *Metwally* was that it attempted to bring about a revival of a state law with retrospective effect. That means the protection offered by the Court's decision in *Metwally* is a protection against retrospective laws. However, as there is no general prohibition on retrospective laws, it is only a protection against retrospective laws that alter inconsistency between Commonwealth and state laws. This partiality is what has led commentators such as James Stellios to say the decision lacks 'logic'[68] — why would you have a partial prohibition on retrospectivity when you do not have a general prohibition on prospectivity? This partiality is a product of shoehorning the right into a provision that is concerned with the operation of the federal system. The right becomes confined by that context in that it only applies in respect of a specific type of federal interaction.

Third, the result was not necessarily rights enhancing. Most obviously, it led to the denial of Mr Metwally's rights — the finding of discrimination against him was invalidated.[69] However, that invalidation flows from the fact that the university's right was constitutional while Mr Metwally's was statutory. One would expect a constitutional right to trump a statutory right. More significantly, however, a general prohibition on retrospective revival of a state statute is not necessarily a rights-enhancing position. Retrospective revival will most commonly be used where Commonwealth Parliament makes a mistake — a court finds that a Commonwealth law intended to cover the field when Parliament did not intend to cover the field and thus Parliament seeks to reverse the effect of the court's decision. If the state law that the Commonwealth seeks to revive is one that grants rights against the state, the prohibition diminishes rights because the state is the legal person who is being protected from its retrospective application. Even if the state law that the Commonwealth seeks to revive is one that grants rights against a private individual, as was the case in *Metwally*, the position might not be rights enhancing if the rights conferred by the state law outweigh those conferred by the prohibition on retrospective revival. Therefore, the only scenario in which the prohibition will unquestionably be rights enhancing is where the inconsistent state law is punitive.

B *Separation of Church and State*

In 2010, Ron Williams was sending his children to a government school. That school had a chaplain to provide chaplaincy services pursuant to a contract between the Commonwealth Government and a private chaplaincy provider. Mr Williams opposed the arrangement due to its purported interference with the separation of church and state. Describing himself as a secular public education advocate, his view was that religious services should not be present in government schools.[70] The *Constitution* provided a direct route to challenging the contract on this basis. Section 116 prohibits the Commonwealth from 'establishing any religion',

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67 See, eg, *Metwally* (n 60) 456 (Gibbs CJ), 460 (Mason J), 469 (Murphy J), 471 (Wilson J), 474 (Brennan J).

68 Stellios (n 14) 704.

69 *Metwally* (n 60) 469–70 (Murphy J).

70 Luke Beck, '*Williams v Commonwealth*: School Chaplains and the Religious Tests Clause of the *Constitution*' (2012) 38(3) *Monash University Law Review* 271, 271.

'imposing any religious observance' and requiring a 'religious test … as a qualification for any office … under the Commonwealth'. Mr Williams challenged the program under s 116, but his challenge was unsuccessful due to the High Court's narrow interpretation of the provision.[71]

There was, however, an alternative basis on which Mr Williams could seek to invalidate the program, one which had no direct connection to the separation of church and state. The *Constitution* contains a set of provisions for the regulation of executive power and legislative supervision of executive spending.[72] These provisions, as the Court noted, exist not to safeguard secularism, but instead to protect representative and responsible government (that is, protection of legislative accountability of executive spending)[73] and federalism. The connection to federalism is that, because the legislative chamber designed to represent the states — the Senate — has limited power over appropriation bills, it is only through requiring full statutory authorisation that the Senate is able to have meaningful input into the way in which the executive spends public money.[74]

Mr Williams argued that the Commonwealth's contract with the private chaplaincy provider was invalid on the basis that it lacked statutory authorisation. Funding for the school chaplaincy program had been appropriated pursuant to the requirement in s 83 of the *Constitution*, but otherwise had no statutory authorisation. The Commonwealth claimed it could enter into the contracts to establish, operate and fund the program without statutory authorisation (that is, its non-statutory executive power could support the program). The Court disagreed,[75] holding that the contract required statutory authorisation, which it did not have, and was therefore invalid.

