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Constitutional Shoehorning

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Abstract

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

I Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

II The Concept and Its Complications

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

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

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

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

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

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

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

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

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

12 Karlan (n 8) 878, 880.

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

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

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

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

A *Causes*

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

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

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

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

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

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

B *Distinctiveness*

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

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

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

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

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

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

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

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

C *Identification*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34 Williams and Hume (n 13) 113–14.

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

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

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

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

III Evaluating the Concept

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A *Positive Attributes*

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

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

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

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

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

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

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

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

B *Negative Attributes*

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

1 *Partiality*

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

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

49 Karlan (n 8).

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

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

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

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

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

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51 See below Part IV(C).

52 See below Part IV(B).

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

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

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

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

2 *Complexity*

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

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

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

3 *Lawyers versus Clients*

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

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

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

IV Constitutional Shoehorning in Practice

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

A *Legal Certainty*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61 Ibid.

62 Ibid 457–8 (emphasis added).

63 Ibid 477 (emphasis added).

64 Ibid.

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

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

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

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

B *Separation of Church and State*

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

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

68 Stellios (n 14) 704.

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

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

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

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

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

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

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71 Ibid 272.

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

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

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

75 Ibid (Heydon J dissenting).

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

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

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

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

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

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

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

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

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

81 Ibid.

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

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

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

C *Post-Sentence Detention*

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

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82 *Pape* (n 25).

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

84 Ibid 38–9.

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

86 Ibid 39.

87 *Kable* (n 7).

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

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

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

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

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88 Ibid 62–3 (Brennan CJ).

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

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

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

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

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

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

D *Deportation of Indigenous Peoples*

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

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

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

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

95 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V Conclusion

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

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

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

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

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

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

"We Are One, But We Are Many": Conceptions of Australia's Sovereign People and the Proposed Voice to Parliament

David Moignard Ferrell*

Abstract

This article examines the defeat of the 2023 referendum on the Aboriginal and Torres Strait Islander Voice to Parliament ('Voice') in terms of competing conceptions of 'the people' in Australian constitutional law. Applying James Tully's theory of popular sovereignty to Australian law and history, this article advances the tension between two views of the sovereign people — as homogenous and formally equal, or plural and differentiated — as a lens to analyse developments in Australian constitutional law. It begins by briefly surveying the history of Indigenous Australian sovereign difference under the *Australian Constitution*, situating the recognition sought through the Voice. It then identifies, drawing on Tully's critique of 'modern constitutional' popular sovereignty, an orthodox conception of the sovereign people persisting in Australian law as a homogenous, formally equal entity authorising the supremacy of representative Parliament. Finally, it suggests a competing strain of Australian constitutional thought which, constructing the sovereign people as plural, enables alternative forms of constitutional governance. Such plural modes of constitutionalism, it argues, were embodied by the Voice and informed the No campaign's arguments in the terms of a 'unified' constitutional 'people'. Through examination of the Voice, this article articulates competing constructions of 'the people' as a lens for interrogating developments in Australian constitutional law.

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I Introduction

This article examines the defeat of the October 2023 referendum on the Aboriginal and Torres Strait Islander Voice to Parliament ('Voice') in terms of competing conceptions of 'the people' in Australian constitutional law. By introducing James Tully's critique of 'modern constitutional' popular sovereignty to existing Australian scholarship, this article advances the tension between two views of the sovereign people — as homogenous and formally equal, or plural and differentiated — as a lens to analyse developments in Australian constitutional law.

In May 2022, the Albanese Labor Government announced a referendum to decide whether to insert a Voice to Parliament into the *Australian Constitution*. The proposed amendment was framed '[i]n recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'. In 1992, the High Court had recognised 'the people' as sovereign in the *Constitution*.[1] Who 'the people' were and what their 'sovereignty' entailed, however, was 'ambiguous'[2] and 'opaque'.[3] Today, this article argues, the prevailing picture of Australia's sovereign 'people' is as a homogenous, formally equal entity, channelling its sovereignty through the representative government of Commonwealth Parliament — a picture mirroring that criticised by Tully in *Strange Multiplicity*.[4] The Voice proposal challenged this orthodoxy, promising to formalise plurality within the Australian people by recognising a distinct constitutional status for Aboriginal and Torres Strait Islander peoples.

In October 2023, the Voice proposal was defeated at referendum. This article analyses the defeat as reflecting a continuing disagreement about the character of the sovereign 'people' in Australian constitutional culture: whether they are to be constructed as homogenous and formally equal, or as plural and differentiated. Both views have foundations in Australia's constitutional text and history, and reflect competing ideals in Australia's constitutional culture. Ultimately, in 2023, the Australian polity rejected the constitutional pluralism embodied by the Voice proposal, preferring values of formal equality, homogeneity and the centralised authority of representative Parliament integrated into a 'unified' conception of 'the people'.

Part II briefly surveys the history of Indigenous Australian sovereign difference under the *Australian Constitution*, detailing how Aboriginal and Torres Strait Islander peoples' distinct sovereignty claims have been suppressed in Australian constitutional history, culminating in the Voice proposal's promise to recognise Aboriginal and Torres Strait Islander peoples as Australia's 'First Peoples'. Part III applies Tully's analysis of 'modern constitutionalism' to Australian law, arguing that, in tension with the plurality of the Voice proposal, the

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1 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*') 137–8 (Mason CJ).

2 George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1, 4.

3 Sarah Murray, '"The People" as a Source of Constitutional Principle: The Australian Constitution and the Contours of Representative Government' (2017) 29 (Special Issue) *Singapore Academy of Law Journal* 882, 882.

4 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

orthodox conception of the sovereign people in Australian law, inherited from a 'modern constitutional' tradition, is as a homogenous, formally equal and unitary entity, legitimising the supreme authority of representative Parliament.

Finally, Part IV argues that a plural conception of the sovereign people also exists in Australian law, generating different modes of constitutional law and governance aimed at more accurately representing the multiform people. Two such theoretical approaches — deliberative constitutionalism and democratic constitutionalism — it is suggested, were imprinted into and projected upon the Voice proposal. Consequently, the rejection of the Voice, in the terms of the No campaign, expressed a commitment to a 'unified' account of 'the people', and the mode of constitutionalism it engenders.

Popular sovereignty is a 'notoriously ambiguous concept'.[5] For the purposes of this article, popular sovereignty concerns 'the source from which the *Constitution* derives its authority'.[6] The related notion of 'constituent power', the power to amend the *Constitution*, is a specific manifestation of this authority.[7] 'Constitutional culture' refers to the understandings of a legal system by the population under that system, rather than the understandings only of the elites who directly practise constitutional norms.[8] Whereas constitutional history has generally focused on the roles of elites,[9] the notion of constitutional culture draws attention to broader cultural conceptions informing the development of constitutional law.[10]

I am conscious that I write as a non-Indigenous person in the field of colonial law. It is not the purpose of this article to suggest or advocate for particular forms of recognition of First Nations sovereignty, or to speak for the intentions of the *Uluru Statement from the Heart* ('*Uluru Statement*'). Nor is it the purpose of this article to suggest which view of the sovereign people is correct or preferable. Questions about appropriate recognition of Indigenous Australians are beyond the scope of this article. Rather, this article takes as its starting point that popular sovereignty and constitutional legitimacy are predominately *colonial* cultural concepts which cannot be assumed in negotiations between Indigenous and non-Indigenous peoples.

The purpose of this article is not to advocate any one conception of the sovereign 'people' as monolithically correct or preferable. Rather, this article emphasises that the contradiction between the multitude and the singular is central, inextricable and jurisgenerative to the concept of a sovereign 'people', and inseparable from Australia's settler-colonial history. Consequently, the tension cannot be 'resolved' in law or by referendum. Rather, an understanding of this paradox, and the values and commitment which circulate it, directs attention towards the legal-cultural inheritances operating in Australian constitutional thought and

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5 Winterton (n 2) 4. See also Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "The People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36, 38.

6 Winterton (n 2) 4.

7 George Duke and Carlo Dellora, 'Constituent Power and the *Commonwealth Constitution*: A Preliminary Investigation' (2022) 44(2) *Sydney Law Review* 199, 204.

8 Jason Mazzone, 'The Creation of a Constitutional Culture' (2005) 40(4) *Tulsa Law Review* 671, 672.

9 Ibid 684.

10 Ibid 685–96.

provides a lens through which to understand developments in Australian constitutional law.

This article is indebted to recent scholarship on Australian popular sovereignty, particularly Elisa Arcioni's investigations of 'the people', including as 'plural' or 'unified' in the context of *Love v Commonwealth*,[11] and analyses by Nicholas Aroney, Benjamin Saunders, Simon Kennedy, Ron Levy and William Partlett, among others, of the role of popular sovereignty in Australia's *Constitution*. This article aims to supplement this discussion by introducing the scholarship of Tully alongside an analysis of the historical roots, implications for constitutional practice, and inhabitations of these characterisations of 'the people' in Australian constitutional law, thereby developing a fuller picture of competing conceptions of Australia's sovereign people.

II Indigenous Sovereign Difference and the Voice Proposal

Continuing Aboriginal claims to sovereignty represent a 'constitutional legitimacy crisis' for Australian law.[12] Section A of this Part will argue that the historical response of the Australian state to this 'crisis' has been repression of sovereign Aboriginal identity, initially by segregation from, and later by assimilation into, an imagined, uniform Australian people, but that these policies necessarily failed to dissolve the distinctiveness of Aboriginal sovereign claims in Australian law. Consequently, Section B will argue that the Voice proposal promised, in contrast, to recognise Aboriginal and Torres Strait Islander peoples as the 'First Peoples' of the Australian population, entrenching a form of plurality in the *Constitution*.

A *Aboriginal Sovereign Difference*

In 1788, Arthur Phillip arrived in Botany Bay carrying a commission declaring British sovereignty over Australia from the eastern shore to a longitude of 135 degrees east. It was an 'incredible' legal claim.[13] Contemporary international law would only have granted sovereignty over the surrounding watershed,[14] and would only have been effective against European nations, not sovereign first nations.[15] The commission for settlement, informed by accounts of offshore explorers, assumed an empty land, home to few, rudimentary people.[16] Accounts of explorers and administrators, including Arthur Phillip, increasingly expressed anxiety at the

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

[12] Gabrielle Appleby, Ron Levy and Helen Whalan, 'Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46(3) *UNSW Law Journal* 761, 765.

[13] Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966) 631. See also Henry Reynolds, *Truth-Telling: History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021) 24.

[14] WE Hall, *A Treatise on International Law*, ed A Pierce Higgins (Oxford University Press, 8th ed, 2001 reprint of 1924) 129–30.

[15] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 33–8 (Brennan J) ('*Mabo No 2*'); *Worcester v Georgia*, 31 US 515 (1832) 543–4 (Marshall CJ).

[16] Reynolds (n 13) 18–20.

apparent inaccuracy of that assumption.[17] Early judgments of colonial courts distinguished between Aboriginal people and British subjects, and recognised Indigenous legal autonomy.[18] Shortly, however, the rulings turned; settled territories became 'newly discovered and unpeopled'.[19] These rulings informed the decision of the Privy Council in *Cooper v Stuart* that Australia was a 'tract of territory practically unoccupied without settled inhabitants'.[20] Thereafter, Indigenous groups would have no sovereignty within Australia's legal order. In 1824 and 1829, Australia's sovereign claim was extended westward by proclamation to annex the remainder of the continent. Although the Australian Government would not exercise effective control over the entire continent until into World War II,[21] according to colonial law any sovereignty of Indigenous nations had vanished.

Aboriginal and Torres Strait Islander peoples continued, however, to claim distinct sovereign identity.[22] Claims that First Nations' sovereignty was never ceded underscore the 'shaky' legality of the foundation of the Australian colonies.[23] Contrary to the principle of consent by the governed, these claims demonstrate a segment of the population whose members have not consented to Australia's constitutional order:[24] who insist upon their distinct authority or constituent power even where the dominant constitution implies this is impossible.[25] The historical response of the Australian state to this 'constitutional legitimacy crisis' has been to exclude Aboriginal peoples from and later assimilate them within a 'unified' conception of the Australian people.[26]

This exclusion has typified Australian legal history.[27] At its most extreme, it comprised erasure through genocide and figuration of a 'dying race'.[28] More recently, it involved segregation of Aboriginal people from the Australian polity. At Federation, Aboriginal people were excluded from voting in both Queensland and Western Australia.[29] Following Federation, the *Commonwealth Franchise Act 1902* (Cth) conferred the right to vote federally on all adult Australians, but actively

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17 Ibid ch 1.

18 See, eg, *R v Ballard* [1829] NSWSupC 26. See also *R v Bonjon* [1841] NSWSupC 92; Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7.

19 *Wilson v Terry* (1849) 1 Legge 505, 508 (Stephen CJ).

20 *Cooper v Stuart* (1889) 14 App Cas 286, 291 (Lord Watson).

21 Reynolds (n 13) 85–6. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1901, 4806–7 (Alfred Deakin, Attorney-General).

22 See Paul Muldoon and Andrew Schaap, 'Aboriginal Sovereignty and the Politics of Reconciliation: The Constituent Power of the Aboriginal Embassy in Australia' (2012) 30(3) *Environment and Planning D* 534, 534.

