George Winterton Memorial Lecture 2024

A New Australian Constitutionalism? Constitutional Purposes, Proportionality and Process Theory

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Abstract

Australian constitutional law rests on a foundation of settled principle, including the idea that Australian constitutionalism comprises a mix of legal and political, negative and positive, and fixed and dynamic, constitutional commitments. It also depends on a series of settled substantive principles. Beyond this, there is greater contest between three rival visions of constitutional reasoning: legalism versus purposive or 'functionalist' approaches to interpretation; autochthonous versus proportionality-based tests of constitutional validity; and context-invariant versus process-sensitive or 'representation-reinforcing' approaches to construction. This essay explores these three dimensions of contest, and argues for the benefits of the newer approach within each of these dyads. Each of these approaches is conceptually and empirically distinct. But each offers important benefits from a democratic and rule of law perspective, and has affinities from a conceptual and comparative viewpoint. The essay therefore argues for a new purposive, proportionality-based and process-sensitive approach to constitutional construction, as a unified approach to constitutional construction in Australia. It also notes the incipient support for each element of this approach within the judgment of members of the High Court of Australia in recent Ch III cases.

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I Introduction

Democratic constitutionalism in Australia subsists on a bedrock of certain widely agreed principles, including the idea that the Australian constitutional order consists of a mix of legal and political, negative and positive, and fixed and dynamic, constitutional commitments.[1] The Australian constitutional order is also characterised by a range of substantive principles shaped by these macro-constitutional commitments.[2] But, beyond this 'bedrock constitutional layer', there is greater contest over the future and foundations of the Australian constitutional model.

Two models compete, in this context, for ascendancy in Australian constitutional discourse,[3] each emphasising three broad ideas about how the High Court of Australia should approach the construction of the *Commonwealth Constitution*. One model features 'legalism', the use of autochthonous tests of constitutional validity, and context-invariant principles of constitutional construction.[4] A newer, alternative model emphasises a more contextual approach involving attention to constitutional purposes, proportionality and process-based considerations ('three constitutional p's') — or constitutional values, proportionality and judicial 'representation reinforcement'.[5]

The aim of the essay is to defend these 'newer' approaches, or constitutional p's, by highlighting the ways in which they may help advance commitments to democracy and the rule of law in Australia.[6]

These three constitutional p's are used as a shorthand for an approach that involves attention to: (1) either constitutional purposes or constitutional values (noting that the two concepts are related but not identical, and that one involves a 'purposive' and the other a 'functionalist' approach); (2) the notion of proportionality, but potentially involving different stages and variants; and (3) a variety of potential approaches to judicial representation reinforcement.

The three p's need not go together. This is true theoretically, and evidenced by the fact that no current member of the Court has explicitly endorsed all three approaches. There is, however, a conceptual connection between them which underpins the claim that they can and should be viewed as part of a new — if as yet

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1 See, eg, Adrienne Stone, 'More than a Rule Book: Identity and the Australian Constitution' (2024) 35(2) *Public Law Review* 127 ('More than a Rule Book').

2 See Rosalind Dixon, 'Constitutional Fixed Points and the Australian Constitution: Cass Sunstein on "How to Interpret the Constitution"', *AUSPUBLAW* (Blog Post, 21 February 2024) <https://www.auspublaw.org/blog/2024/2/constitutional-fixed-points-the-australian-constitution-cass-sunstein-on-how-to-interpret-the-constitution> ('Constitutional Fixed Points'). On the scope and varying meaning of some of these constitutional 'imperatives', see also Joshua Thomson and Madeleine Durand, 'Constitutional Imperatives' (2020) 49(1) *Australian Bar Review* 154.

3 See, eg, Adrienne Stone, 'Judicial Reasoning' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472.

4 See, eg, Jeffery Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 689; Stone, 'More than a Rule Book' (n 1) 11.

5 Rosalind Dixon, 'Comparative Representation-Reinforcing Theory', *Global Constitutionalism* (forthcoming) ('CRRT'). See also Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1429.

6 See Murray Wesson, 'The Reception of Structured Proportionality in Australian Constitutional Law' (2021) 49(3) *Federal Law Review* 352.

unrealised or nascent — *tripartite* model of Australian constitutional reasoning. Both purposive and functionalist kinds of reasoning invite forms of constitutional balancing usefully mediated through a test of structured proportionality.[7] Purposive construction in Australia invites attention to democracy as a constitutional value, and hence representation-reinforcing considerations. And structured proportionality invites a range of difficult evaluative judgments by courts, the political legitimacy of which can be enhanced by explicit consideration of democracy and representation-reinforcing arguments. While existing legalist approaches invite many of the same considerations, they do not do so as openly, or to the same degree.

The essay also seeks to defend the three p's as *a general approach* to constitutional construction. Of course, how they apply will vary according to the context. Some constitutional values will be more relevant in some contexts than others. And the notion of proportionality will need to be adjusted according to the nature of the constitutional issue at stake. For instance, it will need to be understood as involving one-, two- and three-stage variants, of which only the three-stage version is equivalent to current notions of 'structured proportionality'. Structured proportionality itself may need to be glossed to accommodate a range of contextual, common-law style and democratic considerations. But, subject to these modifications, the argument the essay makes is for a newly integrated approach by the Court, which encompasses each of the three constitutional p's across all (or almost all) areas of constitutional discourse.

In this sense, the argument the essay makes is for something like an Australian version of the 'new constitutionalism' adopted in Latin America in the 1990s — an approach that, while not wholly new, was associated with an important shift in courts' interpretive approaches in the region during a time of broader democratic constitutional transition. While the contours of this approach are often contested, most scholars agree that, at a minimum, this new constitutionalism involved greater reliance by courts on constitutional values and notions of proportionality[8] as well as, some might argue, implicit commitments to judicial representation reinforcement.[9] It was also widely defended as helping mark a transition to a more democratic, substantive vision of constitutional justice.[10]

The essay also illustrates the plausibility, and distinctiveness, of this new approach by reference to four recent decisions of the Court involving Ch III of the *Constitution* and the *Kable*[11] principle: *NAAJA*,[12] *Garlett*,[13] *Benbrika No 2*[14] and

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7 Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 200–2. See below Part III(B).

8 Javier Couso, 'Latin American New Constitutionalism: A Tale of Two Cities' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press, 2022) 354.

9 See Manuel José Cepeda Espinosa and David Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19(2) *International Journal of Constitutional Law* 548; Manuel J Cepeda Espinosa, 'Responsive Constitutionalism' (2019) 15(1) *Annual Review of Law and Social Science* 21.

10 See Couso (n 8).

11 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

12 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 ('*NAAJA*').

13 *Garlett v Western Australia* (2022) 277 CLR 1 ('*Garlett*').

14 *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 ('*Benbrika No 2*').

NZYQ.[15] In *NAAJA*, the central question was whether the Legislative Assembly of the Northern Territory ('NT') could give NT police the power to arrest and detain certain suspects and hold them for four hours pending a decision to charge, or else release them unconditionally or in conjunction with an infringement notice. The key constitutional question was whether this scheme effectively undermined the independence and integrity of NT courts as courts capable of exercising federal jurisdiction, or the *Kable* principle as it applied to NT courts. In *Garlett*, the question before the Court was whether Western Australia's scheme for the preventative detention of 'high risk serious offenders' was compatible with the *Kable* principle, or the independence and integrity of state courts as courts capable of exercising federal jurisdiction. In *Benbrika No 2*, the Court was required to consider whether provisions of the *Australian Citizenship Act 2007* (Cth) authorising the Minister of Home Affairs to strip certain convicted offenders (and dual nationals) of their citizenship was inconsistent with the constitutionally prescribed separation of Commonwealth judicial and non-judicial power. And in *NZYQ*, the question was whether the Commonwealth Parliament could authorise the Minister of Home Affairs to detain non-citizens for the purpose of their potential later removal or deportation from Australia where there was no reasonably foreseeable prospect of their removal and, related to that, whether relevant provisions of the *Migration Act 1958* (Cth) should be interpreted as having that effect. The answers were also variable: in *Garlett* and *NAAJA* the majority of the Court upheld the relevant schemes against challenge, whereas in *Benbrika No 2* and *NZYQ* the Court was (near) unanimous in striking down the relevant legislation.

But each of the 'new' approaches or principles was evident in the judgments of at least one Justice in each case. For instance, constitutional values played a notable role in the decisions of Justice Gordon in both *Garlett* and *Benbrika No 2*, and (then) Justice Gageler in *Garlett*. Proportionality-based reasoning was a notable feature of Justice Edelman's reasoning in *Benbrika No 2* and *NZYQ*, and process-sensitivity was a hallmark of Justice Gageler's dissent in *NAAJA*. And while none of these approaches gained support from a majority of the Court, or was wholly new — each finds some support in different judgments of the Court across the last few decades — they were distinct from the approach taken by the majority, and the Court, in many prior cases.