The case highlights two dimensions of constitutional shoehorning. First, it demonstrates the role of shoehorning in helping to ensure constitutional limits are enforced. Over 400 spending programs worth billions of dollars were being operated in this manner.[76] The effect of the Court's decision was that all of them might have been invalid. Absent constitutional shoehorning, it is very possible that a case involving this constitutional limit would not have come before the Court. It is unlikely that recipients of funding under these programs would have sought to challenge their constitutional validity given that they benefitted from them. It is also unlikely that anyone else with clear standing to challenge the programs would have initiated proceedings to declare them invalid. The states, for example, have standing to initiate constitutional proceedings, but had shown little interest in challenging the religious funding program because it resulted in additional services being available to state schools. While some states supported Mr Williams' challenge once it was

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71 Ibid 272.

72 See, eg, *Constitution* ss 61, 81, 83.

73 See, eg, *Williams No 1* (n 5) 232–3 [136] (Gummow and Bell JJ).

74 See, eg, ibid 192–3 [37], 203–4 [58], 205–6 [60]–[61] (French CJ), 232–3 [136], 234 [143], 235 [145] (Gummow and Bell JJ), 347 [501], 348 [503], 353 [522] (Crennan J).

75 Ibid (Heydon J dissenting).

76 Daniel Stewart, '*Williams v Commonwealth* and the Shift from Responsible to Representative Government' [2013] (72) *AIAL Forum* 71, 75; Shipra Chordia, Andrew Lynch and George Williams, '*Williams v Commonwealth [No 2]*: Commonwealth Executive Power and Spending after *Williams [No 2]*' (2015) 39(1) *Melbourne University Law Review* 306, 326–7.

before the Court,[77] it is far from clear that they would have brought a challenge themselves. As Shipra Chordia, Andrew Lynch and George Williams have noted, there remain serious questions over the constitutional validity of many other funding programs, yet no state has sought to initiate proceedings to challenge them in the decade since *Williams No 1* was decided.[78]

Second, the case demonstrates how constitutional shoehorning can produce results that are not necessarily rights enhancing and can introduce greater complexity into the law. After Mr Williams' success, Commonwealth Parliament enacted remedial legislation, seeking to give express statutory authorisation for most programs that had previously operated without such authorisation. Mr Williams brought a second shoehorned challenge, arguing that the statute authorising the funding was constitutionally invalid under the federal division of powers (that is, Commonwealth Parliament did not have a head of legislative power under which to enact the remedial legislation). The challenge was confined to that part of the statute authorising the school chaplaincy program. Mr Williams won again. The Court held there was no head of power for that part of the statute. The Commonwealth's main argument, that it was a '[benefit] to students' under s 51(xxiiiA), failed because the Court affirmed a narrow definition of benefit, limiting it to 'material aid provided against the human wants which the student has by reason of being a student'.[79]

Despite two successes, Mr Williams ultimately lost. The Commonwealth continued to provide funding for chaplains in state schools by resorting to a third way of authorising funding for the program. The Commonwealth Parliament enacted legislation under s 96 of the *Constitution*, which allows the Commonwealth to provide funding to the states on terms and conditions that they think fit, including a condition that the funding be distributed to a third party — in this case, the school chaplaincy providers. Ultimately, therefore, the litigation did not meaningfully advance the concern — the separation of church and state — that Mr Williams sought to advance.

However, it is arguable that nor did the litigation meaningfully advance the concern — legislative supervision of executive funding — that the constitutional provisions sought to advance. As noted at the time, the remedial legislation enacted after *Williams No 1* was passed by Parliament in just three hours and gave the executive the power to spend money on anything it wanted without further legislative scrutiny.[80] It was, as Anne Twomey noted, 'an abject surrender of [Parliament's] powers of financial scrutiny to the Executive, and all in an effort to save a few school chaplains'.[81] The need to rely on s 96 grants to fund the school chaplains added a further layer of complexity and opacity to the program — now it

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77 See, eg, *Williams No 1* (n 5) 181–2 [9] (French CJ), 223–4 [112] (Gummow and Bell JJ). This is why the Court spent little time considering whether Mr Williams had standing to bring the challenge.