23 Michael Dodson, 'Sovereignty' (2002) 4 *Balayi* 13, 18. See also Reynolds (n 13) 4.

24 Muldoon and Schaap (n 22) 543.

25 See Ron Levy, Ian O'Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 2021) ch 5; Appleby, Levy and Whalan (n 12).

26 Arcioni, 'Competing Visions' (n 11) 82–6.

27 See Sean Brennan and Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 27, 47; Shireen Morris, '*Love* in the High Court: Implications for Indigenous Constitutional Recognition' (2021) 49(3) *Federal Law Review* 410, 418–19.

28 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 137 [4.15]. See also Reynolds (n 13).

29 *Constitution Amendment Act 1893* (WA) s 12; *Elections Act 1885* (Qld) s 6.

excluded Aboriginal people from that date.[30] Though suffrage was conferred upon Aboriginal people in 1963, it was not until 1983 that full legal equality would be enjoyed, through the adoption of compulsory voting, as had been imposed on the rest of the Australian population since 1924.[31]

Aboriginal people were excluded from the operation of the Federal Government's power to make laws for '[t]he people of any race' under s 51(xxvi) of the *Constitution*. Section 25 of the *Constitution* continues to contemplate the exclusion of any race from franchise if they are disqualified from voting at state elections, while the now-removed s 127 provided that '[i]n reckoning the numbers of the people of the Commonwealth … [Aboriginal people] shall not be counted'. To the extent that these provisions represent a constitutionalised acknowledgement of minorities, they do so on terms of subordination and confinement. Government policy concerning Indigenous Australians has been paternalistic and expressly coercive, including such contemporary measures as the Northern Territory National Emergency Response.[32] This policy of exclusion morphed by degrees into one of assimilation and formal equality, crystallising in the 1967 referendums which removed s 127 and included Aboriginal people within the Commonwealth Parliament's races power.[33] Following the 1967 referendums, Australia's *Constitution* contained no references to or express recognition of Aboriginal and Torres Strait Islander peoples.[34] Aboriginal claims to a distinct sovereign identity, however, were not dissolved by attempts at formal integration.[35]

By recognising the persistence of Indigenous native title within common law, but evading determinations regarding Indigenous sovereignty, *Mabo No 2* inflamed challenges of Indigenous sovereignty within the law without resolving them. Brennan J spoke of a 'change in sovereignty'[36] and 'fictions … that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown'.[37] However, the Court refused to determine questions of pre-existing or persisting sovereign claims of Aboriginal people.[38] In subsequent cases, the High Court only hardened its disengagement from questions of Indigenous sovereignty.[39]

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30 *Commonwealth Franchise Act 1902* (Cth) s 4.

31 Williams, Brennan and Lynch (n 28) 136 [4.11].

32 Muldoon and Schaap (n 22) 547. See Desmond Manderson, 'Not Yet: Aboriginal People and the Deferral of the Rule of Law' (2008) 29/30 *Arena Journal* 219.

33 Arcioni, 'Competing Visions' (n 11) 83–4.

34 Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of Australia, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Report, May 2023) 12 [2.14] ('*Voice Advisory Report*').

35 Brennan and Davis (n 27) 32–3.

36 Ibid 51.

37 Ibid 58. See also at 99–100 (Deane and Gaudron JJ).

38 Ibid 29 (Brennan J).

39 See, eg, *Coe v Commonwealth* (1993) 68 ALJR 110 ('*Coe*').

B *The Voice to Parliament*

1 *Voice Proposal*

In May 2017, the *Uluru Statement* was released, the product of the First Nations National Constitutional Convention.[40] The statement declared:

> Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent …
>
> This sovereignty is a spiritual notion: the ancestral tie between the land … and the Aboriginal and Torres Strait Islander peoples … It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.[41]

The *Uluru Statement* called for the establishment of a constitutionally enshrined Aboriginal and Torres Strait Islander Voice to Parliament, maintaining that '[w]ith substantive constitutional change ... we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood'.[42] In October 2017, Prime Minister Malcolm Turnbull rejected this call for a Voice, stating that such a body was not 'desirable or capable of winning acceptance at a referendum'.[43] Nevertheless, the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples was established in March 2018, and the co-design process for an entrenched Voice proceeded into 2019.

In May 2022, the Albanese Labor Government announced a referendum on the Voice, to be held within that term of government. In March 2023, the Government released a proposed question and the text of the amendment. The question read:

> A Proposed Law: to alter the *Constitution* to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?

The proposed amendment read:

> **Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples**
>
> 129 Aboriginal and Torres Strait Islander Voice
>
> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
>
> (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
>
> (ii) the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
>
> (iii) the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait

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40 *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017) ('*Uluru Statement*').

41 Ibid.

42 Ibid.

43 Calla Wahlquist, 'Indigenous Voice Proposal "Not Desirable", Says Turnbull', *The Guardian* (online, 26 October 2017) <https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull>.

> Islander Voice, including its composition, functions, power and procedures.

On 19 July 2023, the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 ('Constitution Alteration Bill') passed both houses of Parliament, to be put to the Australian people at referendum under s 128. On 14 October 2023, the referendum was defeated in every state, with 60% of electors voting to reject the proposal.[44] Opposition Leader Peter Dutton, commenting after polling had closed, repeated the central message of the No campaign: 'The proposal and the process should have been designed to unite Australians, not to divide us.'[45]

2 *Recognising Indigenous Australians*

The proposal had effectively conflated two matters: the constitutional recognition of Aboriginal and Torres Strait Islander peoples as a distinct group within the Australian people, and the establishment of the Voice.[46] The substance of the proposed amendment concerned the establishment, composition and powers of the Voice. Consequently, few submissions to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum ('Joint Select Committee') engaged with the legal consequences of recognising Indigenous peoples in the *Constitution*. The locus of the debate was instead the Voice body, and especially the effect of its representations to the executive and Parliament,[47] with the Committee emphasising that '[v]ery few stakeholders disputed that Aboriginal and Torres Strait Islander peoples should be recognised in some form'.[48]

Constitutional recognition was a core function of the proposal. The Explanatory Memorandum to the Constitution Alteration Bill stated that the first purpose of the proposal was 'to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'.[49] This recognition sought to remedy the fact that 'the *Constitution* effectively excluded Aboriginal and Torres Strait Islander peoples in significant ways'.[50] The Explanatory Memorandum moreover set out the *Uluru Statement* in full.[51] The second reading speech for the Bill similarly stated that the proposal was targeted to remedy the fact that 'Aboriginal and Torres Strait Islander peoples are not recognised in our *Constitution* … to recognise the First Peoples of Australia [and to] rectify over 120 years of explicit exclusion in provisions of Australia's founding legal document'.[52] Attorney-General Mark Dreyfus observed: 'The introductory words recognise Aboriginal and Torres Strait

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44 Josh Butler, 'Indigenous Voice to Parliament: Australia Rejects Constitutional Change as Albanese Says Vote "Not End of the Road"', *The Guardian* (online, 14 October 2023) <https://www.theguardian.com/australia-news/2023/oct/14/australian-voters-reject-proposal-for-indigenous-voice-to-parliament-at-historic-referendum>.

45 Ibid.

46 *Voice Advisory Report* (n 34) 73.

47 See ibid 17–28 [3.3]–[3.42].

48 Ibid 11 [2.9].

49 Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 2. See also at 10 [7].

50 Ibid 2. See also at 2–3.

51 Ibid 14.

52 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2023, 2702 (Mark Dreyfus, Attorney-General).

Islander peoples as the First Peoples of Australia. They reflect the fact that establishing the Voice is an act of recognition, in the manner the delegates at Uluru sought in 2017.'[53]

3 *The Constitutional Consequences of Recognition*

What would the consequences of such recognition have been? This article engages with the possibility that this recognition could have essentially informed the constitutional meaning of 'the people'. In their submission to the Joint Select Committee, Nicholas Aroney and Peter Gerangelos suggested that the insertion of the Voice provisions in a discrete chapter would give recognition of Indigenous peoples 'a structural prominence in the *Constitution* similar to three other important constitutional topics' and to 'the other major institutions established by the *Constitution*' — Parliament, the executive and the judiciary — inviting 'constitutional implications'.[54] Unlike the proposed preamble recognising Aboriginal peoples that went to referendum in 1999, the proposed Voice provisions did not contain a non-justiciability clause.[55] Consequently, as Aroney argued elsewhere, 'the introductory words [could] contain implications of their own'.[56] In particular,

> [t]he recognition of 'the First Peoples of Australia' in the proposed section 129 is likely to be interpreted in the context of the reference in the preamble to the [*Constitution*] to the agreement of 'the people' of the several Australian colonies … [I]t is quite possible … that the 'First Peoples' referred to in section 129 will be recognised by the courts as a distinct and yet integral part of the 'Australian People' ... [57]

This suggestion is further supported by the content of extrinsic and campaign materials for the Yes campaign, read through the High Court's approach to previous constitutional amendments. In two cases in which the High Court meaningfully interpreted amendments to the *Constitution*, the Court examined wide extrinsic materials. In 2009, in *Wong v Commonwealth*,[58] the High Court was called on to interpret s 51(xxiiiA), the 'social services power' of Parliament inserted into the *Constitution* by referendum in 1946.[59] All Justices but one used extrinsic materials in interpreting the provision. Their Honours analysed the second reading speech, parliamentary debates surrounding the passage of the Bill, the historical and political context of the passage of the Bill and referendum, the Yes and No cases put to voters in pamphlets, and even the advice of the Solicitor-General and the Attorney-

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53 Ibid 2701.

54 Nicholas Aroney and Peter Gerangelos, Submission No 92 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (2023) 2 [5], [6].

55 Aroney and Gerangelos (n 54) 3 [10]. See also Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24(2) *UNSW Law Journal* 382, 394–5.

56 Nicholas Aroney, 'First Peoples and the People of the Australian Commonwealth' (Conference Paper, Queensland Supreme Court and District Court Judges Conference, 14 August 2023) 2–3 ('First Peoples').

57 Ibid 4. See also Aroney and Gerangelos (n 54) 3–4 [10].

58 *Wong v Commonwealth* (2009) 236 CLR 573 ('*Wong*').

59 *Constitution Alteration (Social Services) 1946* (Cth) s 2.

General's department to the Member who introduced the Bill.[60] Likewise, in 1998 in *Kartinyeri v Commonwealth*, a majority of the High Court considered the case for the Yes vote provided to electors ahead of the 1967 referendum in determining the meaning of the amended races power under s 51(xxvi).[61]

Clear references to the recognition of Aboriginal and Torres Strait Islander peoples in the extrinsic materials, as well as the *Yes Pamphlet*,[62] in the context of claimed 'spiritual' sovereignty which 'co-exists' with the Crown,[63] could have supported the judicial recognition of a distinct constitutional status for Aboriginal and Torres Strait Islander peoples among the Australian people. In its submission to the Joint Select Committee, the Law Council of Australia asserted explicitly that the amendment promised to recognise the 'unique status and rights of Aboriginal and Torres Strait Islander peoples as Australia's Indigenous Peoples'.[64] The additional comments from the Australian Greens similarly welcomed

> the inclusion of the preamble sentence as an important recognition of First People's cultural ties to Country along with the inclusion of the Statement from the Heart into the Bill's Explanatory Memorandum, containing as it does, multiple references to First Nations Sovereignty.[65]

What form this recognition of a distinct place within the Australian people could have taken is now unknowable. *Mabo No 2* and *Coe v Commonwealth* rejected the possibility of Indigenous sovereignty separate from the Australian state.[66] Likewise, while invocations of Aboriginal and Torres Strait Islander 'sovereignty' are diverse, scholarship relays that few are aimed at external independence.[67] Rather, sovereignty 'is seen as a footing, a recognition, from which to demand those rights and transference of power from the Australian state, not a footing to separate from it'.[68] Aroney suggested that the introductory phrase of the proposed amendment[69] could support the discovery of domestic dependent nationhood for Aboriginal and

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60 See *Wong* (n 58) 587–91 (French CJ and Gummow J), 623–5 (Hayne, Crennan, and Kiefel JJ), 649–51 (Heydon J). Cf at 604 (Kirby J).

61 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 358 (Brennan CJ and McHugh J), 361–3 (Gaudron J), 382–3 (Gummow and Hayne JJ), 406–7, 413 (Kirby J).

62 Australian Electoral Commission, *Your Official Referendum Booklet* (2023) 8, 10, 12, 14, 16, 18 ('*Yes Pamphlet*'). See also Lorena Allam, Josh Butler, Nick Evershed and Andy Ball, 'The Yes Pamphlet: Campaign's Voice to Parliament Referendum Essay — Annotated and Factchecked', *The Guardian* (online, 20 July 2023) <https://www.theguardian.com/australia-news/ng-interactive/2023/jul/20/the-vote-yes-pamphlet-referendum-voice-to-parliament-voting-essay-aec-published-read-in-full-annotated-fact-checked> ('*Yes Pamphlet Factchecked*').

63 See above n 41 and accompanying text.

64 Law Council of Australia, Submission No 91 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of Australia, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (21 April 2023) 12, quoted in *Voice Advisory Report* (n 34) 13 [2.17].

65 *Voice Advisory Report* (n 34) 85 [1.2].