The remainder of the essay is divided into five Parts. Part II outlines certain foundational constitutional principles in Australia, which it suggests should be viewed as largely settled or agreed starting points for debates over preferred approaches to constitutional construction. Part III explores the more contested dimensions to the Australian constitutional model, and especially the contrast between old and new approaches to questions of legalism, sufficiency of connection and context-sensitive interpretation. Part IV outlines the key democratic and rule of law arguments in favour of a 'new' more purposive, proportionality-based and process-sensitive approach to these questions, while Part V considers their inter-dependence as well as their independent status as principles of construction. Part VI offers a brief conclusion on the prospects for the new Australian constitutional model.

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[15] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 ('*NZYQ*').

II Bedrock Principles in Australian Constitutional Law

Like many other constitutional systems worldwide, the Australian constitutional system consists of a mix of 'legal' and 'political' constitutional models.[16] The *Australian Constitution* is a written, entrenched legal instrument interpreted and enforced by the High Court of Australia. In that sense, it embodies a canonically 'legal' model of constitutionalism.[17] At the same time, the *Constitution* operates against the backdrop of a range of unwritten, *conventional* constitutional norms, including norms of responsible government and parliamentary rights protection.[18] These norms are also largely enforced through political rather than legal processes.[19]

This is part of what is meant when we talk about Australia as having a 'Washminster' system of government: this conveys the idea that the drafters of the *Constitution* borrowed from the United States ('US') a system of federalism and an entrenched separation of judicial and non-judicial power, while retaining a United Kingdom ('UK') style model of parliamentary democracy and responsible government.[20] But it also conveys the idea that core Australian constitutional norms are enforced through a mix of legal and political processes or mechanisms.[21]

There are also other ways in which Australia's constitutional order reflects a mix of legal and political constitutional models. The *Constitution* itself affirms the central role of the Commonwealth Parliament in the process of constitutional implementation. The *Constitution* contains a range of 'by law' clauses that permit or require the Parliament to enact legislation implementing constitutional requirements, or else permit Parliament to modify certain constitutional default positions.[22] This is a hallmark of a constitutional model that combines legal and political forms of constitutional enforcement.[23]

In addition, there are a growing number of tribunals and independent agencies that play a critical role in the implementation of written and unwritten constitutional norms.[24] In a comparative context, Mark Tushnet labels this the rise of a

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16 Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 357; Stone, 'More than a Rule Book' (n 1). On this distinction generally, see, eg, Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); Adam Tomkins, *Our Republic Constitution* (Hart Publishing, 2005).

17 See Rosalind Dixon, 'Responsive Constitutionalism in Australia' (2024) 52(3) *Federal Law Review* 359 ('Responsive Constitutionalism').

18 Ian Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Anthem Press, new ed, 2014).

19 Stone, 'More than a Rule Book' (n 1).

20 Elaine Thompson, 'The "Washminster" Mutation' (1980) 15(2) *Politics* 32.

21 Stone, 'More than a Rule Book' (n 1); Crawford and Goldsworthy (n 16). See also Ryan Goss, 'What Do Australians Talk about When They Talk about "Parliamentary Sovereignty"?' [2022] (1) *Public Law* 55.

22 For discussion, see Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9(3–4) *International Journal of Constitutional Law* 636.

23 Ibid.

24 John McMillan, 'Administrative Appeals in Australia: Future Directions' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 227.

constitutional 'fourth branch'.[25] In Australia, this fourth branch also includes bodies such as Commonwealth and state ombudsmen, integrity institutions, electoral commissions and human rights commissions, all of which rely on a mix of legal and political tools, and play a central role in enforcing capital 'C' and small 'c' constitutional norms.[26]

Australian constitutionalism likewise rests on the idea of both a negative and positive state.[27] Some scholars suggest that the very notion of constitutionalism is predicated on there being limits to state action. Martin Loughlin, for example, argues that this is one reason we should reject the idea of constitutionalism within modern democratic self-government.[28] The Australian constitutional model also clearly contemplates a range of limits on the actions of Commonwealth and state parliaments, and those of executive officials.

But, as a range of recent scholarship makes clear, the Australian constitutional model is also predicated on a commitment to *empowering* the state to act — not only for the protection of individual rights but also for general 'social welfare'.[29] Numerous powers in s 51 of the *Constitution* empower Parliament to tax and spend in ways that reflect the logic of a social welfare state.[30] The *Constitution* was shaped by a concern for workers' rights, and a strong tradition of Chartist thought and activism in Australia.[31] The political constitution in Australia has also long reflected commitments to egalitarianism, economic redistribution and a strong welfare state.[32]

Australian constitutionalism is also defined by competing commitments to stability and change. On some level, this is true for all democratic constitutional systems worldwide. But Australian constitutionalism is also characterised by *open* attempts to reconcile these commitments. For instance, the High Court has generally eschewed both the idea of a purely 'originalist' or backward-looking approach to constitutional construction and one that embraces the idea of a constitutional 'living

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25 Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021). Where this branch is constitutionally entrenched, Tarun Khaitan suggests it is useful to view it as a form of 'guarantor branch': Tarunabh Khaitan, 'Guarantor Institutions' (2022) 16(S1) *Asian Journal of Comparative Law* S40.

26 See, eg, Paul Kildea and Sarah Murray, 'Democratic Constitutions, Electoral Commissions and Legitimacy: The Example of Australia' (2021) 16(S1) *Asian Journal of Comparative Law* S177. See also Stone, 'More than a Rule Book' (n 1).

27 For general discussion, see NW Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018); Adrienne Stone and Lael K Weis, 'Positive and Negative Constitutionalism and the Limits of Universalism: A Review Essay' (2021) 14(4) *Oxford Journal of Legal Studies* 1249.

28 Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).

29 Stone, 'More than a Rule Book' (n 1); Will Bateman, 'Federalising Socialism without Doctrine' (2024) 52(3) *Federal Law Review* 328; Lynsey Blayden, 'Active Citizens and an Active State: Uncovering the "Positive" Underpinnings of the Australian Constitution' (2024) 52(3) *Federal Law Review* 293; William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156; Rosalind Dixon, 'Responsive Constitutionalism' (n 17).

30 See, eg, *Australian Constitution* s 51. See also discussion in Patrick Emerton and Kathryn James, 'The Australian Constitution as a Framework for Securing Economic Justice' (2023) 51(3) *Federal Law Review* 372; Blayden (n 29); Bateman (n 29); Stone, 'More than a Rule Book' (n 1).

31 Blayden (n 29); Bateman (n 29); Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143.

32 For general discussion, see Barber (n 27); Stone and Weis (n 27). See also Stone, 'More than a Rule Book' (n 1); Dixon, 'Responsive Constitutionalism' (n 17).

tree'.[33] Instead, it has endorsed a 'hybrid' approach that distinguishes between the original 'denotation' of constitutional language (which is not open to change) and its contemporary 'connotation', as something that may change in light of evolving social attitudes and understandings.[34]

In addition, the Australian constitutional order combines a quite rigid model of capital 'C' written constitutionalism with a far more flexible model of small 'c' constitutionalism and change: s 128 of the *Constitution*, for example, makes formal constitutional amendment extremely difficult.[35] But there are far fewer obstacles to legislative change. We also have an active practice and culture of legislative change.[36] Hence, the Australian small 'c' constitutional model has been regularly updated by the passage of a range of small 'c' or quasi-constitutional statutes such as the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

In addition to these 'macro' principles, the Australian constitutional order arguably embodies a range of substantive principles that both reflect and are shaped by this macro-structure.[37] These principles are part of what makes Australian constitutionalism unique or distinctive, in global terms, and what defines the *precise way* in which universal tensions within democratic constitutionalism are accommodated within Australia.

III From Old to New Constitutional Approaches

There are, however, other elements of Australia's constitutional model that are less settled, or more open to contest: for instance, legalism, autochthonous tests of constitutional validity, and context-invariant approaches to construction.

'Legalism' in Australia is most prominently associated with the ideas of Sir Owen Dixon, who argued for a 'strict and complete legalism' as the safest guide to the construction of the *Commonwealth Constitution*.[38] Legalism, for Dixon, was clearly not the same as textualism: as a judge, Dixon authored numerous opinions relying on modalities of argument *other* than the text or language of the *Constitution* alone.[39] Indeed, some of Dixon's most enduring constitutional decisions placed

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33 See, eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337; *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

34 See, eg, Goldsworthy, 'Constitutional Interpretation' (n 4); Stone, 'More than a Rule Book' (n 1) 11.

35 See George Williams and David Hume, *Power People: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

36 Lisa Burton Crawford, 'The Age of Hyper-Legislation?' (Conference Paper, Annual Conference of the International Society of Public Law, 25 June 2018).

37 See generally, Dixon, 'Constitutional Fixed Points' (n 2).

38 Sir Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 245, 247 ('Address'). For useful exploration, see Adrienne Stone, 'Between Realism and Legalism: Michael Coper and the Enduring Appeal of *Cole v Whitfield*' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 89 ('Between Realism and Legalism').