78 Chordia, Lynch and Williams (n 76) 326–7.

79 *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 459–60 [46] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

80 Anne Twomey, 'Bringing Down the House? Keeping School Chaplains Means a Surrender to the Executive', *The Conversation* (online, 27 June 2012) <https://theconversation.com/bringing-down-the-house-keeping-school-chaplains-means-a-surrender-to-the-executive-7926>.

81 Ibid.

involved not only agreements between the Commonwealth and the chaplaincy providers, but also between the Commonwealth and the states.

Before moving on to the next case study, it is worth briefly mentioning the precursor to Mr Williams' challenge, *Pape v Federal Commissioner of Taxation*,[82] due to the conspicuous absence of constitutional shoehorning. In *Pape*, the Court held that ss 81 and 83 of the *Constitution*, provisions dealing with the appropriation of moneys, do not confer power on the Commonwealth to spend money. This result laid the groundwork for Mr Williams' challenge. For the purposes of this article, the most remarkable fact about *Pape* was Mr Pape. The case was a result of actions taken to avert the global financial crisis that emerged in 2007–08. The Commonwealth Government took the view that Australia was at risk of entering a severe economic recession and sought to stimulate the economy by distributing one-off payments of between $250 and $900 to millions of Australians.

Mr Pape's challenge was to the constitutional validity of those payments, one of which he stood to receive. He was a constitutional law barrister and lecturer who opposed the expansiveness of the Commonwealth's financial powers.[83] Thus, he brought the challenge solely for the purpose of seeking to enforce the *Constitution*'s provisions regulating the spending of money by the executive.[84] He was not trying to shoehorn his challenge into some other interest he was seeking to protect. The case thus serves as further evidence of the importance of constitutional shoehorning to the enforcement of constitutional limits. Without constitutional shoehorning, the system of government would be reliant on people like Mr Pape to enforce compliance with the *Constitution*. And Mr Pape was a rare individual. He had to be willing to act against his immediate self-interest by seeking to challenge the distribution of money to himself. Furthermore, he had to be willing to risk temporarily being the most unpopular person in Australia for, had he been successful, his case would have denied payments to millions of other Australians.[85] Indeed, he was subject to intense personal attacks and threats for bringing the case.[86] The rarity of a person with this level of conviction helps explain why challenges to many aspects of a constitution would be uncommon without shoehorning.

C *Post-Sentence Detention*

A third instance of constitutional shoehorning comes from the 1996 decision of *Kable v Director of Public Prosecutions (NSW)*.[87] Mr Kable was coming to the end of a sentence of imprisonment for manslaughter of his wife. In prison, he had written threatening letters to members of his wife's family. In response, New South Wales Parliament enacted the *Community Protection Act 1994* (NSW), which 'provid[ed] for the preventive detention (by order of the Supreme Court made on the application

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82 *Pape* (n 25).

83 George Williams, 'Bryan Pape and his Legacy to the Law' (2015) 34(1) *University of Queensland Law Journal* 29, 32–6.

84 Ibid 38–9.

85 As George Williams has written, '[i]t takes a brave person to stand between the Commonwealth and an offer of cash to nearly 9 million taxpayers, let alone in the midst of a global economic recession': ibid 38.

86 Ibid 39.

87 *Kable* (n 7).

of the Director of Public Prosecutions) of Gregory Wayne Kable'.[88] The law empowered the Supreme Court to make an order for Mr Kable's continuing detention if certain criteria were established.