66 *Mabo No 2* (n 15) 31–4 (Brennan J); *Coe* (n 39) 114–15 (Mason CJ).

67 Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 312.

68 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 99. See further Asmi Wood, 'Self-Determination under International Law and Some Possibilities for Australia's Indigenous Peoples' in Laura Rademaker and Tim Rowse (eds), *Indigenous Self-Determination in Australia* (ANU Press, 2020) 269, 269.

69 'In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'.

Torres Strait Islander peoples, or fiduciary-like obligations, as in Canada, New Zealand and the United States.[70] However, this coheres uneasily with the suggestion of national 'unity' envisioned by the Yes campaign,[71] and notions of 'fuller nationhood' expressed in the *Uluru Statement*. The submission of the Law Council of Australia to the Joint Select Committee identified that one of the key reasons for the amendment was that 'all Australians "own" the *Constitution*', including Aboriginal and Torres Strait Islander peoples.[72] I argue that the reference in the introductory phrase to 'First Peoples' rather than 'First Nations'[73] could less radically be read to imply a unique status of Aboriginal and Torres Strait Islanders within Australia's *sovereign* people.[74]

III 'Great Underlying Principle': The 'Unified' Account of 'The People'

Part II of this article related how historical policies of exclusion and assimilation failed to resolve the fundamental 'crisis' of legitimacy for the Australian state represented by continuing Aboriginal sovereign claims. It also argued that, by contrast, the Voice proposal stood to recognise and entrench the distinct status of Aboriginal and Torres Strait Islander peoples within 'the people' of Australia. Part III will discuss popular sovereignty under Australian law, detailing how, contrary to the Voice provisions, Australian constitutional culture exhibits a bias towards a 'unified' construction of 'the people' inherited from 'modern constitutional' thought.

Recognition of Indigenous plurality collides with the prevailing understanding of 'the people' in Australian constitutional law and culture: a 'unified' people, undifferentiated for the purposes of law, represented through a single, supreme Parliament. Section A will articulate this construction, drawing on the theory of Tully, as emerging from a 'modern constitutional' tradition, which frames a formal 'unity' of 'the people' in order to enable abstracted and centralised constitutional modes, prioritising the unitary state, stable representative government and formal equality. Section B will identify this 'unitary' construction of 'the people' in the jurisprudence of popular sovereignty in Australia, aligning it with the endorsement of the supremacy of Commonwealth Parliament.

A *The Modern Constitutional Unitary People*

In *Strange Multiplicity*, Tully set out to answer 'one of the most difficult and pressing questions' of our age: 'Can a modern constitution recognise and accommodate cultural diversity?'[75] Tully perceives, in contemporary Western constitutionalism, an inability to recognise multiple, diverse peoples, and a predilection 'to exclude and

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70 Aroney, 'First Peoples (n 56) 6–8. See also Aroney and Gerangelos (n 54) 5 [14].
71 *Yes Pamphlet* (n 62).
72 Law Council of Australia (n 64) 7, quoted in *Voice Advisory Report* (n 34) 12 [2.16].
73 See *Voice Advisory Report* (n 34) 85 [1.2].
74 See ibid 11–13 [2.10]–[2.17].
75 Tully (n 4) 1.

assimilate cultural diversity in the name of uniformity'.[76] This tendency originates, Tully diagnoses, in a dominant strain of 'modern constitutional' theory.[77]

'Modern constitutionalism' generally refers to the political and legal tradition emerging during the period of the Enlightenment in Western Europe, concerned broadly with limited government, the rule of law and the protection of basic liberties.[78] In *Strange Multiplicity*, Tully criticises a strain of this tradition, typified by the works of Thomas Paine, but broadly 'given theoretical expression in the writings of the modern European political theorists from John Locke to John Stuart Mill',[79] which consciously defined itself in opposition to 'the "ancient constitution" based on custom, tradition and irregularity', and framed the sovereign people as uniform, singular and homogenous.[80]

As noted by David Lee, '[f]ew doctrines [were] as foundational to modern constitutional theory [as] popular sovereignty'.[81] The 'notion that the ultimate source of all authority exercised through the public institutions of the state originates in the people' provided a secular foundation for modern constitutionalism's most influential theorists.[82] However, the 'diffuse and scattered' nature of 'the people' complicated attempts to attribute to them supreme power or authority.[83] The core project of modern constitutionalism was the formation of a theory of centralised public authority, 'limited and circumscribed within the bounds of law':[84] the establishment of 'a constitution that is legally and politically uniform' and free from 'the irregularity of an ancient constitution'.[85] The multiplicity of the population and their customary practices, observes Tully, contradicted this ideal.[86] Modern constitutionalism and popular sovereignty were 'fundamentally at odds with each other'.[87] To resolve this tension, modern constitutional theory constructed the

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76 Ibid 31.

77 See especially ibid ch 3.

78 David T ButleRitchie, 'The Confines of Modern Constitutionalism' (2004) 3(1) *Pierce Law Review* 1, 6.

79 Tully (n 4) 42.

80 Ibid 41–2. See also at 67. Tully does not suggest that this widely drawn collection of temporally aligned 'modern constitutional' thinkers, including 'Paine's contemporaries, especially Jean-Jacques Rousseau, Adam Smith, Immanuel Kant, Benjamin Constant and Georg Wilhelm Friedrich Hegel, as well as several of his predecessors, such as John Locke and Thomas Hobbes' (at 42) are entirely monolithic in their advancement of a unitary sovereign people. Rather, he sees these strains of modern constitutional theory as having 'elbowed aside entire areas of the broader language of constitutionalism — such as the common law, earlier varieties of whiggism and civic humanism — which provide the means of recognising and accommodating cultural diversity' (at 37) and that '[d]espite the dominant trend to uniformity, subordinate areas of constitutional theory and practice have been open to the recognition and accommodation of different cultures' (at 31). Consequently, as will be articulated in Part III, expressing pluralism does not necessarily involve inventing whole new ways of thinking, but rather 'recover[ing] and reconstruct[ing]' those strains of 'common law' and constitutionalism which allowed 'intercultural negotiations on just forms of constitutional association' (at 31).

81 Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press, 2016) 1. See also Tully (n 4) 59.

82 Lee (n 81) 1.

83 ButleRitchie (n 78) 26–7.

84 Lee (n 81) 1. See also at 7.

85 Tully (n 4) 66. See also at 67.

86 Ibid ch 3, 64–7.

87 Lee (n 81) 1.

sovereign 'people' with 'a formal, narrowly defined character'.[88] The people, though a multitude in fact, were, as a sovereign entity, conceptualised as 'unified' and 'unitary':[89] 'indivisible and necessarily dominant within a territory'.[90]

This construction of 'the people' allowed the formulation of the unitary state. The period of medieval constitutionalism preceding modern constitutionalism was defined by 'horrifyingly bloody ... wars. The prime reason for this was that there was no *uniform* concept of the "state"'.[91] Perceiving 'conflicting jurisdictions and authorities of the ancient constitutions [as] the cause of wars', says Tully, modern constitutional theorists were motivated to theorise a unitary nation-state, whereby authority was 'organised and centralised by the constitution in some sovereign body: in a single person or assembly, a system of mixed or balanced institutions, or in the undifferentiated people'.[92] Thomas Hobbes, for example, sought to arrest the fracturing of public authority which he witnessed in the English Civil War. He posited society as formed by a 'covenant' between every individual member of the 'multitude', whereby each agreed to 'confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will'.[93] This act constituted a unitary sovereign ruler, 'one indivisible entity with a unitary will and personality'[94] aligned with a unitary 'Commonwealth' capable of stably and authoritatively wielding public authority.[95]

This unitary quality of the sovereign authority was imposed back upon the sovereign 'people'. Jean-Jacques Rousseau seminally theorised the continuing sovereignty of 'the people' — separating constituent from governing constituted power[96] — through the 'general will' of the population.[97] For Rousseau, sovereignty was 'nothing less than the exercise of the general will'.[98] He maintained, however, the unitary structure of sovereign will. The notion of 'a single superior and sovereign will capable of expressing the permanent and common interests of the entire nation' remained attractive as a bulwark against political division.[99] The 'general will' subordinated individual wills to the 'common interest'.[100] Sovereignty was 'indivisible'[101] and suffered no 'partial wills' or 'partial society'[102] even if, in fact, subsets of the community did conflict with the 'general will'.[103]

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88 ButleRitchie (n 78) 29. See also Tully (n 4) 67.
89 See especially Tully (n 4) 67.
90 Levy, O'Flynn and Kong (n 25) 130–1.
91 Lee (n 81) 7 (emphasis in original). See also Tully (n 4) 66–7.
92 Tully (n 4) 67.
93 Thomas Hobbes, *Leviathan*, ed David Johnston (Norton, 2nd ed, 2020) 118. See also Tully (n 4) 84.
94 Lee (n 81) 11.
95 Hobbes (n 93) 118.
96 Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020) 29; Murray Forsyth, 'Hobbes's Contractarianism: A Comparative Analysis' in David Boucher and Paul Kelly (eds), *The Social Contract from Hobbes to Rawls* (Routledge, 2004) 39, 42.
97 Jean-Jacques Rousseau, *The Social Contract*, tr Jonathan Bennett (Early Modern Texts, 2017) 7. See also Forsyth (n 96) 42.
98 Rousseau (n 97) 12.
99 Jeremy Jennings, 'Rousseau, Social Contract and the Modern Leviathan' in David Boucher and Paul Kelly (eds), *The Social Contract from Hobbes to Rawls* (Routledge, 2004) 117, 118.
100 Rousseau (n 97) 7, 16.
101 Ibid 12.
102 Ibid 14.
103 Ibid 8.

Modern constitutional theorists sought to integrate this 'ideal' of popular sovereignty into the framework of the modern constitution[104] but, remaining 'distrustful of "the masses"' [saw] radical democratic participation and will formation [as] destructive and troublesome'.[105] Representative democratic government, as an institution, allowed popular sovereignty to be 'built into the apparatus of modern constitutionalism', but reduced the plurality of the sovereign 'people' to abstracted majoritarianism.[106] Consequently, 'democratic institutions were nothing more than positivist structures that allowed for the determination of popular sentiment'[107] and '[r]epresentative government [was] an acknowledgement that constitutionalism [was] prime'.[108]

In the United Kingdom, modern constitutional popular sovereignty underwrote explanations of parliamentary sovereignty.[109] Jeremy Bentham theorised a 'split' in the sovereignty of the United Kingdom, where 'the people' chose assemblies in periodic elections but did not control lawmaking functions.[110] Albert Venn Dicey similarly posited a distinction between 'legal' and 'political sovereignty': the sovereignty of the British Parliament was a 'merely legal conception [meaning] simply the power of law-making unrestricted by any legal limit'.[111] Political sovereignty was possessed by the body whose will 'is ultimately obeyed by the citizens of the state',[112] and this was 'the people', or more particularly, 'electors [who] can in the long run always enforce their will'.[113] Underlying this was the modern constitutional notion of 'the people', or the nation, as one. The 'essence of representative government', said Dicey, is that Parliament should 'give effect to the will of … the electoral body, or of the nation'.[114] Because of the majoritarian structure of the people's sovereign will, Walter Bagehot identified the House of Commons, and not the unelected House of Lords or the Crown, as the sovereign institution.[115]

This positivist treatment of the sovereign 'people' was upheld by formal equality and unity.[116] For Hobbes, in order to sustain the 'unity' by which the sovereign institution was legitimated, it was necessary that 'the people' be formally equal.[117] To allow a hierarchy of differences in society would allow the assertion of superior places within the social order, and those with inferior places would refuse

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104 ButleRitchie (n 78) 27.
105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid 29.
109 See Saunders and Kennedy (n 5) 44.
110 Ibid.
111 AV Dicey, *Introduction to the Study of the Law of the Constitution*, ed Roger Michener (Liberty Fund, 8th ed, 1982) 27.
112 Ibid.
113 Ibid 27–8.
114 Dicey (n 111) 285.
115 Walter Bagehot, *The English Constitution* (Chapman & Hall, 1867) 164, 270, cited in Saunders and Kennedy (n 5) 46.
116 Forsyth (n 96) 38. See further Tully (n 4) 84–5.
117 Kinch Hoekstra, 'Hobbesian Equality' in SA Lloyd (ed), *Hobbes Today: Insights for the 21st Century* (Cambridge University Press, 2012) 76.

the covenant of society.[118] This would reintroduce the pluralism Hobbes' theory sought to eradicate.[119] Hobbes' equality was not a natural fact but a formal construction: an 'acknowledgement', 'allowance' and 'attribution' between covenanters.[120]

For John Stuart Mill, similarly, sovereignty was to be vested in 'the entire aggregate community' through franchise[121] — the 'whole people' must have 'ultimate power'.[122] Dicey advocated for the referendum as a process of constitutional change, in part because he believed a greater proportion of the population, particularly minorities outweighed in regular elections, would turn out to participate.[123] This electoral equality allowed 'the people' to be constructed as homogenous 'in the sense that culture is irrelevant [or] capable of being transcended'.[124] Diversity being served sufficiently 'by an implicit and substantive common good and a shared set of authoritative European institutions',[125] the modern constitution eliminates 'diversity as a constitutive aspect of politics'.[126]