39 See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*'); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*'). On 'modalities', see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982).

significant reliance on constitutional history and structure as well as prior case law.[40] Legalism, in this sense, is also best understood as an approach to constitutional construction that permits attention to constitutional text, history, structure *and* case law.[41] But it is also an approach that downplays the relevance, or appropriateness, of attention to broader values, or the consequences of court decisions.[42] And it is an approach that has commanded support from a wide range of lawyers and judges.[43]

Two other ideas are closely associated with the idea of legalism in constitutional construction in Australia. First, the Court has held that, at least in the context of s 51 of the *Constitution*, the validity of Commonwealth laws should be assessed by reference to either of two distinctly Australian tests that ask whether a law is

- sufficiently connected or 'appropriate and adapted' to a particular head of power, or else
- 'reasonably appropriate and adapted' to advancing a legitimate government purpose,

as to be within power, or avoid contravening a relevant constitutional limitation.[44] The Court has also applied similar tests of reasonable necessity, or tests that ask whether a law is 'reasonably appropriate and adapted' to its ends, in a range of other contexts — including Ch III of the *Constitution*.[45] Second, the Court has held that the *Constitution* should be interpreted as an ordinary legal text, and hence given its ordinary and natural meaning, without regard to any ongoing assumptions about the nature of federalism or the relationship between the Commonwealth and the states.[46] In effect, this means that the Court has endorsed a form of *context-invariant* approach to the construction of Commonwealth legislative power.

Both approaches have legalist underpinnings: they state the question of constitutional construction in ways that avoid any express or overt consideration of the costs or benefits of a law to the achievement of particular constitutional or legislative purposes. Legalism, autochthonous tests of constitutional validity, and context-invariant approaches to construction are thus all closely related ideas. And each retains clear support in current constitutional argument and practice.

At the same time, these legalist principles are under pressure from three rival ideas or principles: purposive construction, proportionality-based reasoning, and process-sensitive approaches to constitutional construction. As Part IV notes, each

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40 See, eg, *Boilermakers* (n 39); *Melbourne Corporation* (n 39).

41 Stone, 'More than a Rule Book' (n 1).

42 Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455 ('The Functional Constitution'); Sir Anthony Mason 'Foreword' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) vi. See also Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 429; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106.

43 See, eg, Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000).

44 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Coleman v Power* (2004) 220 CLR 1 ('*Coleman*').

45 *Jones v Commonwealth* (2023) 97 ALJR 936, 968–9 [153]–[154] (Edelman J).

46 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

of these ideas finds support in the judgments of at least one current member of the High Court, as well as certain prior decisions of the Court. And, as Part V explores, they have a strong normative basis in ways that make them true rivals in debates over the preferred approach to constitutional construction in Australia.

A *Purposive or Functionalist Approaches to Construction*

What does it mean to talk about a 'purposive' approach to constitutional construction? The idea of a purposive approach to statutory interpretation emphasises the importance of attention to statutory text, but also the broader context in which a statute is enacted. As the High Court held in *Project Blue Sky v Australian Broadcasting Authority*, this can include attention to a range of sources, including the legislative history behind the law, the structure of legislation and the broader context for a law's enactment.[47]

The same is true in a constitutional context. A purposive approach to constitutional construction implies attention to the broader purposes behind particular constitutional provisions, and the constitutional project as a whole. This, in turn, invites attention to the text and structure of the *Constitution* as a whole, as well as the convention debates and debates over constitutional ratification. This was the approach endorsed by the High Court in *Cole v Whitfield* in overruling prior doctrine limiting the Court's capacity to pay direct attention to the convention debates and other legislative history underpinning the *Constitution*.[48] The Court held that it was permissible to consider these sources for three broad purposes: for identifying the contemporary usages of constitutional language, for identifying the mischief to which particular provisions were directed, and for the broad purposes of Federation.[49] *Cole* therefore set the stage for an important, if incremental, shift in Australian constitutional construction toward a more purposive approach animated by a concern for the construction of particular provisions in the context of the *Constitution* as a whole, or an approach sensitive to the broad purposes animating our federal constitutional arrangements.[50]

At the same time, constitutional 'purposes' can be construed at varying levels of generality. The more abstract the characterisation of a provision's purpose, the more it lends itself to an evolving or dynamic characterisation, whereas the more concrete or specific the ways in which we understand constitutional purpose, the more constraining it will be and less capable of adapting to changing circumstances. Recent decisions also reveal a willingness to embrace more abstract notions of constitutional 'purpose' which implicitly include purposes not fully foreseen by the founders of a constitution, or a notion of evolving constitutional *values*.[51]

Constitutional values are distinct from ordinary community or social values in one important way: their construction is informed by legal sources such as the

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47 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

48 *Cole v Whitfield* (1988) 165 CLR 360 ('*Cole*').

49 Ibid 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

50 For this as the preferred understanding of *Cole* (n 48), as opposed to a more originalist one, see, eg, Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 141–3 ('Beyond the Text').

51 Cf Chief Justice James Allsop, 'Values in Public Law' (2017) 91(2) *Australian Law Journal* 118.

text, history and structure of a constitution, as well as prior case law.[52] Hence, the effort is to guide constructional choice by reference to a range of *legally grounded* values.[53] But even still, the process necessarily invites attention to relatively abstract constitutional values in ways that stand in clear contrast to the call for a form of 'strict and complete legalism'.[54] Indeed, attention to such values could be seen as linked to a distinctive model of *functionalist* interpretation which emphasises constitutional substance over form and the central role of judicial evaluative judgment in the making of constitutional constructional choices.[55]

A functionalist approach of this kind is evident in a range of High Court cases, including recent decisions involving Ch III. For instance, in *Garlett*, in applying the *Kable* principle, both Justices Gordon and Gageler made explicit reference[56] to *constitutional values* as informing the scope of exceptions to the *Lim* principle.[57] Their Honours held, first, that these exceptions must not be construed so broadly that they 'becom[e] the rule'.[58] Second, they held that the exceptions should be construed in light of relevant constitutional values — including commitments to individual liberty and the rule of law.[59] Gageler J made particular reference to the importance of the rule of law, in this context,[60] whereas Gordon J emphasised the centrality of individual liberty.[61] But both Justices emphasised constitutional values as reasons for finding that the relevant scheme was incompatible with the reasoning in *Lim* and the limits imposed by the *Kable* principle.[62]

B *Proportionality-Based Reasoning*

Structured proportionality was first adopted as a doctrine in Australia by a majority of the High Court in *McCloy v New South Wales* in the context of the implied freedom of political communication.[63] Prior to *McCloy*, in cases involving the implied

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52 Dixon, 'The Functional Constitution' (n 42); Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3 ('Functionalism and Australian Constitutional Values'). See also ibid; Lynsey Blayden, 'Institutional Values in Judicial Review of Administrative Action: Re-reading *Attorney-General (NSW) v Quin*' (2021) 49(4) *Federal Law Review* 594; Shreeya Smith, 'Reconceptualising the Non-Statutory Executive Powers and Capacities of the Commonwealth: Values, Balancing and Functionalism through the Lens of "Nationhood" Powers and Capacities' (PhD Thesis, UNSW Sydney, work in progress).

53 Dixon, 'The Functional Constitution' (n 42); Dixon, 'Functionalism and Australian Constitutional Values' (n 52).

54 See Owen Dixon, 'Address' (n 38) 247.

55 Dixon, 'The Functional Constitution' (n 42); Dixon, 'Functionalism and Australian Constitutional Values' (n 52).

56 *Garlett* (n 13) 48 [128] (Gageler J), 60 [169], 63 [175] (Gordon J).

57 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*').

58 *Garlett* (n 13) 50 [136], 53 [148] (Gageler J), 59–60 [168]–[169], 64–5 [179] (Gordon J).

59 Ibid 48 [128], 49 [132]–[133], 51 [140], 54 [150] (Gageler J), 59–60 [168]–[169], 63 [176], 64–5 [179] (Gordon J).

60 Ibid 48 [128], 49 [133], 54 [150].

61 Ibid 59–60 [168]–[169], 63 [176], 64–5 [179].

62 Other members of the Court also noted the importance of the protection of individual liberty in this context, including in the application of the relevant scheme. But the majority made these observations in the context of a more legalist approach to the *Lim* principle and the scope of the rule and exceptions it recognised: see, eg, ibid 27–8 [55] (Kiefel CJ, Keane and Steward JJ), 101–2 [279], [281] (Edelman J), 105–6 [292] (Gleeson J).