The most direct ways of constitutionally challenging the legislation were not open to Mr Kable. The *Australian Constitution* contains no prohibition on bills of attainder and no right not to be detained except in accordance with the ordinary criminal sentencing process. Prior to *Kable*, there was some suggestion that guarantees of this nature might be inferred or implied from the separation of judicial powers established by Ch III.[89] But, importantly, these constitutional provisions apply to Commonwealth laws and Commonwealth courts. Mr Kable was subject to detention by a state court in accordance with a state law.

Therefore, Mr Kable — or, more accurately, his lawyers — had to get very creative. He argued that, as Ch III also envisages the conferral of federal jurisdiction on state courts,[90] state parliaments cannot confer powers on state courts that undermine state courts as repositories of federal judicial power. The High Court agreed. It held that the law compromised the institutional integrity of the state judicial system by asking the Supreme Court to implement what was, in effect, a bill of attainder.[91] The law was invalidated. The *Kable* doctrine was born. The move was, therefore, an act of constitutional shoehorning in that Mr Kable protected his individual interest not to be subject to detention through a process far removed from the ordinary criminal process by relying on a set of provisions that are concerned with the allocation of judicial power in a federal system and that make no mention of state parliaments (that is, the institutions to which the *Kable* doctrine applies).

This successful episode of constitutional shoehorning has produced a considerable degree of constitutional uncertainty and controversy.[92] For the purposes of this article, only one aspect requires attention. Once again, it was not a decision that was necessarily rights enhancing. While the decision protected Mr Kable, it had the effect of reducing the protection for other people in similar situations to him; it did not simply fail to prevent the enactment of laws that detain people outside of the ordinary criminal process, but made their operation worse. The *Kable* doctrine protects the judiciary, not individuals. It prevents state parliaments from undermining the suitability of state courts to act as repositories of federal judicial power. If the judiciary is not implicated, the *Kable* doctrine is not activated. That means state parliaments can still arrange for the detention of individuals as long as the detention order is made by someone other than a judge, such as a member of the executive. As a result, people can still be detained, but it must be on the order of someone who does not enjoy the same safeguards for independence and impartiality that a judge enjoys and in a manner that may not have the same due process protections as a court hearing.

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88 Ibid 62–3 (Brennan CJ).

89 Scott Stephenson, 'Rights Protection in Australia' in Adrienne Stone and Cheryl Saunders (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 905, 922–3.

90 *Constitution* ss 71, 77(iii).

91 See, eg, *Kable* (n 7) 127–8 (Gummow J).

92 See, eg, Elizabeth Handsley, 'Do Hard Laws Make Bad Cases? The High Court's Decision in *Kable v Director of Public Prosecutions (NSW)*' (1997) 25(1) *Federal Law Review* 171.

That is exactly what happened to Julian Knight. Mr Knight was in prison for committing a mass murder and was coming up for parole. As with Mr Kable, the Victorian Parliament did not want Mr Knight released from prison. It enacted an amendment to the *Corrections Act 1986* (Vic) stating that the Parole Board 'must not make a parole order … in respect of the prisoner Julian Knight' except in very limited circumstances. The Parole Board is not a court, and its members do not enjoy the security of tenure and other protections that are afforded to state judges. As the decision to deny parole to Mr Knight was not made by a judge, the High Court held the *Kable* doctrine was not relevant, and the legislation was constitutionally valid.[93]

Mr Kable's case also demonstrates how constitutional shoehorning privileges technical acumen over substantive concerns. His success is widely attributed to the brilliance of his lawyer's submissions.[94] As subsequent decisions such as *Knight* underscore, the fairness or unfairness of the treatment of the detainee is not what determines a case's success.[95]

D *Deportation of Indigenous Peoples*

Mr Love and Mr Thoms were long-term residents, but not citizens, of Australia. After they were convicted of criminal offences, the Minister for Home Affairs sought to cancel their residency visas and deport them from Australia under the *Migration Act 1958* (Cth). Commonwealth Parliament enacted the *Migration Act* pursuant to its power to make laws with respect to 'aliens' under s 51(xix) of the *Constitution*. Mr Love and Mr Thoms challenged the validity of their deportation before the High Court on the basis that the *Migration Act* did not apply to them because they were Aboriginal persons. They claimed Aboriginal persons could not fall within the constitutional description of 'aliens'. By a majority of four to three, the Court agreed.[96]