Moreover, Tully perceives this restriction as a tool of colonial enterprise: having been 'designed to exclude or assimilate cultural diversity'[127] and 'justify the extinction or assimilation of different cultures',[128] it was 'employed, and continue[s] to be employed, to dispossess the Aboriginal nations of their sovereignty and territory and to subject them to European constitutional nation states and their traditions of interpretation'.[129] As colonial European thinkers faced Aboriginal peoples that considered themselves 'sovereign nations with jurisdiction over their territories', a justification was required to establish European sovereignty.[130] The distinction upheld between 'ancient' constitutions, founded on custom and perceived irregularity, and 'modern' constitutions, defined by formality, abstraction and equality, and the superiority of the latter, served to relegate Aboriginal political associations to an 'earlier stage of [historical] development',[131] a 'state of nature'.[132] Such ideas 'vacate[d]' lands 'for settlement without consent by removing the sovereignty and property of Aboriginal peoples',[133] and allowed for the figuration of uniformity of 'the people' as an indication of having achieved modernity.[134] Any failure of Aboriginal peoples to conform to the uniformity of 'the people', and to accede to the European institutions of a modern constitution, is viewed as evidence

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118 Ibid 99–100.
119 Ibid.
120 Ibid 102 (citations omitted).
121 John Stuart Mill, *Considerations on Representative Government*, ed Geraint Williams, *Utilitarianism, On Liberty, Considerations on Representative Government* (Dent, 1996) 223.
122 Ibid 226. See also Saunders and Kennedy (n 5) 45–6.
123 Rivka Weill, 'Dicey Was Not Diceyan' (2003) 62(2) *Cambridge Law Journal* 474, 489.
124 Tully (n 4) 63.
125 Ibid 64.
126 Ibid 63.
127 Ibid 58.
128 Ibid 70.
129 Ibid 70.
130 Ibid 71.
131 Ibid 69. See also 64–8.
132 Ibid 69.
133 Ibid 74.
134 Ibid 67.

of their inadequacy for sovereignty, and justification for their exclusion or assimilation. In this way, the vision of a people upheld by modern constitutionalism 'legitimates the modernising processes of discipline, rationalisation and state building that are designed to create in practice the cultural and institutional uniformity identified as modern in theory'.[135]

Modern constitutionalism was therefore, says Tully, '[t]he picture … of a culturally homogenous and sovereign people [whose] constitution founds an independent and self-governing nation state with a set of uniform legal and representative political institutions in which all citizens are treated equally'.[136] It defined itself in opposition to the 'multiform … assemblage' of 'ancient constitutions'.[137] Concepts of 'popular sovereignty, citizenship, unity, equality, recognition, and democracy' came to

> presuppose the uniformity of a nation state [and its people, such that] multi-national federalism [and] demands for cultural recognition … appear *ad hoc*, even as a threat to democracy, equality and liberty, rather than as forms of recognition that can be explained and justified in accordance with principles of constitutionalism.[138]

B *The Unitary Sovereign People in Australian Law*

This modern constitutional construction of popular sovereignty occupies the *Australian Constitution*. British constitutional ideas were 'second nature to the colonial politicians who negotiated, debated and drafted our *Constitution*'.[139] Recent scholarship by Saunders and Kennedy, and by Partlett, has revived attention to the ways that British and American notions of popular sovereignty animated the framers and inhabit the *Constitution* today.[140] It was not until 1992, however, that popular sovereignty was internally accepted as the foundation for the authority of the *Australian Constitution*.

In *ACTV*, Mason CJ stated that despite the *Constitution*'s 'initial character as a statute of the Imperial Parliament', the Australia Acts of 1986 had 'marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people'.[141] His Honour departed from the decades-old orthodoxy tracing the authority of the *Australian Constitution* to its passage as an Act of the Imperial Parliament.[142] Mason CJ was soon joined by Deane and Toohey JJ, and later McHugh J, as advocates of popular sovereignty, leading George Winterton to declare in 1998 that 'there is no reason to doubt that the views of Mason CJ, Deane, Toohey and McHugh JJ would be endorsed by most, if not all, of the current justices'.[143]

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135 Ibid 82. See also at 83.
136 Ibid 41.
137 Ibid 142.
138 Ibid 9.
139 James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 594 ('*The High Court and the Constitution*').
140 Saunders and Kennedy (n 5) 37; William Partlett, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne University Law Review* 821.
141 *ACTV* (n 1) 137–8 (citations omitted).
142 Brendan Lim, *Australia's Constitution After Whitlam* (Cambridge University Press, 2017) 135–41.
143 Winterton (n 2) 4.

The text of the *Constitution*, however, contained 'sparse'[144] references to 'the people' of the Commonwealth, which did little to clarify the term. The preamble refers to 'the people' of the original states, excluding Western Australia. Sections 7 and 24 provide that the members of the Senate and House of Representatives shall be 'directly chosen by the people'. Section 25 and the former s 127 further provide for the disqualification of races from 'reckoning the numbers of the people … of the Commonwealth'. Though the framers regularly invoked 'the people', the 'will of the people' and the notion of self-rule in the Convention Debates, they failed to 'articulate precisely what they meant by these terms'.[145] A core function of the preamble had been establishment of a single, national people in 'one indissoluble Commonwealth'. John Quick and Robert Garran, writing in 1901, observed that two purposes of the preamble were expressly to declare the agreement of the people of Australia and to declare their purpose to unite.[146] These declarations were to be regarded as 'promulgating principles, ideas, or sentiments operating, at the time of the formation of the instrument, in the minds of the framers, and by them imparted to and approved by the people to whom it was submitted'.[147]

The potential significance of this 'paradigm shift' from parliamentary to popular sovereignty was immediately acknowledged.[148] As a Grundnorm, or foundational norm,[149] popular sovereignty had the potential to significantly alter and direct understandings of Australian constitutional law. The possibility that the *Constitution* was to be interpreted 'for the benefit of the people',[150] or that 'the people' possess an active 'legal sovereignty'[151] or 'constituent power',[152] could pervasively affect constitutional practice.[153] The sovereignty of 'the people' did exhibit legal force. The implied freedom of political communication, and the principle of 'representative government' on which it was based, were interwoven with the sovereignty of 'the people' and used to invalidate the laws of Parliament.[154] Likewise, in *Roach v Electoral Commissioner*[155] and *Rowe v Electoral Commissioner*,[156] the High Court demonstrated a willingness to invalidate electoral laws considered inconsistent with the nature of 'the people' as a political community,

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144 Justice Patrick Keane, 'The People and the *Constitution*' (2016) 42(3) *Monash University Law Review* 529, 538 ('The People and the Constitution'); Arcioni, 'Competing Visions' (n 11) 79.

145 Saunders and Kennedy (n 5) 54.

146 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901) 286; McKenna, Simpson and Williams (n 55) 385–6.

147 Quick and Garran (n 146) 286.

148 Winterton (n 2) 1.

149 Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2015) 'Grundnorm'.

150 Stellios, *The High Court and the Constitution* (n 139) 711.

151 *ACTV* (n 1) 137–8 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J) ('*McGinty*').

152 See Partlett (n 140).

153 See Winterton (n 2) 1–5.

154 See *ACTV* (n 1) 137–8 (Mason CJ).

155 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').

156 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*').

asserting an implied minimum of franchise,[157] and distinguishing the constitutional concept of 'the people' from the related constitutional concept of 'electors'.[158]

These rulings produced anxiety about an expanded scope for judicial law-making. Early judicial statements of popular sovereignty attributed to 'the people' both 'political' and 'legal' sovereignty.[159] This Diceyan terminology allowed 'the people' both supreme political power, as electors of Parliament, *and* supreme law-making authority,[160] stoking fears of a potential 'full panoply' of judicially implied rights.[161] The internalisation of popular sovereignty appeared to 'break Parliament's theoretical monopoly on law-making' and enabled the Court and, potentially, other constitutional entities such as the Senate[162] to 'claim its own power to speak for the sovereign people'.[163]

Leslie Zines, an exponent of the 'British traditional heritage' of parliamentary sovereignty in Australia, expressed particular disquiet following the *ACTV* case, cautioning that such reasoning departed from the principle of parliamentary supremacy and 'may open up a Pandora's box of implied rights and freedoms'.[164] Zines would, however, come to employ a Diceyan logic to restore the supremacy of Parliament:

> Although the implication of representative government derogates from the principle of parliamentary sovereignty, it can be said, paradoxically, to strengthen the political legitimacy of that principle. The notion that emerges … is that a form of representative government is entrenched in the *Constitution* and, subject to that and any other guarantees and restrictions in the *Constitution*, the supremacy of Parliament prevails.[165]

In 2013, the High Court began to articulate a picture of the sovereign people that accorded with Zines' vision: a body of electors, defined by political equality, who expressed their sovereignty exclusively through representative government. Following nearly two decades playing no noticeable part in the Court's reasoning, the language of popular sovereignty reappeared in *Unions NSW No 1*.[166] In this case, a six-member majority of the Court identified 'a sovereign power residing in the people, exercised by the representatives'.[167] Two years later, in *McCloy v New South*

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157 *Roach* (n 155) 173 (Gleeson CJ); *Rowe* (n 156) 18 (French CJ).

158 *Roach* (n 155) 199 (Gummow, Kirby and Crennan JJ). See also *Roach* (n 155) 179 (Gleeson CJ); *Rowe* (n 156) 52, 58 (Gummow and Bell JJ), 119 (Crennan J), 75 (Hayne J, dissenting). See also Murray (n 3) 896; Elisa Arcioni, 'The Core of the Australian Constitutional People: "The People" as "The Electors"' (2016) 39(1) *UNSW Law Journal* 421.

159 See, eg, *ACTV* (n 1) 137–8 (Mason CJ); *McGinty* (n 151) 230 (McHugh J).

160 Dicey (n 111) 27.

161 Lim (n 142) 157–63.

162 See ibid 79–83.

163 Ibid 163.

164 Leslie Zines, 'A Judicially Created Bill of Rights' (1994) 16(2) *Sydney Law Review* 166, 177.

165 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 565. See further Stellios, *The High Court and the Constitution* (n 139) 600; Ryan Goss, 'What Do Australians Talk about when They Talk about "Parliamentary Sovereignty"?' [2022] (1) *Public Law* 55.

166 *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions NSW No 1*'). See further Stellios, *The High Court and the Constitution* (n 139) 673–4.

167 *Unions NSW No 1* (n 166) 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also at 571 [104] (Keane J).

Wales,[168] this sovereignty was refined further by a consistent bloc of Justices, comprising French CJ and Kiefel, Bell, Keane and Nettle JJ. This bloc began framing the sovereignty of the Australian people as 'political sovereignty',[169] described by Nettle J in *McCloy* as the 'freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes'.[170]

In so framing the role of the sovereign people, the Court removed much of the potential consequence of popular sovereignty from the law, as any claim to speak for 'the people' was returned to Parliament.[171] Subsequently, as Partlett identifies, it became 'conventional wisdom' to assert that 'the Australian people exercise a weak version of popular sovereignty understood "in the late 19th-century British constitutional sense"' as acting through electors.[172] 'The main argument for the implied freedoms', asserts James Stellios, became 'in effect the same as the political and moral justification for the common law principle of the supremacy of Parliament, namely the accountability of Parliament to the electorate'.[173]

A feature of 'political sovereignty' articulated by this bloc was 'political equality'. In 1902, Harrison Moore had written of the *Australian Constitution* that '[t]he great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.[174] Six members of the Court in *McCloy* endorsed this statement, with French CJ, Kiefel, Bell and Keane JJ asserting that '[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*'.[175] The exact content of the principle of 'political equality' — other than that it lies 'at the heart of the Australian constitutional conception of political sovereignty'[176] — remained unarticulated.[177] It was, however, reiterated in subsequent implied freedom cases,[178] and broadly reflected 'institutional requirements that flow from an egalitarian ideal', enabling democratic politics.[179]

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168 *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

169 See *Unions NSW No 1* (n 166) 571 (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 593 [196]–[197], 601 [225], 604 [236] (Keane J); *McCloy* ibid 207 [45] (French CJ, Kiefel, Bell and Keane JJ), 257 [216] (Nettle J); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 196 [51] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 614 [40] (Kiefel CJ, Bell and Keane JJ) ('*Unions NSW No 2*').

170 *McCloy* (n 168) 257 [216] (Nettle J) (citations omitted).

171 Lim (n 142) 176–80.

172 Partlett (n 140) 824.

173 Stellios, *The High Court and the Constitution* (n 139) 601.

174 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329.

175 *McCloy* (n 168) 207 [45] (citations omitted). See also at 226 [110]–[111] (Gageler J), 258 [219], 273–4 [271] (Nettle J).

176 Ibid 274 [271] (Nettle J).

177 Will Bateman, Dan Meagher and Amelia Simpson, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 11th ed, 2021) 1238 [10.3.57].

178 *Unions NSW No 2* (n 169) 614 [40] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 22 [44] (Kiefel CJ, Keane and Gleeson JJ).

179 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, 160 (citations omitted).