63 *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*').

freedom, the Court had asked whether a law engaged the freedom, and then whether it was reasonably appropriate and adapted to achieving a legitimate end in a manner compatible with the constitutionally prescribed system of representative and responsible government.[64] In *McCloy*, the Court held that a doctrine of structured proportionality could be substituted for this test of whether a law was 'reasonably appropriate and adapted'.[65]

The Court in *McCloy* suggested that the doctrine has three limbs or elements. First, it asks whether a law is suitable to pursuing a legitimate government purpose. Second, it asks whether a law is narrowly tailored to that purpose or is capable of being described as satisfying the requirements of minimal impairment of relevant constitutional norms or values. And third, it asks whether a law is adequate in the balance, meaning achieves more in terms of the relevant legislative objective than it imposes in terms of relevant harms to constitutionally significant norms or values. This is in addition to the question of whether a law pursues a legitimate government purpose, and does so in a manner compatible with the constitutionally prescribed system of representative and responsible government.[66]

A test of structured proportionality is closely related to the Court's earlier test for determining constitutional validity, which asked whether a law was reasonably capable of being seen as appropriate and adapted to its purpose.[67] This doctrinal formulation has itself varied from time to time in ways that have pointed to a greater or lesser willingness of the Court to provide leeway to the Parliament in the making of judgments about these matters. Hence, proportionality could be seen as a modest adjustment of the standard of review applied by the Court in relation to the implied freedom of political communication.[68]

The most significant departure from prior approaches lies in a willingness directly and openly to consider questions of adequacy in the balance.[69] This limb of the test is rarely the sole basis for the Court's resolution of questions of constructional choice. But its inclusion in a test of constitutional validity still marks an important shift away from a more distinctively legalist test of sufficiency of connection, or one that asks whether a law is 'reasonably appropriate and adapted to its purpose'. It also marks a shift from a quite distinctive or 'autochthonous' Australian approach toward a more globally recognised approach to questions of constitutional validity.

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64 *Lange* (n 44) 562, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

65 *McCloy* (n 63) 193–6 [2]–[4], 214–15 [71] (French CJ, Kiefel, Bell and Keane JJ).

66 Ibid; *Unions NSW v New South Wales* (2013) 252 CLR 530; *Unions NSW v New South Wales [No 2]* (2019) 264 CLR 595 ('*Unions NSW No 2*').

67 See, eg, *Lange* (n 44); *Coleman* (n 44). See also discussion in Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123, 126 ('Proportionality'); Justice Susan Kiefel, 'Section 92: Markets, Protectionism and Proportionality — Australian and European Perspectives' (2010) 36(1) *Monash University Law Review* 1, 10; Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85.

68 Stone, 'Proportionality' (n 67) 124–5, 146–8. See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1.

69 Stone, 'Proportionality' (n 67) 143.

Structured proportionality is a doctrine that finds its origins in Germany and the European Court of Human Rights.[70] It has migrated over time to countries as diverse as Canada, South Africa, Korea, Taiwan, Hong Kong and Colombia.[71] It is also an increasing focus of jurisprudential and scholarly attention in other parts of the Anglo-American world, including in the UK, New Zealand and the US. While the US Supreme Court continues to employ a form of categorical, tiered reasoning which provides an alternative to proportionality-based approaches, several prominent US scholars have noted the intimations of proportionality-style reasoning in aspects of the US Court's recent jurisprudence on due process and equal protection. Indeed, Moshe Cohen-Eliya and Iddo Porat have suggested that 'almost all constitutional courts … are adopting the doctrine of proportionality as their main pillar of constitutional adjudication'.[72] The only question is the specific variant of proportionality a court adopts.

In Australia, the doctrine has also found clear majority support from the Court in the context of the implied freedom of political communication and the application of s 92 of the *Constitution*, and the determination of whether a law burdening interstate trade and commerce can be considered reasonably necessary for a non-protectionist purpose.[73] Justice Edelman in particular has also endorsed the extension of the doctrine to other contexts, including Ch III of the *Constitution*. The Court in *Falzon* expressly rejected the usefulness of structured proportionality to the application of the *Lim* principle.[74] But in *Garlett*, in applying the *Kable* principle, Edelman J expressly relied on proportionality-style considerations as relevant to determining whether the relevant legislative scheme infringed the *Kable* principle.[75] In *Benbrika No 2*, Edelman J again adopted a distinctive approach to the application of the *Lim* principle, linking the concept of a punitive law to one that is 'not proportionate to, or sufficiently connected with, an otherwise legitimate purpose',[76] and emphasising the severity of the consequences of citizenship deprivation for individuals, in this context.[77] And even more notably, in *NZYQ*, the Court expressly noted Edelman's preference for a test of proportionality in the course of its joint judgment.[78] In the recent decision in *ASF17*, Edelman J further elaborated this approach, noting its connection to functionalism or a commitment to the protection of individual liberty.[79]

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70 Justice Susan Kiefel, 'English, European and Australian Law: Convergence or Divergence?' (2005) 79(4) *Australian Law Journal* 220, 230–1.

71 Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013); Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press, 2019); Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press, 2020).

72 Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463. See discussion in Chordia (n 7) 2.

73 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217.

74 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 343 [25] (Kiefel CJ, Bell, Keane and Edelman JJ), 359–60 [95] (Nettle J) ('*Falzon*').

75 *Garlett* (n 13) 88 [242], 94 [257]–[258].

76 *Benbrika No 2* (n 14) 921 [94].

77 Ibid 923 [104].

78 *NZYQ* (n 15) 1017 [52] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

79 *ASF17 v Commonwealth* (2024) 98 ALJR 782, 802 [103]–[104].

C *Representation-Sensitive Constructional Choice*

The idea of process-based reasoning, or judicial representation reinforcement, is less familiar to Australian constitutional lawyers. The most prominent advocate of this approach in Australia is Chief Justice Stephen Gageler, who has explicitly endorsed this approach in his extra-judicial writing.[80] Gageler draws, in this context, on a long tradition of representation-reinforcing thinking in Australia and especially the US, including the work of John Hart Ely in *Democracy and Distrust: A Theory of Judicial Review*.[81] In the US context, Ely argued that the Supreme Court should avoid making contested moral judgments in the interpretation of various open-ended clauses of the *Constitution*, and instead leave such questions to the political branches of government. In this sense, Ely offered a critique — and corrective — to what he saw as the excesses of the Warren Court era in the US.

At the same time, Ely argued that the Supreme Court had an important role to play in ensuring that the democratic process functioned sufficiently well to warrant judicial deference of this kind. Specifically, he argued that the Court had a central role to play in (1) maintaining the channels of political change, especially in the face of attempts by incumbents to 'clog' those channels or tilt them in their own favour, and (2) protecting the rights of 'discrete and insular minorities', in the face of majoritarian disregard or excesses.[82]

The ideas have received criticism — especially because Ely claimed that the theory he proposed was in some sense 'neutral' or objective, or marked a sharp distinction between a procedural and a substantive role for the Court.[83] But they have also had enduring influence in the US,[84] and elsewhere,[85] and sparked a further line of more modern, comparative 'political process' or 'representation-reinforcing theory'.[86]

Gageler also adapted these ideas to the Australian context to capture the way in which ideas of judicial representation reinforcement can operate in a system of

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80 Gageler, 'Beyond the Text' (n 50) 149–52; Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162. For analysis, see Amelia Loughland, 'Taking Process-Based Theory Seriously: Could "Discrete and Insular Minorities" Be Protected under the *Australian Constitution*?' (2020) 48(3) *Federal Law Review* 324; Rosalind Dixon and Amelia Loughland, 'Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia' (2021) 19(2) *International Journal of Constitutional Law* 455.

81 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). See Gageler, 'Beyond the Text' (n 50) 149–51, citing Percy Partridge, 'The Politics of Federalism' in Geoffrey Sawer (ed), *Federalism: An Australian Jubilee Study* (Australian National University, 1952) 174.

82 Ely (n 81) chs 5, 6. See also discussion in Loughland (n 80).

83 See Laurence H Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89(6) *Yale Law Journal* 1063. See also Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) ch 2 ('*Responsive Judicial Review*').

84 Ryan D Doerfler and Samuel Moyn, 'The Ghost of John Hart Ely' (2022) 75(3) *Vanderbilt Law Review* 769.

85 Rosalind Dixon and Michaela Hailbronner, 'Ely in the World: The Global Legacy of *Democracy and Distrust* Forty Years On' (2021) 19(2) *International Journal of Constitutional Law* 427.

86 Gardbaum (n 5); Dixon, 'CRRT' (n 5).

representative and *responsible* government.[87] The prime focus of his Honour's reasoning in this context has been the degree to which various legislative provisions have the capacity to enhance or detract from the constitutionally prescribed system of representative and responsible government. This is especially evident in cases involving the application of the implied freedom of political communication.[88] In this context, Gageler connects the idea of representation reinforcement to his and Justice Gordon's preferred *categorical* approach to questions of constitutional justification.