Mr Love and Mr Thoms thus successfully used the federal division of powers to protect themselves from being deported from Australia. In countries with a bill of rights, these sorts of claim are ordinarily dealt with as a matter of individual rights, such as the right to respect for private and family life: does the deportation of a non-citizen with a long-term connection to the country unjustifiably infringe their right to respect for their family life? For example, in the United Kingdom the deportation of non-citizens convicted of criminal offences has been halted to prevent violations of that right contained in the *Human Rights Act 1998* (UK).[97] Alternatively, the issue might be dealt with as a matter of indigenous rights. This has occurred in countries including Canada, where the rights of non-citizen indigenous persons, albeit not in

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93 *Knight v Victoria* (2017) 261 CLR 306.

94 Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2014) 40(1) *Monash University Law Review* 75, 109.

95 Ibid.

96 *Love* (n 6) (Bell J, Nettle J, Gordon J, Edelman J; Kiefel CJ, Gageler J & Keane J dissenting).

97 These decisions have generated considerable controversy in the United Kingdom. The United Kingdom Government mentioned them as a reason for repealing the *Human Rights Act 1998* (UK) in its 2021 consultation paper on the subject: Ministry of Justice (UK), 'Human Rights Act Reform: A Modern Bill of Rights' (Consultation Paper, December 2021) 37–8. In 2022, when the Government proposed to replace the Act with the British Bill of Rights, a specific exception to the right to a family life was created for persons in this situation: British Bill of Rights 2022 (UK) cl 8. The Bill was later abandoned after a change of Prime Minister.

the context of deportation, have been considered under the *Constitution*'s protection for the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada'.[98]

This instance of constitutional shoehorning illustrates two of its characteristics, depending on the lens through which the case is viewed. If *Love* is viewed through the lens of individual rights, it introduces a partial right. Indigenous non-citizens are constitutionally protected from deportation, but non-Indigenous non-citizens are not. From the perspective of individual rights, that is an unusual dividing line to draw because it means that a person's enjoyment of a right to remain in the country is premised on their Indigeneity rather than, say, their degree of connection to the country or the nature and severity of the crime they committed.

If *Love* is viewed through the lens of Indigenous rights, it is not necessarily rights enhancing. For those people who were the immediate beneficiaries of the decision, it shifted rather than removed their source of vulnerability. They were moved into a legal grey zone where they were neither a citizen nor a visa holder[99] and, therefore, were dependent on the government to determine their legal status in Australia (beyond the right not to be deported). Initially, the government demonstrated no interest in providing them with a path to attaining a secure legal status, instead seeking to overturn the High Court's decision to reinstate its power to deport them.[100] After a change in government at the 2022 federal election, the government decided to drop the case and offer them a path to permanent residency or citizenship.[101]

Beyond the people who were the immediate beneficiaries of the decision, it is not clear that the decision in *Love* enhanced the constitutional status of Indigenous persons in Australia. In previous decisions, the Court has repeatedly emphasised 'the importance of loyalty, or allegiance, to the question of alienage',[102] meaning that a non-alien is typically someone who owes allegiance to Australia. Unlike non-Indigenous persons who are able to change this status (for example, becoming an 'alien' through renouncing their Australian citizenship), an implication of *Love* is that Indigenous persons can never change their status to one of 'alien'. That potentially means they owe permanent allegiance to the Crown, a point stressed by some dissenters. For example, Keane J stated:

> If one takes seriously the notion of 'permanent allegiance', it is difficult to see how persons of Aboriginal descent can unilaterally free themselves from that allegiance. … [T]he absence of a cogent explanation as to how permanent allegiance may lawfully be repudiated invites the query whether other persons

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98 *Constitution Act 1982* (n 21) s 35(1); *R v Desautel* [2021] SCC 17.