Justice Keane had elsewhere articulated 'political equality' as an attribute of the 'unity' and 'solidarity' necessary for a sovereign people.[180] His commentary clarifies the picture of 'the people' mobilised by the majority in *McCloy*. Keane had been a driving force in the reinvigorated jurisprudence of popular sovereignty. His Honour was the first contemporary justice to expressly declare that the sovereignty of 'the people' implied 'political equality', and it was this statement which was relied upon in the joint judgment of French CJ, Kiefel, Bell and Keane JJ in *McCloy*.[181] In his extra-judicial writing, Keane had contended that the notion of a constitutional 'people' necessarily involved 'social solidarity' and 'political unity'.[182] In the American constitutional context, he stated, 'unity' provided a stronger constitutional basis for desegregation than the reasoning adopted in *Brown v Board of Education*,[183] would have avoided 'the contortions of the later US jurisprudence relating to affirmative action',[184] and even prevented the 'baffling' position of the US Supreme Court regarding the right to bear arms.[185] In the Australian context, 'unity' expressed both a limit on government in dividing 'the people' in public life, as well as obligations of 'civic duty' for 'the people'.[186] Such 'unity' was asserted by Keane as a feature of Australia's constitutional order. While there were 'of course, serious differences between societal groupings',[187] he maintained:

> Our Framers made the brave judgment that the prospect of a tyrannous majority, of so much concern to members of persecuted minorities, was a chimera in a polity in which there were no rigidly defined social strata and antagonistic societal groupings.[188]

The picture of 'the people' articulated by this bloc of Justices and informed by the commentary of Keane thus traces Tully's modern constitutional picture: a unified, formally equivalent and uniform sovereign people, exercising their authority through elections to empower Parliament alone with sovereign authority.

IV 'Strange Multiplicity': Plural Accounts of 'The People' and the Rejection of the Voice

The preceding Part traced Tully's analysis of the modern constitutional 'unitary' sovereign people in Australian law and legal culture. It described the tension in prevailing modern constitutional thought between popular sovereignty and formal constitutionalism, explaining how the construction of the people as 'unitary' provided a conceptual foundation for the authority of the unitary state, representative government, and formal equality. It then extracted these elements in the jurisprudence of popular sovereignty in Australia, which, by synthesising popular

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180 Keane, 'The People and the Constitution' (n 144) 533.
181 But see Tham (n 179) 166.
182 Keane, 'The People and the Constitution' (n 144) 533, 539. See also PA Keane, 'In Celebration of the Constitution' (Speech, Banco Court, Brisbane, 12 June 2008) <http://classic.austlii.edu.au/au/journals/QldJSchol/2008/64.html> ('In Celebration of the Constitution').
183 Keane, 'The People and the Constitution' (n 144) 534.
184 Ibid 536.
185 Ibid.
186 Ibid 539.
187 Keane, 'In Celebration of the Constitution' (n 182) 10.
188 Ibid 2.

sovereignty with parliamentary supremacy and formal equality, invoked the sovereign people as 'unified'.

This 'unified' account is not, however, the only picture of 'the people' operating in Australian constitutional law and culture. In this Part, Section A will argue that an account of 'the people' as plural — divisible into groups possessing distinct constituent power and different capacities under the *Constitution*, referable to that group's unique relationship to the constitutional community and text — pre-exists the Voice in Australian federalism, illustrating how plural constructions of the sovereign people manifest alternative constructions of constitutional law. Section B will argue that the Voice, poised to embed a plurality of 'the people' in the *Constitution*, stood to express and legitimate such alternative constitutional forms. It describes first, how, ahead of the referendum, the Voice was analysed as a vector for deliberative constitutionalism and, second, how the Voice stood to embody a developing form of common law constitutionalism, echoing Tully's theory of democratic constitutionalism. These deviations from constitutionalism predicated on a 'unitary' people, Section C will claim, animated the No campaign to reject the Voice proposal in the terms of modern constitutional commitments: the unitary state, supreme Parliament and formal equality.

A *'Polity Composed of Polities': Plural Federal People*

Australia's people, at Federation, were not considered an aggregate whole, but a 'Federal Commonwealth'[189] — a polity composed of polities. '[F]ederalism', says Aroney, 'was the non-negotiable pre-supposition, not responsible government', of the National Australasian Convention Debates.[190] Arcioni and Aroney have highlighted how federalism continues to obstruct the framing of Australia's sovereign people as uncomplicatedly singular.[191] The conception of the Australian state as, in the terms of James Bryce, a 'community made up of communities',[192] required a unique 'set of analytical criteria' to comprehend popular sovereignty.[193]

Different constructions of the sovereign people yield different modes of constitutional government and different approaches to constitutional law. A plurality of 'the people' undermines an exclusive authority of majoritarian government, enabling other, counter-majoritarian institutions to claim to speak for parts of the sovereign people. The institutions of Australian government operationalise this union of polities. 'The composition of the Senate', Arcioni notes, remains 'an

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189 Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 1 ('*Constitution of a Federal Commonwealth*').

190 Ibid 6.

191 But see generally Tully's discussion of American federalism and 'diverse' federalism: Tully (n 4) 92–5, ch 5.

192 James Bryce, *The American Commonwealth* (Macmillan, 2nd ed, 1889) vol 1, 14. See Aroney, *Constitution of a Federal Commonwealth* (n 189) 34–5. See further Peter C Oliver, 'Parliamentary Sovereignty, Federalism and the Commonwealth' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing, 2018) 49, 58. See also Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43(2) *Federal Law Review* 177, 185; Partlett (n 140) 838.

193 Nicholas Aroney, 'Constituent Power and the Constituent States: Towards a Theory of the Amendment of Federal Constitutions' (2017) 17 *Jus Politicum* 5, 5.

obvious indication of the peoples of the states being distinct communities',[194] and 'thereby identifies the constituent power of "the people"'.[195] The majoritarian House of Representatives represents 'the people of the Commonwealth', while the Senate represents 'the people of the States'.[196] A federal High Court, the 'keystone of the federal arch',[197] is necessary to maintain the federal compact.[198] The power of judicial review, 'a significant departure from the English constitutional tradition of parliamentary sovereignty', grants the court a counter-majoritarian power to enforce the federal terms.[199]

Further, contrary to Moore's 'great underlying principle',[200] the sovereignty of the divisible 'people' does not manifest equal political power. The *Constitution* explicitly discriminates between the peoples of the states and territories in terms of political capacity, and the High Court recognises this.[201] The 'equal representation of the several Original States' in the Senate grants unequal voting power to residents of different states.[202] Section 128 requires a 'double majority' of 'a majority of the States [by] a majority of electors' to pass constitutional amendments, inflating the power of less populous states. Section 128 further requires that any formal amendment affecting the constitutional power of a state not pass unless the majority of electors in that state approve the amendment, essentially granting a veto power to residents of that state. *McKellar* confirmed that ss 7 and 24 ensured representation in Parliament only for the people of states, not territories.[203] Although s 122 allows Parliament to grant Territorians representation, they enjoy no constitutional entitlement.

McKinlay[204] and *McGinty v Western Australia*[205] saw the Court rebuff a constitutionally entrenched equality of voting power.[206] In *McGinty*, Gummow J emphasised that the 'ultimate sovereignty' reposed in s 128 was not distributed equally, but anticipated unequal preference to the electors of a state when altering constitutional provisions affecting that state.[207] 'Broad statements as to the reposition of "sovereignty" in "the people" of Australia,' said his Honour, 'if they

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194 Elisa Arcioni, 'The Peoples of the States under the Australian Constitution' (2022) 45(3) *Melbourne University Law Review* 861, 867 ('Peoples of the States').

195 Ibid 882.

196 *Australian Constitution* ss 7, 24; Arcioni, 'Peoples of the States' (n 194) 867.

197 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

198 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 73 [56] (Gummow, Hayne and Crennan JJ).

199 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 3rd ed, 2020) 376 [7.27].

200 Tham (n 179) 163–5.

201 See further Arcioni, 'Peoples of the States' (n 194) 884–6; *Street v Queensland Bar Association* (1989) 168 CLR 461.

202 *Australian Constitution* s 7.

203 *A-G (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527, 532–3 (Barwick J), 542 (Gibbs J), 561–3 (Stephen J, Mason J agreeing at 562–3), 565–6 (Jacobs J), 568–9 (Murphy J), 582 (Aickin J) ('*McKellar*').

204 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ('*McKinlay*').

205 *McGinty* (n 151).

206 Stellios, *The High Court and the Constitution* (n 139) 596–7 (discussing *McKinlay*).

207 *McGinty* (n 151) 274–5.

are to be given legal rather than popular or political meaning, must be understood in light of the federal considerations contained in s 128'.[208] McHugh J expressed the point more baldly:

> Only the people can now change the *Constitution*. They are the sovereign. But, because their rights to amend the *Constitution* are not equal, the Australian people do not have equal shares in that sovereignty. …
>
> When the share of individuals in the sovereignty of the nation, in the right to amend the *Constitution* and in Senate voting is expressly made unequal and when new States and Territories may have unequal representation in the Parliament, it is obvious that equality of individual voting power is not and has not been a fundamental feature of the *Constitution.*[209]

The tension between a unitary or a plural conception of 'the people' is therefore already entrenched in structures of the *Constitution* itself. The incremental diminishment of the view of the *Constitution* as 'an agreement between sovereign powers'[210] reflects a shift not just in judicial attitudes, but in Australian constitutional culture, towards a unified understanding of the national people. The growing dominance of federal Parliament represented not merely a growing 'preference for British over American institutions and concepts',[211] but more fundamentally 'the *Constitution* [being] read in a new light … reflected from events that had … led to a growing realization that Australians were now one people and Australia one country'.[212]

B *Pluralist Constitutional Methods under the Voice*

The legitimacy crisis occasioned by Indigenous claims to sovereignty urgently re-animates this tension. By formally recognising Indigenous plurality, the Voice seemed poised to activate novel approaches to the *Constitution*. Two contemporary constitutional theories, deliberative constitutionalism and democratic constitutionalism, which emerged from the commentary and case law preceding the Voice referendum, illustrate the institutional and jurisprudential potency of the plural conception of 'the people' embedded in the Voice.

1 *Deliberative Constitutionalism*

Ahead of the referendum, the pluralist possibility of the Voice caused it to be canvassed as a vector for deliberative constitutionalism. Deliberative democracy is 'a reaction against traditional democratic models that principally sought to tally the fixed preferences of majorities or interest groups'.[213] It seeks to reinvigorate democratic legitimacy by incorporating meaningful deliberation between citizens in decision-making.[214] Deliberative constitutionalism extends this project to

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208 Ibid 275.
209 Ibid 237–8.
210 Stellios, *The High Court and the Constitution* (n 139) 1.
211 Ibid 594.
212 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J) ('*Payroll Tax Case*').
213 Ron Levy and Hoi Kong, 'Introduction: Fusion and Creation' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 1, 1.
214 Ibid.

constitutional law, seeking to restore democratic legitimacy by construing a constitution as 'principally a vehicle for deliberation'[215] 'within and among the constituent political units of a [society]'.[216] Deliberative constitutionalism frames a constitution as a process by which 'a polity continually … work[s] through social controversies and refine[s] its own constitutional commitments via procedures of robust deliberative democracy'.[217]

A system of parallel, representative institutions 'giving political and legal authority to disparate voices within the federal state' naturally provides expression for democratic deliberation.[218] Gabrielle Appleby, Ron Levy and Helen Whalan argued in 2023 that the Voice could operate as an institution of deliberative democracy 'capable of creating a dialogue between peoples' and facilitating a plurality of constituent power groups 'working through, and perhaps, settling competing legitimacy claims, via a deliberative and democratic process'.[219] This model, they assert, avoids the 'limits [of] the appropriateness of [majoritarian] democracy in an unequally divided polity'[220] and allows 'multiple sovereignties [to] be accommodated',[221] achieving 'a conversation about both constitutive … and ongoing matters … in which the sovereignty of each side may be respected and pragmatic solutions for allowing each to be expressed in practice are pursued'.[222] This, say the authors, was the method envisioned by the *Uluru Statement*.[223]

Deliberative constitutionalism is posited as an avenue to involve diverse peoples in ongoing constitution-making,[224] particularly of informal constitutional change, affecting the 'fragments of ordinary law — statutes, judgments and unwritten conventions'[225] which amount to, if not enforceable law, 'constitutional morality'.[226] It is said to 'avoid foreclosing essential debates about the nature and

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215 Hoi L Kong and Ron Levy, 'Deliberative Constitutionalism' in Andre Bächtiger, John S Dryzek, Jane Mansbridge and Mark E Warren (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 625, 634.

216 Ibid 635.

217 Ibid 632.

218 Robyn Hollander and Haig Patapan, 'Deliberative Federalism' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 101, 102. See also Kong and Levy (n 215) 635.

219 Appleby, Levy and Whalan (n 12) 764. But see especially Asmi Wood, 'Critique of "Voice versus Rights"' [2023] *UNSW Law Journal Forum* 5:1–17, in particular Wood's criticism of this projection onto the Voice as presuming the function of the Voice while debate was still 'in train' (at 3), overreaching the 'meaning in the *Constitution Alteration Act*' (at 6) and, centrally, assuming a non-Indigenous perspective in approaches to questions of Indigenous sovereignty and self-determination (at 13). Wood acknowledges the Voice's 'recognition of Aboriginal and Torres Strait Islander peoples [as] explicitly giv[ing] form to the Indigenous body-politic referred to by the majority in *Love v Commonwealth*' (at 3–4). See also 15–16. However, he retorts that '[c]onstitutional legitimacy is *not really an issue for most Indigenous people*' (at 7, emphasis in original). '[N]on-Indigenous peoples should avoid addressing these deficiencies [in colonial legitimacy] through the Voice or other Indigenous attempts for some form of redress' and instead allow Indigenous voices on issues of Indigenous sovereignty and self-determination to set their own agenda (at 9).