But there is no necessary connection between a commitment to judicial representation reinforcement and an approach of this kind. The idea of judicial representation reinforcement can inform a far broader range of areas of constitutional discourse, and be encompassed within proportionality-based as well as more categorical models of scrutiny.[89] For instance, in *NAAJA*, in dissenting on the constitutionality of the NT's system of 'paperless arrests', Gageler J placed explicit reliance on representation-reinforcing concerns. His Honour held that the scheme in question was in fact punitive, and that the role of NT courts in the scheme was effectively to 'facilitate punitive executive detention'.[90] In reaching this conclusion, Gageler also emphasised the representation-reinforcing benefits of a decision to remove courts from a role in this kind of scheme: doing so, Gageler reasoned, would mean that *on its face* the scheme would appear as a system of 'catch and release' or 'one which authorises police to detain, and then release, persons arrested without warrant on belief of having committed or having been about to commit an offence'.[91] This, Gageler suggested, would also increase 'political accountability': it would then be for the Assembly to decide 'whether or not to enact a scheme providing for deprivation of liberty in that stark form'.[92] This reasoning also stood in direct contrast to the more context-invariant approach to these questions adopted by the majority.[93]

The essence of a process-sensitive approach is that it is explicitly context sensitive and adjusts the appropriate level of judicial scrutiny of a law to the process by which it was adopted, or recently reconsidered by the legislature: laws that reflect recent, reasoned forms of legislative deliberation are more likely to attract a degree of deference under this approach than laws that reflect animus, oversight or a lack of recent, reasoned debate. And the aim of both judicial restraint and robust intervention, in this context, is to promote the proper functioning of the constitutional system of representative and responsible government: restraint rewards and encourages its independent functioning, whereas intervention corrects and compensates for its failings.

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87 Gageler, 'Beyond the Text' (n 50) 139, quoting *ACTV* (n 94) 109–11 (Sir Maurice Byers QC) (during argument).

88 See, eg, *McCloy* (n 63); *Unions NSW No 2* (n 66). See also discussion in Dixon and Loughland (n 80).

89 See Dixon, *Responsive Judicial Review* (n 83) ch 4; Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92 ('Calibrated Proportionality'); Dixon, 'Responsive Constitutionalism' (n 17).

90 *NAAJA* (n 12) 620 [128].

91 Ibid 621 [135].

92 Ibid.

93 Ibid 592–3 [37]–[38] (French CJ, Kiefel and Bell JJ), 651–2 [236]–[237] (Nettle and Gordon JJ).

IV Why a New Australian Constitutionalism

There are two broad arguments for this 'new' constitutional model of reliance on constitutional values, proportionality doctrines and process-sensitive considerations compared to the older, more traditional reliance by the High Court on legalism, and autochthonous and context-invariant approaches to constitutional validity: arguments that sound in commitments to democracy and the rule of law.

Commitments to democracy and the rule of law are important both within the Australian constitutional tradition and more generally. A commitment to 'democracy' was one of the key values relied on by the High Court in *ACTV* as informing the development of the implied freedom of political communication.[94] And as the Court itself noted in *Lange*, a commitment to representative government underpins ss 7, 24 and 128 of the *Constitution*. It also underpins the history of key moments in the founding and re-founding of the Australian constitutional order (for example, the 1967 constitutional referendum and passage of the *Australia Acts* in 1986).[95] Similarly, as Sir Owen Dixon noted in *Australian Communist Party v Commonwealth*, the *Constitution* is framed on the assumption of respect for the rule of law.[96] Commitments to self-government and the rule of law are also part of an overlapping consensus among constitutional democracies worldwide about the 'minimum core' requirements of a commitment to liberal constitutionalism.

Of course, each of these concepts must also be understood in the Australian context in a particular way that is historically and structurally grounded rather than open ended.[97] Democracy, for example, is a contested concept that allows for broader or narrower, or thicker or thinner, interpretations.[98] For that reason, Justice McHugh in particular also criticised the Court's reliance on democratic values in *ACTV* as too open ended, and as drawing on values in the making of constructional choices in ways that led to too open ended a form of judicial balancing or too much scope for judicial creativity in the making of constitutional implications.[99] The High Court in *Lange* also narrowed its prior reliance on democracy and made clear that the particular understanding of democracy at stake in *ACTV* was best understood as one closely tied to the text and structure of the *Australian Constitution*, namely the provision in ss 7, 24 and 128 for representative and responsible government.[100]

Similarly, the rule of law in Australia has a particular distinctive scope and meaning.[101] At the most abstract level, the idea of the rule of law entails a

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94 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 139 (Mason CJ), 156 (Brennan J) ('*ACTV*').

95 See, eg, Elisa Arcioni, 'Competing Visions of "The People" in Australia: First Nations and the State' (2023) 1(1) *Comparative Constitutional Studies* 75.

96 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

97 Stone, 'More than a Rule Book' (n 1).

98 Dixon, *Responsive Judicial Review* (n 83) chs 2–3.

99 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 194–205 (McHugh J).

100 *Lange* (n 44) 567. For useful exposition and critical discussion, see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668.

101 See, eg, Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

commitment to *non-arbitrary* forms of government.[102] But, more concretely, it can be understood to entail three interrelated ideas: the idea that everyone, including the executive government, should be subject to the law; the idea of laws being published and knowable in advance; and the idea of a government of 'law not men [or women]'.[103]

In addition, these are not the only criteria for assessing the desirability of an approach to constitutional construction; other considerations include the consistency of various approaches with a commitment to legal legitimacy and the constitutional separation of powers. But, as Part III notes, both legalism and functionalism (or purposive approaches) are premised on attention to formal constitutional modalities, and hence notions of legal legitimacy. Proportionality-based reasoning involves a modest rather than radical shift in a court's approach to assessing the validity of laws. And process-based considerations seek to respect, rather than undermine, a functional understanding of the separation of powers.

Yet, as the rest of this Part shows, all three approaches can be seen to offer modest but meaningful gains for democracy and the rule of law in Australia: purposive and proportionality-based forms of reasoning arguably promote the rule of law in both the second and third senses — that is, rule according to norms that are the product of a collective or 'intersubjective' agreement, rather than individual or subjective judgment, and norms that are knowable and predictable in application.[104]

A *Purposive Construction*

One of the key arguments for legalism is its relationship to the rule of law.[105] The text of a democratic constitution is generally the product of agreement among a diverse range of political elites, and often the public at large, or their legislative representatives. The history and structures found in a constitution have a similar provenance. And constitutional doctrine often reflects the judgments of 'many minds', or many different judges across time, through a process of incremental, common-law style reasoning.[106] Reliance on these sources — and these sources alone — is thus one way in which judges can ensure that their constructional choices reflect a commitment to the rule of 'law not men [sic]', or the many rather than the few. Or, as Adrienne Stone notes, it is one means by which judges can seek to apply a standard of legal correctness that is 'external' to them as individuals.[107]

The difficulty with legalism, however, is that often it runs out or fails to provide determinate answers to a range of real-world questions of constructional choice. This is a familiar critique of textualism as a theory that calls for an exclusive

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[102] Martin Krygier, 'What's the Point of the Rule of Law?' (2019) 67(3) *Buffalo Law Review* 743.

[103] See Richard H Fallon Jr, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97(1) *Columbia Law Review* 1.

[104] On the notion of 'intersubjective agreement', see, eg, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1998).

[105] See Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000); Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56(4) *University of Chicago Law Review* 1175.

[106] See, eg, David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63(3) *University of Chicago Law Review* 877. See also Cass R Sunstein, 'Burkean Minimalism' (Working Paper No 273, John M Olin Program in Law and Economics, 2006).

[107] Stone, 'Between Realism and Legalism' (n 38).

focus on the text of a written constitution and its original semantic meaning.[108] It is also one reason that most *legalists* (including Owen Dixon himself) are willing to go beyond the text to consider the guidance provided by a broader range of historical, doctrinal and structural modalities of constitutional argument.[109]

Even these additional sources, however, often fail to provide clear answers to concrete questions of constructional choice.[110] Often, they will conflict, or point in different directions in the making of a specific constructional choice.[111] Legalism, therefore, will also often 'run out' as a guide to the resolution of concrete constitutional controversies.[112] And the argument for attention to constitutional purposes or values, in this context, is that it can provide additional guidance to courts, which is again consistent with a commitment to the rule of law.

Judges are routinely called on to make a range of values-based judgments — for example, in sentencing, in determining the content of notions of 'reasonableness' in tort or criminal law, or the scope of a 'public policy' exception in contract. These judgments are also often dependent on judgments about prevailing social values and expectations. But values-based judgments of this kind can also often be modified by statute — and hence the collective judgments of the legislature. In a constitutional context, this is far less true. Judicial judgments about values are often quite difficult for parliaments to override, and hence there is a heightened demand for such judgments to conform, *ex ante*, to the requirements of the rule of law.[113]

The advantage of a purposive or functionalist approach, in this context, is that it can help do exactly that, namely ensure — to the maximum extent possible — that the social and political values individual judges draw on are those that find some support in a broader set of collective value judgments, such as those embodied in the text, history and structure of a constitution, or prior case law.