99 *Love* (n 6) 209–10 [131] (Gageler J).

100 *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, High Court of Australia, Case No S192/2021.

101 Paul Karp, 'Labor Drops Coalition Bid to Overturn High Court Ruling that Indigenous Australians Can't Be Aliens', *The Guardian* (online, 28 July 2022) <https://www.theguardian.com/australia-news/2022/jul/28/labor-drops-coalition-bid-to-overturn-high-court-ruling-that-indigenous-australians-cant-be-aliens>; Nicholas McElroy, 'Aboriginal Man Daniel Love Still at Risk of Deportation Despite Landmark High Court Ruling, Lawyer Says', *ABC News* (online, 18 July 2023) <https://www.abc.net.au/news/2023-07-18/daniel-love-high-court-gold-coast-immigration-deportation/102614382>.

102 *Love* (n 6) 174 [16] (Kiefel CJ) (citations omitted).

> of Aboriginal descent not confronted with the same immediate difficulties [as the plaintiffs] would so blithely embrace the rank paternalism that suffuses this argument. In this regard, *the special privilege offered to persons of Aboriginal descent by the reciprocal arrangement urged by the plaintiffs does not come without cost*. To accept the argument would be to accept limitations on the freedom of persons of Aboriginal descent to pursue their destiny as individuals.[103]

This concern may very well be overstated, but the point is not without any possible merit. The relationship between the Australian state and Indigenous peoples is a complex one, and having an irrevocable status under the *Constitution* might not necessarily be emancipatory for, or welcomed by all, Indigenous peoples.

These observations are not intended to suggest the decision was wrong or has produced poor outcomes. Instead, it is to suggest that constitutional shoehorning — using the federal division of powers to vindicate individual or Indigenous rights — is not without potential costs.

V Conclusion

Constitutional shoehorning is, in some respects, an entirely predictable and even inevitable feature of litigation and adjudication. Litigants are understandably going to try every plausible argument that might help them win their case, even if that argument involves a constitutional provision that appears unrelated to the substantive concern that motivated their litigation in the first place. Why wouldn't a litigant trying to protect their free speech raise arguments under the right to free speech as well as the federal division of powers if both are plausible? As this article has argued, this move is not without its benefits. The state should be made to obey the federal division of powers as well as the bill of rights. However, as this article has also argued, it can come with costs. A win on the federal division of powers might make the law on free speech more complex and partial — for example, protecting speech from legislative interference by one level of government, but not the other. From the perspective of federalism, that makes sense, but from the perspective of the interest the litigant was seeking to protect, namely free speech, it does not.

The existence of constitutional shoehorning invites reflection on its implications for constitutional design. Are there ways in which a constitutional text can be drafted that minimise the costs of shoehorning while leaving open the realisation of its benefits? While a full answer is beyond the scope of this article, a tentative observation is that there are consequences for designing a constitution in a way that limits the ability of individuals to seek protection for their fundamental rights and freedoms. As mentioned earlier, the absence of rights does not mean an absence of demand for rights protection. If one omits a bill of rights or includes a partial bill of rights, individuals will try alternative routes to attain the protection they seek. There may, therefore, be benefit in providing a direct and obvious route to protection and, if there are concerns about granting courts the power to undertake rights-based

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[103] Ibid 231 [217] (Keane J) (emphasis added).

judicial review, limit it through, for instance, legislative override powers.[104] The potential lessons from the study of constitutional shoehorning are, however, broader than this point. The study might also inform, for instance, debates about how narrow or broad rules of standing should be.[105] Consequently, constitutional shoehorning is a subject that invites further study, especially in the Australian context where it is a significant aspect of constitutional litigation and adjudication.

[104] See, eg, Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2017) ch 12.

[105] For a discussion of standing in the constitutional context in Australia, see the special issue on access to constitutional justice in (2011) 22(3) *Bond Law Review*.