220 Appleby, Levy and Whalan (n 12) 780.

221 Ibid 777.

222 Ibid 785.

223 Ibid 763.

224 Kong and Levy (n 215) 627.

225 Lim (n 142) 15.

226 Ibid 21 (citations omitted).

scope of political community',[227] allowing continual reinvention of the groups and identities recognised constitutionally and 'complex conceptions of political community and affiliation'.[228] It further deviates from traditional constitutional approaches by authorising the counter-majoritarian, constitutional court to defend arrangements reached by deliberative constitutional methods.[229] It attempts to reverse key commitments of modern constitutionalism, promising to reintegrate the plurality of voices and authorities in law and governance.

2 *Democratic Constitutionalism*

Tully's answer to the motivating question of *Strange Multiplicity* — whether constitutionalism can recognise cultural diversity — was the promotion of a different way of thinking about constitutions: reconceiving a constitution as 'a "form of accommodation" of cultural diversity'.[230] This theory of a 'democratic constitutionalism' is defined in opposition to the abstracted formula of modern constitutional popular sovereignty. Modern constitutionalism, Tully saw, quarantines the multiformity of 'the people' from the law at the same time as it draws legitimacy from them.[231] As a 'positivist enterprise', it imposes upon 'the people' the mould of a unitary entity, 'fragment[ing] and stifl[ing] social discourse [and] confin[ing] social and political possibilities'.[232] Tully's democratic constitutionalism instead frames the constitution as an 'activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time'.[233]

Under this theory, the actual forms of association within a sovereign people are a source of constitutional law. Michael Simpson summarises:

> If a constitution is not to be conceived of as something abstracted that stands above an unformed constituent group of people, then perhaps it can be conceived in broader terms as the wide-ranging fields of interaction, understood as rules and customs, that emerge, are established, are contended with, and change through the very practices of everyday interactive rule-following itself.[234]

Democratic constitutional theory invites judicial decision-makers to interrogate the actual values, associations and recognitions within a constitutional community — revealing the 'hidden constitutions' of a polity, disguised by 'the rule of modern constitutionalism and the narrow range of uses of its central terms'[235] — and to formulate the law in some degree of conformity, limited by the formal conventions of the *Constitution* and the common law, thereby 'mak[ing] explicit the implicit rules embodied in practice in a culture or community'.[236]

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227 Kong and Levy (n 215) 636.
228 Ibid.
229 Ibid 626.
230 Tully (n 4) 30.
231 Ibid 183.
232 ButleRitchie (n 78) 31.
233 Tully (n 4) 30.
234 Michael Simpson, '"Other Worlds Are Actual": Tully on the Imperial Roles of Modern Constitutional Democracy' (2008) 46(3) *Osgoode Hall Law Journal* 509, 521.
235 Tully (n 4) 99.
236 Ibid 107.

Ahead of the Voice referendum, the High Court's approach to Indigenous plurality increasingly displayed a form of common law constitutionalism paralleling the commitments of democratic constitutionalism.[237] The internalisation of popular sovereignty, Justice French has noted, appeared to authorise judges resorting to '"contemporary community values" to develop common law'.[238] If 'the people' were the authority underpinning the *Constitution* then it might be said that 'community values' should inform constitutional law. Popular sovereignty sees, thereby, '[s]tandards and values … being ascribed to the community and in turn … being reflected back into the law itself'.[239]

Brendan Lim saw Chief Justice Mason as expressing a judicial philosophy favouring a 'reflexive relationship between the concept of popular sovereignty and the phenomenon of judicial lawmaking'.[240] Mason perceived that an 'evolving concept of the democratic process [in Australia] is moving beyond an exclusive emphasis on parliamentary supremacy and majority will',[241] and openly acknowledged that judges make law.[242] Brennan J likewise saw that contemporary values 'justify judicial development of the law'.[243] '[T]he genius of the common law system', states Brennan J, 'consists in the ability of the courts to mould the law to correspond with the contemporary values of society.'[244] This impulse animated his Honour's judgment in *Mabo No 2* where, in overruling the doctrine of terra nullius, he invoked 'contemporary values' and 'contemporary notions of justice and human rights'.[245] '[I]t is imperative in today's world', his Honour said, 'that the common law should neither be nor be seen to be frozen in an age of racial discrimination'.[246]

This method, and its conflict with a method predicated on a 'unified' people, arguably surfaced plainly in *Love v Commonwealth*,[247] 'a battle for the identity of "the people"'.[248] In *Love*, a bare majority of the High Court, comprising Bell, Nettle and Gordon JJ, and Edelman J, writing separately, agreed that Aboriginal Australians could not be 'aliens' under s 51(xix) of the *Constitution*. Arcioni has argued that the majority judgments in *Love* demonstrate a view of 'the people' as 'plural and diverse', while the dissent advanced 'a unified conception dominated by formal equality and democratic participation'.[249] For the minority, observes Arcioni,

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237 See further ibid 113–16.

238 Robert French, 'The Constitution and the People' [2001] FedJSchol 7 <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2001/7.html>. See also Robert French, 'Law Making in Representative Democracy: The Durability of Enduring Values' (2017) 19(1) *Flinders Law Journal* 19.

239 PD Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government: Volume 1 — Principles and Values* (Law Book Co, 1995) 1, 6.

240 Lim (n 142) 172.

241 Ibid 169, quoting Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149, 162.

242 Lim (n 142) 170, quoting Sir Anthony Mason, *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason*, ed Geoffrey Lindell (Federation Press, 2007) 398, 405. See also John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17(3) *Sydney Law Review* 351.

243 *Dietrich v The Queen* (1992) 177 CLR 292, 319.

244 Ibid 319.

245 *Mabo No 2* (n 15) 30.

246 Ibid 41–2.

247 *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*').

248 Arcioni, 'Competing Visions' (n 11) 76.

249 Ibid.

a distinct, Aboriginal constitutional status contravened formal equality between subjects of Australia.[250] Kiefel CJ and Keane J, two exponents of the 'political sovereignty' and 'equality' of the sovereign people, maintained that the Australian people were and are formally undifferentiated, saying '[f]rom the time of British settlement the legal status of Aboriginal persons in Australia — as subjects of the Crown — has not been different from other Australians'[251] and there is no 'special class within the people of the Commonwealth'.[252] The minority suggested that recognition threatened the sovereignty of the Australian state, as prohibited by *Mabo No 2*.[253] Their Honours also advanced the supremacy of Parliament by, as Davenport describes, aligning definition of 'the people' with the 'broad legislative discretion to control community membership [by] citizenship'.[254]

The majority, by contrast, conceived the constitutional people as 'plural', 'capable of accommodating a distinct identity of First Nations people'.[255] This distinct place *within* 'the people', said the majority, was 'directly contrary to accepting any notion of [external] Indigenous sovereignty persisting after the assertion of sovereignty by the British Crown'.[256] A 'fundamental reason' for this recognition was the acceptance in Australian law and society of the place of Aboriginal peoples within the Australian community.[257] The meaning of 'alien', said Bell J, being responsive to 'changes in the national and international context',[258] was for the Court, not merely Parliament, to declare.[259]

Edelman J most explicitly explained that Australian history has not 'assimilated Aboriginal people within a unitary, homogenous political community that is defined almost entirely by legislative norms of citizenship'.[260] Edelman J challenged the notion of formal equality and homogeneity endorsed by the minority as inattentive to 'the one thing that is essential to real community: difference'.[261] 'Political community', says Edelman J, 'is not a concept that is wholly a creature of legislation'.[262] 'To the extent that such an approach might be said to be based upon a concern for *equality* within the political community, it would involve a misunderstanding of both equality and community.'[263] Demands for homogeneity in the capacities of the constitutional people '[misunderstand] the concept of equality

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250 Ibid 95–6. See also Morris (n 27) 418.
251 *Love* (n 247) 172 [9] (Kiefel CJ).
252 Ibid 221 [178] (Keane J). See further at 221–3 [176]–[182] (Keane J).
253 See ibid 172–3 [9]–[10], 176177 [25] (Kiefel CJ), 196–8 [91]–[94], 200–01 [102]–[103] (Gageler J), 226–228 [197], [199]–[205] (Keane J).
254 Mischa Davenport, '*Love v Commonwealth*: The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership' (2021) 43(4) *Sydney Law Review* 589, 590. See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 574 [43]–[44] (Kiefel CJ, Keane and Gleeson JJ).
255 Arcioni, 'Competing Visions' (n 11) 76. See also Morris (n 27) 426; Wood (n 219) 4.
256 *Love* (n 247) 278–9 [356] (Gordon J).
257 Ibid 183 (Bell J), 272 [335], 278 [355], 279–80 [360] (Gordon J), 252–4 [269]–[272] (Nettle J), 289 [396] (Edelman J).
258 Ibid 189 [69].
259 Ibid 187 [64].
260 Ibid 315 [453].
261 Ibid 289 [396].
262 Ibid 321 [466].
263 Ibid 320–1 [467] (emphasis added).

before the law. To treat differences as though they were alike is not equality. It is a denial of community.'[264]

Though judicial resort to 'community values' need not necessarily express pluralism, the jurisprudence surrounding Indigenous Australian constitutional status, particularly in *Love*, has given expression to pluralist values and impulses by reference to plurality within the Australian community. As Arcioni articulates, the conflicting formulations of the 'identity' of 'the people' in *Love* illustrate judicial commitments to particular constitutional values.[265] Yet further, these conflicting judgments demonstrate how alternative constructions of the sovereign people implicate genuinely and significantly different approaches to a constitutional practice, ostensibly founded on popular sovereignty. For the minority Justices in *Love*, the role of 'the people' in Australian constitutional law remains formalistic and their authority remains abstracted. The constructively unified people are sustained behind institutions: defined by an equality which legitimates their engagement with authoritative, parliamentary democratic processes. For the majority Justices, however, the forms of association they perceive within the sovereign people are an authoritative source of constitutional law. More than a mere figure, 'the people' are, through the mouths of the judicial elite, present and operative in constitutional law.

C *Are We One? Or Are We Many? The Rejection of the Voice*

In 2017, Prime Minister Turnbull refused the call from the *Uluru Statement* for a referendum on an Aboriginal and Torres Strait Islander Voice to Parliament, saying:

> Our democracy is built on the foundation of all Australian citizens having equal civic rights — all being able to vote for, stand for and serve in either of the two chambers of our national Parliament ...
>
> A constitutionally enshrined additional representative assembly which only Indigenous Australians could vote for or serve in is inconsistent with this fundamental principle.
>
> It would inevitably become seen as a third chamber of Parliament.[266]

In promising to recognise the plurality of Aboriginal and Torres Strait Islander peoples, the Voice seemed poised to express, endorse and legitimise novel approaches to constitutional government and law. It appeared poised to provide textual and institutional support for deviations from the modern constitutional orthodoxy predicated on a 'unitary' people. The Voice referendum thus put to the Australian people the same question which split the Court in *Love*: Are the people 'unified' or plural for the purposes of constitutional law? Beyond the legal and political elite, Australian constitutional culture was surveyed. The Yes campaign saw in plurality a

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[264] Ibid 315 [453].

[265] Arcioni, 'Competing Visions' (n 11) 95–6.

[266] Malcolm Turnbull, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release 41263, Department of Prime Minister and Cabinet, 26 October 2017) ('Response to Referendum Council') <https://pmtranscripts.pmc.gov.au/release/transcript-41263>. But see Malcolm Turnbull, 'I Will Be Voting Yes to Establish an Indigenous Voice to Parliament', *Malcolm Turnbull* (Web Page, 16 August 2022) <https://www.malcolmturnbull.com.au/media/i-will-be-voting-yes-to-establish-an-indigenous-voice-to-parliament> ('I Will Be Voting Yes').

greater 'unity',[267] a 'fuller expression of Australia's nationhood'[268] and an adequate recognition of the distinctiveness of Aboriginal and Torres Strait Islander Australians.[269] The No campaign raised as objections — in terms of the commitments of the modern constitutional, 'unified' view of 'the people' — the integrity of the Australian state, the authority of Parliament, and the equality of the people.[270]

1 *Fracturing the Unitary State*

Suggestions of Aboriginal sovereignty resurfaced anxieties about the integrity of the Australian state. The modern constitutional formulation of a necessary connection between a people and their unitary state emerged in both the 'progressive' and 'conservative' No campaigns. According to the progressive No campaign, which advocated for more significant Indigenous sovereign recognition, the passage of the Voice amendment threatened to dissolve Aboriginal sovereignty by ceding it to the Australian state.[271] A conception of Aboriginal sovereignty as necessarily unitary prohibited the co-existence of that sovereignty with the Australian constitutional order. For the conservative No campaign, threats to the sovereignty of the Australian state arose in suggestions that a treaty between Aboriginal peoples and the Australian Government would follow if the Voice proposal succeeded at referendum. As the *No Pamphlet* states: 'By definition, a treaty is an agreement between governments, not between one group of citizens and its government.'[272] This reflects a loyalty to the unitary state model not entirely congruous with current international practice, since 'New Zealand (Aotearoa), Canada, Norway, Sweden, Finland, Japan, Greenland and the US have all negotiated treaties with Indigenous peoples'.[273] Circulating misinformation also suggested that the success of the referendum would see land ceded to Aboriginal and Torres Strait Islander Australians as a result of the referendum,[274] or that an ill-conceived 'rent' would have to be paid.[275] These suggestions, encouraged by the *No Pamphlet*'s suggestion that 'reparations and compensation and other radical changes' may follow the Voice,[276] underscored anxieties about a fracturing of the stable authority of the Australian state.