Of course, even constitutional values can themselves run out, or fail to provide decisive guidance in the resolution of concrete constitutional cases: like legalist arguments, they too may conflict or point in different directions, or fail to provide sufficiently concrete guidance in a particular case. Here, there will be no choice but for judges to apply a form of interpretive default rule (which itself embodies certain values-based judgments) or else broader social values, or consequences, as a guide to resolving a particular case. But this kind of broader, pragmatic approach could also be considered something like a last resort from a rule of law perspective: in some cases, it may be necessary to provide certainty to individuals (itself a requirement of the rule of law). But its systemic consequences for the rule of 'law not men [sic]' should mean that judges only take this approach

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108 See Cass R Sunstein, *How to Interpret the Constitution* (Princeton University Press, 2023) 62, 66–7.

109 On the connection between legalism and textualism, see Stone, 'More than a Rule Book' (n 1) 130 n 26.

110 Dixon, 'The Functional Constitution' (n 42).

111 See Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control* (Associated General Publications, 1946).

112 See ibid. See also Gageler, 'Beyond the Text' (n 50) 4.

113 On the relationship between constitutional amendment, judicial override and legal and political legitimacy, see, eg, Rosalind Dixon and Adrienne Stone, 'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 95.

after exhausting the guidance provided by more orthodox legalist, purposive and functionalist approaches.

B *Structured Proportionality, Democracy and the Rule of Law*

Compared to more autochthonous tests of constitutional validity, proportionality-based reasoning has three broad potential advantages. First, as Part III notes, it is a constitutional discourse that speaks to the global constitutional community. Speaking the same *constitutional language* as the global community can also substantially reduce the 'transaction costs' of other courts learning from Australia, and the Court learning from other constitutional and appellate courts.[114]

By itself, this may not be a sufficient basis for the Court to change its approach to constitutional reasoning. In approaching the task of constitutional construction, most commentators agree that the Court should adopt the approach that is best for Australia, not the global community as a whole.[115] At times, the idea of a common language may also obscure important differences in context and conceptions of the judicial role that underpin the doctrine of proportionality in different countries and the constitutional purposes that proportionality analysis serves in Australia.[116] And transnational dialogue of this kind must be approached with this risk in mind.

But the virtue of proportionality discourse, in this context, is that it provides a common conceptual and discursive frame for understanding how various normative and empirical claims have informed similar questions of constitutional construction across countries. Being part of a global dialogue on these questions can also offer real benefits to Australia and Australian constitutional discourse: it can provide lawyers and judges with useful doctrinal, discursive and empirical lessons in the resolution of open-ended constitutional questions. In this sense, the language of proportionality can function much like a common economic currency: it can increase productive forms of trade or exchange across borders.[117]

There are two additional arguments for proportionality-based forms of reasoning which sound in commitments to the rule of law and democracy. Doctrines of proportionality offer a structured and transparent means by which courts can adjudicate difficult questions about the balance between competing legislative objectives and other constitutional commitments.[118] These doctrines invite a broad approach to the question of whether relevant constitutional norms are engaged in a given case, and then a structured and predictable framework for adducing and

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114 On transaction costs in a constitutional context, see, eg, Dixon and Ginsburg (n 22).

115 See Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28(1) *Monash University Law Review* 85. But see Michael Kirby, 'Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?' (2009) 98(2) *Georgetown Law Journal* 433.

116 See, eg, Chordia (n 7).

117 Andrew K Rose, Ben Lockwood and Danny Quah, 'One Money, One Market: The Effect of Common Currencies on Trade' (2000) 15(30) *Economic Policy* 9.

118 See Dixon, 'Calibrated Proportionality' (n 89) 144–6; Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551. See also Robert Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2011). For doubts about this argument, see Stone, 'Proportionality' (n 67).

assessing the arguments and evidence as to whether limitations on the enjoyment or implementation of those norms are justified in the circumstances.

In addition, the language of proportionality offers a framework for constitutional analysis that resonates in ordinary, non-legal discourses for understanding the legitimacy of government action — hence, a constitutional vocabulary that enhances the scope for legislative and public engagement with Court decisions on the meaning of the *Constitution*.[119] In some theories of constitutional construction, this will be important for enhancing the scope for 'dialogue' with the Court.[120] This, in turn, can have important *democratic* benefits — in promoting a weaker, more democratically 'responsive' model of judicial review on certain morally and politically charged questions.[121]

In other accounts, the very idea of 'constitutional dialogue' is contrary to notions of constitutional and judicial supremacy.[122] But even in this account, legislative engagement with the Court can promote compliance with Court rulings. And public understanding can promote public confidence in the Court and constitutional systems of justice in ways that further enhance commitments to constitutionalism and the rule of law.

The most significant challenge to a structured proportionality analysis has come from two members of the current Court, Justices Gageler and Gordon, who have argued for a more categorical US-style, tiered approach to these questions.[123] Their Honours point to the value of this approach in offering clear *ex ante* guidance to individual litigants and their advisors about how questions of this kind will be approached by the Court in various categories of case.[124] The argument has considerable force. However, it also downplays the *rule of law disadvantages* to the Court being required to identify appropriate tiers of scrutiny on a case-by-case basis, or the potential artificial distinctions it may create between categories of case.[125] Many of these criticisms have been ventilated in the US in the context of evolving debates about the usefulness and appropriateness of categorical approaches to

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[119] See, eg, Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law Journal* 3094, 3146; Susan Kiefel, 'Standards of Review in Constitutional Review of Legislation' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 488. See also discussion in Stone, 'Proportionality' (n 67) 145.

[120] See, eg, Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, 2019); Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391 ('Creating Dialogue'); TRS Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23(4) *Oxford Journal of Legal Studies* 563; Peter W Hogg and Allison A Bushell, 'The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)' (1997) 35(1) *Osgoode Hall Law Journal* 75.

[121] See, eg, Rosalind Dixon, 'The Supreme Court of Canada, *Charter* Dialogue, and Deference' (2009) 47(2) *Osgoode Hall Law Journal* 235; Rosalind Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?' (2009) 37(3) *Federal Law Review* 335. See also Dixon, *Responsive Judicial Review* (n 83).

[122] See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1.

[123] *Brown v Tasmania* (2017) 261 CLR 328, 377–9 [162]–[166] (Gageler J), 465–6 [432]–[433] (Gordon J) ('*Brown*'). For discussion of this objection and its significance, see John Basten, 'Understanding Proportionality Analysis' (2021) 43(1) *Sydney Law Review* 119.

[124] Dixon, 'Calibrated Proportionality' (n 89). See also Stone, 'Proportionality' (n 67) 128–9, 150.

[125] Stone, 'Proportionality' (n 67) 151–2.

scrutiny in that country. These criticisms have also been drawn out in Australia by Evelyn Douek in her analysis of the doctrine of proportionality.[126] They also all involve some sacrifice in legal consistency and predictability and, hence, commitments to the rule of law.

One response to this difficulty lies in a willingness to *combine* the insights to be gained from a categorical approach with the concept of structured proportionality.[127] This kind of 'calibrated proportionality'-based approach would be premised on the idea that many of the factors that Justices Gageler and Gordon identify as informing a categorical approach can be used to guide the Court in applying a form of structured proportionality test.[128] Indeed, such an approach is already arguably implicit in the approach of Justice Edelman to structured proportionality. In his recent judgments on the implied freedom of political communication, Justice Edelman has offered an important modification of the original vision of proportionality offered in *McCloy*, a modification which draws on common law notions and traditions as offering important guidance in the calibration of structured proportionality in various cases.[129] The 'calibrated proportionality'-based approach could also be informed by a range of more conceptual, representation-reinforcing or process-sensitive concerns.[130] In either event, it would have the capacity to maintain the benefits of proportionality-style reasoning in promoting doctrinal consistency and transparency, while at the same time inviting appropriate attention to context in the application of the relevant test.

This approach could also be applied in a manner that acknowledged the distinctive task facing the Court in the construction of constitutional powers versus prohibitions, and purposive versus non-purposive powers. Brad Selway, for example, suggested that a test of proportionality could be divided into 'low', mid-level and high-level proportionality.[131] Another approach could be to distinguish between single-stage, two-stage and three-stage approaches. This would be in addition to more open-ended forms of balancing or proportionality analysis, akin to administrative law–style notions of reasonableness or proportionality.[132]

Each test could also be understood as corresponding to different limbs of a test of structured proportionality, and different areas of constitutional discourse. For instance, single-stage proportionality analysis would involve only the first limb of a test of structured proportionality, namely the question of suitability. This test would also replace the notion of a law being 'appropriate and adapted' to its purpose or context, and be appropriate to cases involving the construction of non-purposive heads of Commonwealth power.

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126 Douek (n 118).

127 See, eg, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668; Stone, 'Proportionality' (n 67) 152–3; Dixon, 'Calibrated Proportionality' (n 89).

128 Dixon, 'Calibrated Proportionality' (n 89).

129 Ibid. See, eg, *Brown* (n 123) 479 [484]; *Clubb v Edwards* (2019) 267 CLR 171, 330–1 [463].

130 Dixon, 'Calibrated Proportionality' (n 89). See also Dixon, *Responsive Judicial Review* (n 83) ch 4.

131 B Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7(4) *Public Law Review* 212, 212, 215.

132 Janina Boughey, 'Proportionality and Legitimate Expectations' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 121, 134–9.