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267 *Yes Pamphlet* (n 62) 10, 12.

268 *Uluru Statement* (n 40).

269 *Yes Pamphlet* (n 62).

270 Australian Electoral Commission, *Your Official Referendum Booklet* (2023) 9, 11, 13, 15, 17, 19 ('*No Pamphlet*'); Lorena Allam, Josh Butler, Nick Evershed and Andy Ball, 'The No Pamphlet: Campaign's Voice to Parliament Referendum Essay — Annotated and Factchecked', *The Guardian* (online, 20 July 2023) <https://www.theguardian.com/australia-news/ng-interactive/2023/jul/20/the-vote-no-pamphlet-referendum-voice-to-parliament-voting-essay-aec-published-read-in-full-annotated-fact-checked> ('*No Pamphlet Factchecked*').

271 Paul Karp, 'Why a Voice to Parliament Won't Affect First Nations Sovereignty as Lidia Thorpe Fears', *The Guardian* (online, 26 January 2023) <https://www.theguardian.com/australia-news/2023/jan/26/will-indigenous-voice-to-parliament-impact-first-nations-sovereignty-explainer>.

272 *No Pamphlet* (n 270).

273 *No Pamphlet Factchecked* (n 270).

274 Kirstie Wellauer, Carly Williams and Bridget Brennan, 'Why the Voice Failed', *ABC* (online, 16 October 2023) <https://www.abc.net.au/news/2023-10-16/why-the-voice-failed/102978962>.

275 RMIT ABC Fact Check, 'Secret Agendas, Context-Free Claims and Mistaken Identities: These Are the Key Themes in Voice to Parliament Misinformation', *ABC* (online, 29 September 2023) <https://www.abc.net.au/news/2023-09-29/fact-check-voice-to-parliament-misinformation/102913680>.

276 *No Pamphlet* (n 270) 11.

2 *Plurality of Authority*

The No campaign similarly expressed concern that the Voice would dilute or obstruct the authority of Parliament. The *No Pamphlet* foregrounded the claim that the proposed amendment was 'divisive and permanent', and warned that '[t]he High Court would ultimately determine [the Voice's] powers, not the Parliament' and so it 'risks legal challenges, delays and dysfunctional government'.[277] The potential of the High Court, as interpreter of the *Constitution*, to exert authority through the Voice provisions contrary to the law-making supremacy of Parliament was a core anxiety conveyed by the No campaign.[278] The fear that representations to the Voice would enable legal challenges to government actions or that 'activist judges' might usurp the power of the Voice to 'interfere with the work of government' remained a 'genuine fear amongst some Coalition MPs and constitutional conservatives' and circulated public discourse.[279]

So too did the spectre of the Voice itself acting as an authority obstructing the law-making supremacy of Parliament. This characterisation, captured in Turnbull's infamous label, a 'third chamber of parliament',[280] persisted in the public discourse, despite inconsistency with the provisions themselves.[281] The suggestion that the Voice represented 'a parallel system of representative government based on race'[282] also remained a persistent claim in No campaign media throughout the debate. These arguments appeared influential with voters. For 32% of respondents to a poll conducted shortly after the referendum, the top three reasons for voting No included that the Voice proposal would give Aboriginal people 'too much power'.[283]

3 *Inequality of Peoples*

Perhaps the central claim of the No campaign was that the Voice 'divides us'.[284] The *No Pamphlet* stated that '[t]his goes against a key principle of our democratic system, that all Australians are equal before the law', and '[t]his Voice will not unite us; it will divide us by race'.[285] The Pamphlet claimed the proposal would 'create different classes of citizenship' and '[enshrine] a Voice in the *Constitution* for only one group of Australians':[286]

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277 Ibid 11.

278 Sonam Thomas, 'The Voice and the High Court Challenge: Analysis of a Misrepresented Legal Debate', *RMIT University* (online, 13 June 2023) <https://www.rmit.edu.au/news/crosscheck/the-voice-and-the-high-court-challenge>.

279 Ibid.

280 Turnbull, 'Response to Referendum Council' (n 266); Wahlquist (n 43). But see Turnbull, 'I Will Be Voting Yes' (n 266).

281 Thomas (n 278); RMIT ABC Fact Check (n 275).

282 Morgan Begg and Daniel Wild, 'Indigenous Voice Counterpoint: A Violation of Racial Equality' *The Sydney Morning Herald* (online, 6 June 2019) <https://www.smh.com.au/national/indigenous-voice-counterpoint-a-violation-of-racial-equality-20190603-p51u3u.html>.

283 Rafqa Touma, 'People Who Watched Sky News More Likely to Have Voted No in Referendum, Survey Finds', *The Guardian* (online, 16 October 2023) <https://www.theguardian.com/australia-news/2023/oct/16/people-who-watch-sky-news-more-likely-to-vote-no-survey-of-voting-behaviour-finds>.

284 *No Pamphlet* (n 270) 13.

285 Ibid 13.

286 Ibid 11.

> Our Constitution belongs to all Australians. Our Parliament is there to represent all Australians. ... Our national anthem was recently changed to reflect the fact that we are 'one and free'. By contrast, this Voice would permanently divide Australians, in law and spirit.[287]

The No campaign depicted the Voice as a deviation from a principle of equality within the *Constitution*. The primary organisation of the No campaign, Australians For Unity, presented as its primary message: 'The Voice will divide Australians by race and completely change our democracy.'[288] 'All Australians are equal', stated a typical opinion piece by the Institute of Public Affairs: 'The legal status of Australians should not be decided according to their skin colour or race. ... Our nation's founding document should not divide us'.[289] It further stated: 'The universality of the Australian constitution [should not] be compromised' and 'the concerns and needs of Indigenous Australians are fundamentally [not] different to that of non-Indigenous Australians'.[290] Indeed, beyond constructive equality among 'the people', 32% of voters polled stated that Indigenous and non-Indigenous Australians faced the same levels of discrimination.[291] Drawing explicitly on modern constitutional thinkers, the non-aligned Rule of Law Education Centre accused the proposal of being 'the antithesis of the principle[s] espoused by American revolutionaries … who considered it self-evident that we are all created equal. Revolutionary France … embraced this idea'.[292] These suggestions of inequality reverberated strongly among No voters. According to polling shortly after the referendum, 82% of respondent No voters listed that the Voice would 'divide Australia' in their top three reasons for voting as they did.[293] For 41% of respondents it was the primary reason.[294]

V Conclusion

This article has aimed to show that two conceptions of Australia's sovereign people persist in Australian constitutional culture generating distinct, competing modes of constitutional practice, and that the tension between these conceptions was animated in the arguments surrounding, and outcome of, the Voice referendum. Drawing on the scholarship of Tully who articulates the tendency of contemporary Western constitutional culture towards a uniformity which supports abstraction and suppresses cultural diversity, this article has sought to demonstrate the significance of the competing pictures of the sovereign people in Australian constitutional culture — visions which wrestled in the Voice debate and will do so again as Australia continues to negotiate questions of cultural and political diversity.

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287 Ibid 13.

288 Australians for Unity, *Home Page* (Website, 25 July 2023) <https://webarchive.nla.gov.au/awa/20230725035824/https://australiansforunity.com.au>.

289 Begg and Wild (n 282).

290 Ibid.

291 Touma (n 283).

292 'The Voice Referendum; The Argument for Voting No', *Rule of Law Education Centre* (Web Page, 2023) <https://www.ruleoflaw.org.au/voice-the-case-for-voting-no/>.

293 Touma (n 283).

294 Ibid.

The reasons for the defeat of the Voice referendum are, of course, complex and irreducible. It is commonly observed that misinformation and disinformation ran rampant, while critics have said that the messaging of the Yes campaign struggled to cut through.[295] No referendum in Australian history has passed without bipartisan support. Yet, the commitments to a 'unified' people exhibited by the No campaign reveal the influence of a deeper ambiguity concerning the nature of popular sovereignty as a Grundnorm of the *Australian Constitution*. The spectre of deviation from orthodox constitutional modes, predicated on a constructive 'unity' of 'the people', inflamed anxieties inherited from a modern constitutional tradition which, incorporated into the rhetoric of the No campaign, informed a rejection of the proposal in terms of inherited values of the unitary state, parliamentary supremacy and equality.

The lens of these competing conceptions of 'the people' highlights the significance of Australian constitutional culture and its historical inheritances to the development of Australian constitutional law. By providing for intervention by the Australian people in decisions about the shape and values of the *Constitution*, referendums under s 128 invite analysis of the culturally and historically specific normative imaginary. Even the debates and practices of judges and politicians reflect the life of ideas operating in wider society, especially where those elites claim to speak for that community. As Australian constitutional scholarship takes more seriously the normative foundation of popular sovereignty, it is necessary to interrogate the often-unspoken assumptions and constructions that, underlying that concept, direct and shape constitutional practice.

In this vein, while the defeat of the referendum represents a regrettable failure to institutionalise culturally diverse popular sovereignty, it does not represent the triumph of a 'unified' view. Indigenous sovereign difference survives the referendum. Australian federalism remains in tension with ideals of national formal unity. Both 'unified' and plural views, and the approaches to constitutional practice they engender, have roots in constitutional text and history. Rather, the referendum re-enacts the paradox at the centre of constitutional theory founded on popular sovereignty — what Hobbes called the 'double signification' of 'the people' — simultaneously a collective and a multitude.[296] Popular sovereignty in its relationship to constitutional theory continues to contend with this paradox. But, as the jurisprudence of Aboriginal rights and federalism illustrate, the negotiation of these two, apparently contradictory aspects of 'the people' can produce new law responsive to changing societal demands. It remains a potent source of law that, constitutionally and culturally, we are *one* but we are *many*.

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295 See, eg, Wellauer, Williams and Brennan (n 274).

296 Thomas Hobbes, *The Elements of Law: Natural and Politic*, ed Ferdinand Tönnies (Routledge, 2nd ed, 2018) 124. See further Hobbes (n 93) 110–14.

George Winterton Memorial Lecture 2024

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

Rosalind Dixon*

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).

Before the High Court

Intermediate Appellate Courts and the Doctrine of Precedent: *Lendlease Corporation Ltd v Pallas*

Emerson Hynard[*] and Ilana Slobedman[†]

Abstract

The High Court of Australia appeal in *Lendlease Corporation Ltd v Pallas* raises a novel question of precedent: what approach should an intermediate appellate court ('IAC') take when faced with competing IAC authorities? The cases reveal that different approaches have been adopted: deferring to the home jurisdiction, favouring the most recent decision, and approaching the issue afresh. The principled answer to this question must be informed by the modern concept of a single Australian common law and the corollary rule that an IAC should not depart from a decision of another IAC on an issue of national operation unless convinced that the earlier decision is 'plainly wrong'. It is argued that if Court B has found a decision of Court A to be plainly wrong, should the issue come before Court A again for determination, it is not open for Court A to defer to its previous decision or consider the matter afresh. In an integrated judicial system of equals working together to achieve a common goal, consistency demands that Court A give heightened deference to the decision of Court B.

I Introduction

In *Lendlease Corporation Ltd v Pallas*,[1] the High Court will consider conflicting interpretations of a statutory provision reached by two intermediate appellate courts ('IACs'). Our focus is not on the construction of that provision, but rather a novel question of precedent that arises on the pending appeal. It is now orthodox that an IAC 'should [not] depart from a decision of another intermediate appellate court'

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1 *Lendlease Corporation Ltd v Pallas*, High Court of Australia, Case No S108/2024.

when interpreting uniform national legislation, Commonwealth legislation, or the common law of Australia, unless 'convinced that the interpretation is plainly wrong'.[2] But beneath this rule lies a host of narrower, unanswered questions, including that raised by the appeal: what approach should an IAC take when faced with competing IAC authorities?

Notwithstanding this is a question of general importance to the role of IACs in a single federal polity, it is 'not an issue on which the parties or contradictor [are] joined' and the parties '[do] not have any particular interest' in the answer.[3] It has therefore been the subject of minimal attention in the written submissions filed by the parties.[4] The purpose of this column is to fill that lacuna. As a necessary first step, Part II traces the emergence of the two competing lines of authority. Part III articulates the rationale for the 'plainly wrong' rule as tempering the interests of consistency and correctness. Part IV then interrogates the approach taken by the New South Wales Court of Appeal, arguing that the principled approach would have been to give heightened deference to the decision of the Full Federal Court of Australia. Part V concludes.