A two-stage proportionality test would involve the first and second limbs of a test of structured proportionality, namely questions of suitability and necessity. This, in effect, could replace the notion of a law being '*reasonably* appropriate and adapted' to its purpose or context and, hence, serve as a test for determining the validity of laws passed under a head of Commonwealth power deemed purposive in nature. The key difference would be that the notion of necessity or minimal impairment would invite, or even require, more open and explicit engagement by the Court with adjacent constitutional values, or those other values adversely impacted by a broad construction of relevant constitutional powers.[133]

Three-stage proportionality judgments, in contrast, would involve all three limbs of a test of structured proportionality, including the notion of proportionality *stricto sensu* or judgments about 'adequacy in the balance'. A test of this kind could also be applied to all areas of constitutional law and discourse involving express and implied limitations on Commonwealth and state power, or prohibitions on certain forms of legislative and executive action.

A more open question would be what kind of proportionality test would apply in contexts such as s 51(xxxi) or Ch III which could be viewed as involving constitutional provisions that are sources both of power *and* of prohibition.[134] The answer suggested by Justice Edelman in cases such as *NZYQ* seems to be a form of three-stage proportionality test, albeit one that involves some degree of judicial restraint in the making of judgments about adequacy in the balance.[135] But this is also an area in which the Court might reasonably choose to apply a two- rather than three-stage proportionality test. Both approaches would be consistent with existing doctrine, and yet render it more transparent and predictable in application, in ways that could be viewed as advancing a commitment to the rule of law.

For all three-stage versions of proportionality, there would also be the option of overlaying such a test with context-specific guidelines drawn from a mix of common law precedent and representation-reinforcing theory. For example, in proposing a test of 'calibrated proportionality' in the application of the implied freedom of political communication, I have suggested previously that the High Court could ultimately take a flexible approach which involves floating between four broad levels of scrutiny, the application of which would be informed by a range of contextual factors.[136]

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133 Dixon, 'Functionalism and Australian Constitutional Values' (n 52).

134 For an earlier attempt to explore the relevance of notions of proportionality to s 51(xxxi), see Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power? Rethinking Section 51 of the Constitution' (2005) 27(4) *Sydney Law Review* 639.

135 For a defence of this kind of approach, see, eg, Chordia (n 7) 202.

136 Dixon, 'Calibrated Proportionality' (n 89) 111.

C *Process-Sensitive Reasoning (or Judicial Representation Reinforcement)*

Compared to other forms of government, democracy has a range of instrumental advantages. It reduces the likelihood of certain forms of armed conflict[137] and avoidable humanitarian disasters.[138] It helps promote the effectiveness and accountability of governments in meeting citizens' needs and wants.[139] It also has important intrinsic rationales or capacities to realise commitments to positive freedom or 'active liberty', and equality, among citizens.[140] A system of representative and responsible government can likewise advance government effectiveness and accountability, and collective forms of self-government.

Real-world political institutions, however, are subject to a range of 'blockages' or imperfections that impede their ability to realise these underlying democratic commitments — and uphold broader constitutional commitments. For instance, individual legislators are often subject to 'blind spots' that mean they do not foresee the full range of ways in which laws may affect the realisation of constitutional norms, or could be redesigned so as more effectively to protect individual rights.[141] And parliaments as a whole are elected and structured in ways that mean that certain voices and perspectives (for instance, those of young people, non-citizens, the homeless and those with mental illness) are systematically excluded or under-represented.[142]

Each term, Parliament can also consider only a certain number of issues or proposals for legislative change. This means that Members of Parliament must prioritise in ways that often reflect majoritarian interests and demands, or the interests and priorities of certain parties. For minorities, in particular, this can mean that their calls for legislative change are often de-prioritised, or met with persistent *legislative inertia*.[143]

Often, courts such as the High Court are well placed to counter these various blockages and thereby *enhance* the performance of a system of representative and responsible government.[144] For instance, they can 'read down' or construe statutory

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[137] On the democratic peace literature, see, eg, Bruce Russet, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton University Press, 1993); Bruce Russett, Christopher Layne, David E Spiro and Michael W Doyle, 'The Democratic Peace' (1995) 19(4) *International Security* 164.

[138] See Amartya Sen, *Development as Freedom* (Oxford University Press, 1999) ch 6.

[139] See Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015); Joseph Schumpeter, *Capitalism, Socialism and Democracy* (LeBooks, 1942).

[140] See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Oxford University Press, 2008); Waldron (n 16).

[141] For further on 'blind spots of application' and 'blind spots of accommodation', see Rosalind Dixon and Davis Landau, 'Competitive Democracy and the Constitutional Minimum Core' in Tom Ginsburg and Aziz Huq (eds), *Assessing Constitutional Performance* (Oxford University Press, 2016) 268 ('Constitutional Minimum Core'); Dixon, *Responsive Judicial Review* (n 83) 83; Dixon, 'Responsive Constitutionalism' (n 17).

[142] For further on 'blind spots of perspective', see Dixon, 'Creating Dialogue' (n 120); Dixon, *Responsive Judicial Review* (n 83) 84.

[143] See Dixon, 'CRRT' (n 5). See also Gardbaum (n 5).

[144] Dixon, *Responsive Judicial Review* (n 83) ch 5. See also Dixon and Landau, 'Constitutional Minimum Core' (n 141).

language in ways that help reduce the impact of legislative blind spots. Or they can construe statutes in a dynamic way, which helps overcome the effect of legislative inertia. In some cases, the mere fact of the Court hearing a case may be enough — it may draw sufficient media and public attention to an issue to prompt legislators (or executive actors) to give it increased attention and priority.

But to do so *consistently* courts must be mindful of representation-reinforcing considerations — both in how they reason and in how they select cases (for example, for the grant of special leave). Such considerations need not always be explicit.[145] But the more explicit they are, the greater the advantages for democracy and the rule of law: it is more likely that courts will in fact construe statutes and the constitution in ways that overcome relevant legislative blockages, and that courts will be more predictable as to when and why they are doing so.

Another argument for process-sensitivity by courts relates to the varying risks associated with constitutional 'over' or 'under'-enforcement.[146] There are a range of reasons why courts under-enforce open-ended constitutional norms. Courts often have limited access to information, compared to the elected branches of government. Courts also face additional questions of *political* legitimacy in the making of contested moral and political choices, and in some cases questions of 'sociological' legitimacy or public acceptance.[147]

But there are also varying risks to an approach of this kind. In some cases, the harms suffered by individuals may be relatively easy for future legislators or executive actors to reverse. In others, the harms may be severe and largely irreversible through subsequent legislative action — for example, because a person has been wrongfully imprisoned or otherwise deprived of their liberty, or has suffered irreparable harm to their relationships or individual development.[148] Or current harms may threaten the very foundations of a democratic system — or what David Landau and I have called the 'minimum core' of a system of constitutional democracy.[149] In the case of irreversible harms to individuals *or* the real and present threats to the democratic minimum core, there will be very real costs of courts deciding to under-enforce constitutional norms.

A process-sensitive approach by courts starts from this understanding. It rejects a context-invariant approach to questions of constitutional validity or construction. Instead, it embraces a case-by-case approach to questions of legal, political and sociological legitimacy — one that considers the impacts of particular decisions both on individuals and on the constitutional system as a whole. In doing so, it also seeks to balance the benefits and dangers to democracy of overly restrained

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145 Dixon, *Responsive Judicial Review* (n 83) ch 9.

146 For this concept, see, eg, Lawrence Gene Sager, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91(6) *Harvard Law Review* 1212.

147 On these various forms of legitimacy, see Fallon Jr (n 103). See also discussion in Dixon, *Responsive Judicial Review* (n 83) ch 4.

148 Dixon, *Responsive Judicial Review* (n 83) 99–101.

149 Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 606; Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021). See also ibid.

and robust forms of constitutional judicial review.[150] In this sense, it is an approach that is inherently democracy-enhancing.

V One or Three New Constitutional Models

What is the relationship of these three different constitutional approaches — purposive, proportionality-based and process-sensitive — to constitutional construction? Clearly, they can be adopted independently. That is true conceptually. It is also evident from the fact that members of the Court endorsed some, but not all, these approaches in the cases set out in Part IV.

But there are still important conceptual affinities between the three approaches which suggest the possibility of a — still nascent — *unified* approach to constitutional construction, which combines attention to constitutional purposes, proportionality doctrines and process-based reasoning. For instance, judicial attention to constitutional values in Australia entails the consideration of a wide range of potential candidate values — including (as a range of leading scholars have suggested), commitments to the rule of law, government accountability, impartial justice, individual liberty, equality (especially political equality),[151] Indigenous recognition, national security and free trade.[152] It entails a commitment to positive as well as negative liberty, and the notion of an 'effective government' capable of realising this positive vision of liberty and constitutionalism.[153] And it may now require attention to notions of individual human dignity.[154] Many of these values are *reflected* in the principles set out in Part II. They also find support in the case law that underpins these principles, as well as a broader range of structural and historical arguments.

Further, this plurality of constitutional values means that the Court will often be required to engage in a process of *balancing* competing values. For instance, in determining whether a particular form of detention is properly viewed as 'punitive' in nature, as in *Benbrika No 2* and *NZYQ*, the Court could be seen as being implicitly called on to balance commitments to individual liberty and national security. Or in making judgments about the validity of a model of 'paperless arrest' or preventative detention under state or territory law, as in *Garlett* and *NAAJA*, the Court could be seen as being required to balance commitments to individual liberty and effective government. And, as Shipra Chordia notes, any true constitutional balancing problem of this kind naturally lends itself to resolution through a test of structured proportionality.[155]

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150 Dixon, *Responsive Judicial Review* (n 83) ch 7.

151 See Stone, 'More than a Rule Book' (n 1).

152 See Dylan Lino 'Indigenous Recognition' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 243; Rebecca Ananian-Welsh and Nicola McGarrity, 'National Security: A Hegemonic Constitutional Value?' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 267; Gonzalo Villalta Puig, 'Free Trade as an Australian Constitutional Value: A Functionalist Approach to the Interpretation of the Economic Constitution of Australia' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 287.

153 See Stone, 'More than a Rule Book' (n 1); Blayden (n 29); Dixon, 'Responsive Constitutionalism' (n 17).

154 See Ashleigh Barnes, 'Australian Constitutional Values: The Case for Dignity?' (DPhil Thesis, University of Oxford, 2023).

155 Chordia (n 7) 10.

Not all constitutional questions lend themselves to this kind of analysis. As Shreeya Smith argues, some structural questions may be better dealt with via a more open-ended approach to balancing competing values.[156] But almost any constitutional limitation or prohibition will do so.[157] And in such cases, reliance on a test of structured proportionality provides a clear and transparent way in which courts can make such judgments within the confines of a broader commitment to the legal method.[158]

Another set of candidate Australian constitutional values could be described as 'democratic' in nature. This includes values such as political equality[159] but also commitments to democratic deliberation and experimentalism — or values that find support in the federal nature of the polity, the bicameral structure of the federal Parliament, and the role of the Senate in particular.[160] These values also again invite attention to other aspects of the new Australian constitutional model — namely, a process-sensitive or representation-reinforcing approach.

There is a clear connection between how courts reason and the *incentives* facing legislators to engage in deliberation. If courts adopt a context-invariant approach, legislators will have limited legal (as opposed to political) incentive to revisit prior deliberations. Doing so will involve the use of time and political capital but have no impact on the likelihood that a law is upheld by the Court. But if a court takes account of the timing and quality of legislative deliberations in assessing constitutional validity, this can serve as a powerful incentive for legislators to reconsider prior legislative practices.

For courts to promote democratic deliberation, they must therefore adopt a flexible and context-sensitive approach, one which accords variable weight to legislative constitutional judgments based on the degree to which they reflect recent, reasoned processes of democratic deliberation.[161] This 'semi-procedural' form of judicial review is also a hallmark of many representation-reinforcing theories of judicial review,[162] but not of more traditional legalist approaches to constitutional construction in Australia.

There is likewise a close conceptual affinity between a doctrine of proportionality and a process-sensitive approach to constitutional construction. The doctrine of proportionality openly invites courts to engage in a form of balancing that depends on a mix of legal and *moral–political* judgment, and thus that stretches

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156 Smith (n 52).

157 See above Part IV(C).

158 Chordia (n 7) 202.

159 Joo-Cheong Tham, 'Political Equality as a Constitutional Principle: Cautionary Lessons from *McCloy v New South Wales*' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 151. See also Stone, 'More than a Rule Book' (n 1).

160 See Scott Stephenson, 'Deliberation as a Constitutional Value' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 133; Gabrielle Appleby and Brendan Lim, 'Democratic Experimentalism' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 221.

161 Dixon, *Responsive Judicial Review* (n 83). Cf Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 2001).

162 See Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6(3) *Legisprudence* 271. See Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue and Deference' (2009) 47(2) *Osgoode Hall Law Journal* 235; Dixon, *Responsive Judicial Review* (n 83) 185–7; Dixon, 'CRRT' (n 5).

the limits of judicial political and sociological legitimacy. One response to this, Chordia argues, is for courts to adopt a 'a clearly articulated contextual institutional theory of judicial restraint'.[163] The idea of judicial representation reinforcement, or comparative political process theory, also provides exactly this kind of account.

VI Conclusion

What does it mean to speak of a 'new' Australian constitutional model — one based on attention to constitutional purpose, proportionality and process-sensitivity? None of the aspects of this model are truly new. As Part III notes, they find support in the decisions of at least some members of the current Court, as well as previous decisions of the Court. And as Part II explores, they subsist on a deep and established bedrock of settled constitutional principle. But they also represent a break from prior constitutional orthodoxy in ways that could be seen as marking a new and promising approach to constitutional construction in Australia.

All three 'p's' — constitutional purposes, proportionality doctrines and process-sensitivity — represent an important evolution in existing constitutional approaches in line with global constitutional developments. Even more importantly, they represent an approach that has significant democratic and rule of law benefits. They are also interconnected.

Each 'p' can certainly be adopted independently. But they also have important conceptual affinities: judicial attention to constitutional values often requires a form of balancing that is conducive to the application of a test of structured proportionality. One such value, in Australia, is the idea of democracy implicit in the constitutionally prescribed system of representative and responsible government; democratic values can also be enhanced by judicial attention to democratic representation-reinforcing concerns. A doctrine of proportionality also has conceptual affinities with the idea of judicial representation reinforcement: it provides a language that legislators and ordinary citizens can understand and invites a form of open-ended evaluative judgment that is usefully disciplined by theories of judicial representation reinforcement. In this sense, the three 'p's' can also be seen as part of a *new, tripartite* model of Australian constitutionalism that mirrors global variants of the 'new constitutionalism', such as those seen in Latin America.

One version of the new constitutionalism in Latin America involves a quite radical, neo-Bolivarian model of pluri-nationalism and environmental constitutionalism. But another, liberal–progressive version of the 'new constitutionalism' simply entails the rejection of an earlier legal formalism in Latin America, with strong continuities with Australian-style legalism, in favour of a more substantive approach to constitutional reasoning that includes doctrines of purposive interpretation, and proportionality.[164]

This version of the 'new constitutionalism' is also distinct from more critical accounts that view the concept as linked to an expansion in constitutional rights and

[163] Chordia (n 7) 201. See also at 80–2.
[164] Couso (n 8).

judicial power,[165] or an expansion of neo-liberal models of property rights protection.[166] At the core of the idea of judicial representation reinforcement is that courts should seek to preserve space for democratic constitutional deliberation on all questions, including questions of first and second generation rights protection, and hence that courts should embrace a mix of strong and weak review, rather than wholly strong forms of review.[167] This is also an understanding that runs through many leading accounts of the 'new constitutionalism' in Latin America.[168]

No Australian judge has gone as far as to endorse this new constitutional model explicitly. But it is certainly a path left open by some members of the Court, — and one open to all — as part of a new *joint* model of constitutional reasoning.

Indeed, one of the advantages to connecting constitutional purposes, proportionality and process-sensitivity is that it offers the Court a path through which to achieve greater consensus around the proper approach to constitutional construction. An approach of this kind is not associated with the existing jurisprudence of any existing member of the Court. For that reason, it could be considered quite 'new' and radical, and of limited near-term practical utility. There are, however, important reputational and psychological reasons for thinking that members of the Court may be more willing to embrace an approach that represents an amalgam of the idea of different justices, rather than simply a line of jurisprudence associated with a single judge.

The idea of the 'new Australian constitutionalism' is also offered in exactly that spirit: as an idea that is prefigured in interesting and important ways in recent decisions of the Court but whose time has not yet, but might still, come. And if it does, the essay suggests, both Australian democrats and constitutionalists will have reason to celebrate.

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165 Ran Hirschl, 'The Political Origins of the New Constitutionalism' (2004) 11(1) *Indiana Journal of Global Legal Studies* 71; Tamás Györfi, *Against the New Constitutionalism* (Edward Elgar Publishing, 2016).

166 Thibault Biscahie and Stephen Gill, 'Three Dialects of Global Governance and the Future of New Constitutionalism' in Guillaume Grégoire and Xavier Miny (eds), *The Idea of Economic Constitution in Europe: Genealogy and Overview* (Brill, 2022) 718.

167 Dixon, *Responsive Judicial Review* (n 83) ch 7. See also Rosalind Dixon, 'Fair Market Constitutionalism: From Neo-Liberal to Democratic Liberal Economic Governance' (2023) 43(2) *Oxford Journal of Legal Studies* 221.

168 See, eg, Cepeda Espinosa and Landau (n 9); Cepeda Espinosa (n 9).