II Diverging Interpretations

The constructional question before the High Court concerns s 175(5) of the *Civil Procedure Act 2005* (NSW) and s 33X(5) of the *Federal Court of Australia Act 1976* (Cth), both of which state that a 'Court may, at any stage, order that notice of any matter be given to a group member or group members'. The issue on appeal is whether these provisions authorise the issuance of a notice foreshadowing that upon settlement, group members who neither registered nor opted out by a specified date will not be able to share in the settlement, but will nevertheless be bound by it.

The New South Wales Court of Appeal answered this question in the negative in *Wigmans v AMP*,[5] influenced by the High Court's reasoning in *BMW v Brewster*.[6] Two years later, in *Parkin v Boral*, the Full Federal Court reached the opposite conclusion.[7] In doing so, Murphy and Lee JJ noted as 'trite, but necessary, to stress' that the Court should not depart from *Wigmans* unless it considered it to be plainly

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2 *Hill v Zuda Pty Ltd* (2022) 275 CLR 24, 34–5 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Hill*'), citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*'); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 411–12 [49]–[50] (Gummow, Heydon and Crennan JJ, Hayne J agreeing) ('*CAL No 14*'); *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

3 Lendlease Corporation Ltd, 'Application for Special Leave to Appeal', Special Leave Application in *Lendlease Corporation Ltd v Pallas*, Case No S59/2024, 13 May 2024, [18].

4 Lendlease Corporation Ltd, 'Appellants' Submissions', Submission in *Lendlease Corporation Ltd v Pallas*, Case No S108/2024, 12 September 2024, [32]–[35], [67]–[69]; Contradictor, 'Contradictor's Submissions', Submission in *Lendlease Corporation Ltd v Pallas*, Case No S108/2024, 10 October 2024, [74]–[81]; Lendlease Corporation Ltd, 'Appellants' Reply', Submission in *Lendlease Corporation Ltd v Pallas*, Case No S108/2024, 24 October 2024, [17]. The respondents' submissions do not address this issue.

5 *Wigmans v AMP Ltd* (2020) 102 NSWLR 199.

6 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 ('*Brewster*').

7 *Parkin v Boral Ltd* (2022) 291 FCR 116 ('*Parkin*').

wrong.[8] Their Honours stated: 'As another intermediate appellate court within an integrated national legal system, we should be slow to conclude that a considered judgment of another intermediate court is "plainly wrong" …'.[9] Following an analysis of the relevant statutory provisions and the reasoning of the New South Wales Court of Appeal in *Wigmans*, their Honours were ultimately 'compelled' to the conclusion that *Wigmans* was plainly wrong and should not be followed.[10]

In *Pallas v Lendlease Corporation Ltd*,[11] the New South Wales Court of Appeal sat an enlarged Bench to revisit the correctness of the decision in *Wigmans*. Bell CJ (with whom Gleeson, Leeming and Stern JJA agreed) stated:

> The starting point of the analysis is not whether s 175(5) of the [*Civil Procedure Act 2005*] confers power on this court to include a notification of the kind sought to be included in the opt out and registration notice that the parties seek to be issued in the present case. It is whether this court's recent unanimous decision in *Wigmans* (which both parties accepted compelled a negative answer to that question) is plainly wrong and should not be followed.[12]

Ultimately, the Chief Justice accepted that, while opinions could differ on the question, *Wigmans* was not plainly wrong, the reasoning in *Parkin* did not sufficiently justify the conclusion that *Wigmans* was plainly wrong, and *Wigmans* was correct.[13]

Notably, and without providing any authority or justification, Bell CJ also observed:

> One matter left unresolved on the authorities concerns what a court is to do in circumstances where neither of two competing interpretations can be said to meet the onerous threshold of being plainly wrong. Where one of those decisions is that of the same court which has previously expressed a view on the matter, that court should adhere to its previously expressed view.[14]

Writing separately, Ward P was not convinced that either *Wigmans* or *Parkin* was plainly wrong. Had the President been persuaded *Wigmans* was plainly wrong, her Honour 'would have concluded that there was compelling reason (namely, for uniformity in this area) to depart from [*Wigmans*], having regard to the different conclusion reached [in *Parkin*]'.[15] Her Honour agreed with Bell CJ that when faced with this 'dilemma', the Court ought to defer to its own previous decision.[16] Accordingly, the New South Wales Court of Appeal followed *Wigmans*.

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8 Ibid 143 [97] (Murphy and Lee JJ, Beach J agreeing).

9 Ibid 145 [109] (Murphy and Lee JJ, Beach J agreeing) (citations omitted). Although not uniform legislation, it was said that the provisions 'are in all but identical terms', citing *Brewster* (n 6) 589 [5] (Kiefel CJ, Bell and Keane JJ). On the application of the 'plainly wrong' rule to non-uniform statutes, see n 65 below.

10 *Parkin* (n 7) 145 [109]–[110] (Murphy and Lee JJ, Beach J agreeing).

11 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 ('*Pallas*').

12 Ibid 107 [93].

13 Ibid 107 [94], 112 [119] (Bell CJ, Gleeson, Leeming and Stern JJA agreeing).

14 Ibid 90 [23] (Bell CJ, Gleeson, Leeming and Stern JJA agreeing).

15 Ibid 113 [127] (Ward P).

16 Ibid.

The question to which the pending appeal gives rise is whether this mode of reasoning was correct.

III A Single Common Law and the 'Plainly Wrong' Rule

Fundamental to this issue is the concept of a single common law of Australia. This concept, in its current form, is relatively recent.[17] It was preceded by a more expansive pursuit: pan-Commonwealth uniformity.[18] While in theory pan-Commonwealth uniformity encompassed intra-Australian uniformity, the reality was more nuanced.[19] English–Australian deference was not reciprocal and Australian courts were often forced to choose between 'imperial deference or intra-Australian camaraderie'.[20] Hence, while some proposed a precedential obligation between coordinate Australian courts stretching beyond mere 'comity'[21] in the first half of the 20th century, no duty in this regard was recognised.[22] As Chief Justice Barwick observed extra-judicially in 1970, notwithstanding 'some degree of comity' that existed between the courts of the colonies and then the states, 'the decisions of the courts of one colony or State did not and do not bind the courts of another'.[23] It was only when ties with the motherland started to loosen that greater bonds between IACs began to be forged.[24]

Several decades on, it is now accepted that there is one common law of Australia. A 'consequence'[25] or 'corollary'[26] thereof is that, as stated above, an IAC should not depart from a decision of another IAC on the interpretation of uniform legislation, Commonwealth legislation, or the common law, unless convinced that interpretation is plainly wrong. This is for two interlocking reasons. The *first* is that the High Court does not need to pronounce on an issue before it can be said that the common law of Australia exists.[27] Rather, there is always a uniform rule throughout the country although, like Schrödinger's cat, its true form might not finally be revealed until the High Court opines.[28] The principled development of the common

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17 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–4 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Lipohar v The Queen* (1999) 200 CLR 485, 505–6 [44]–[45], 507 [50] (Gaudron, Gummow and Hayne JJ) ('*Lipohar*').

18 Antonia Glover, 'What's Plainly Wrong in Australian Law? An Empirical Analysis of the Rule in *Farah*' (2020) 43(3) *UNSW Law Journal* 850, 860.

19 Ibid.

20 Ibid 861.

21 'Comity' is used in this sense to refer to the practice of respect, courtesy and civility: see *R v XY* (2013) 84 NSWLR 363, 373 [34] (Basten JA) ('*XY*').

22 Glover (n 18) 862.

23 Sir Garfield Barwick, 'Precedent in the Southern Hemisphere' (1970) 5(1) *Israel Law Review* 1, 18. See also AR Blackshield, 'Precedent in South Australia: The Hierarchic and the Heuristic' (1981) 7(1) *Adelaide Law Review* 79, 90–1.

24 The reasons for the shift were gradual and have been canvassed elsewhere: see, eg, Glover (n 18) 857–64.

25 Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) ch 10.

26 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 667–8 [125] (Lee J, Allsop CJ and Jagot J agreeing) ('*Personnel Contracting*').

27 *Lipohar* (n 17) 506 [46] (Gaudron, Gummow and Hayne JJ). Cf Robert Stevens, 'Review Essay: Sorting Sources' (2023) 45(4) *Sydney Law Review* 539, 547.

28 Leeming (n 25) 232.

law is thus a collective duty of all courts of Australia.[29] The *second* reason is the importance of consistency in the development and application of the law. The interests of stability, respect, certainty, and public confidence in the integrated judicial system require that courts of a certain level apply laws in a uniform manner.[30]

In a single federation where there are ten IACs and many potential voices, the plainly wrong rule exists as a principle of restraint which promotes consistency and coherence in Australia's single common law.[31] This interest in consistency is more onerous than comity.[32] As Black CJ stated in *S v Boulton*, 'comity', suggesting as it does a basis in goodwill and courtesy, does not 'reflect sufficiently the approach that should be taken when a point of common law comes to be considered by one of Australia's [IACs]'.[33] The obligation is a heightened one of 'duty' to avoid 'an undesirable disconformity' between the views of two different courts on a common issue.[34] As Chief Justice Gageler has written, extra-judicially:

> Comity conveys a mutuality of respect among equals. What comity does not quite convey is the critical contemporary notion of equals within the one system of law working together in a co-ordinated fashion to achieve a common goal.[35]

The duty imposed upon IACs is not, however, unfettered. Flexibility is provided to depart from a decision where it meets the threshold of being 'plainly wrong or, to use a different expression, [where there is] a compelling reason to do so'.[36] What is meant by the term 'plainly wrong' has been the subject of 'rich and nuanced analysis'.[37] As Bell CJ noted in *Pallas*, while the disjunctive is important, these are really 'two sides' of the same coin: a compelling reason to depart from an earlier decision is that the judgment is clearly demonstrated to be erroneous; equally, a strong conviction that the earlier judgement is erroneous will often provide a compelling reason to depart from it.[38] It would be overly simplistic to impose a checklist criterion to the level of persuasion required.[39] At bottom, the essential

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29 *Miller v Miller* (2011) 242 CLR 446, 486 [120] (Heydon J).

30 *Gett v Tabet* (2009) 109 NSWLR 1, 13 [286] (Allsop P, Beazley and Basten JJA) ('*Gett*').

31 *Hill* (n 2) 35 [26] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

32 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 631 [101] (Leeming JA, Gleeson and Barrett JJA agreeing).

33 *S v Boulton* (2006) 151 FCR 364, 370 [26] (Black CJ).

34 *CAL No 14* (n 2) 412–13 [51] (Gummow, Heydon and Crennan JJ, Hayne J agreeing).

35 Justice Stephen Gageler, 'Integrating the Australian Judicial System' (2023) 15(1) *The Judicial Review* 21, 32.

36 *Hill* (n 2) 34–5 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ), citing *Farah* (n 2) 151–2 [135] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) and *RJE v Department of Justice* (2008) 21 VR 526, 554 [104] (Nettle JA).

37 Gageler (n 35) 32.

38 *Pallas* (n 11) 90 [23] (Bell CJ, Gleeson, Leeming and Stern JJA agreeing).

39 One example of a factor from the relevant cases is the existence of an immediately apparent error that was not merely a difference in choice of approach: *Gett* (n 30) 15 [294] (Allsop P, Beazley and Basten JJA). Another is whether the principle is longstanding and has been 'worked through in a series of cases': *Totaan v The Queen* (2022) 108 NSWLR 17, 35 [76] (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ agreeing) ('*Totaan*'); *Personnel Contracting* (n 26) 644 [38] (Allsop CJ, Jagot J agreeing).

question is whether, in all the circumstances, the pursuit of *correctness* sufficiently outweighs the pursuit of *consistency* and its associated values.[40]

IV Two Propositions

The New South Wales Court of Appeal's reasoning in *Pallas* seeks to strike a different balance. It can be encapsulated by two sequential propositions:

- *Proposition 1*: If Court B finds a decision of Court A to be plainly wrong, should the issue come before Court A again for determination the 'starting point' is for Court A to ask whether its original decision is plainly wrong.[41]
- *Proposition 2*: If Court A is not convinced its earlier decision is plainly wrong, or that the decision of Court B is plainly wrong, it is appropriate for Court A to 'adhere to its previously expressed view'.[42]

Proposition 1 is unsupported at a level of principle and authority. The better view is that when Court B has declared the decision of Court A to be plainly wrong, Court A must apply the same plainly wrong threshold to Court B's decision if it is to depart from it. On this reasoning, Proposition 2 falls away. To make good this argument, it is convenient to trace the authorities dealing with conflicting decisions generally, before turning to examine the principled approach.

A *Approaches Taken to Conflicting IAC Authorities*

No doubt a product of their historical context, earlier decisions exhibit deference to the home IAC in circumstances of conflict. For example, in the 1967 decision of *R v White*,[43] a South Australian appellate court was confronted with apparently conflicting decisions of the English Court of Criminal Appeal and one of its previous decisions on the issue of whether multiple convictions in one day constituted separate 'occasions'. Hogarth J was ultimately not satisfied that the decisions were conflicting but noted that, if they were, the relevant authorities should be considered and, if doubt remained, 'the Court should adhere to its previous decision', rationalising that a dissatisfied party could appeal.[44]

The more recent decisions can be split into two categories.

The first category of case exhibits a preference for the most recent authority, particularly where an earlier authority has been found to be plainly wrong. In *Re J & E Holdings*,[45] the New South Wales Court of Appeal considered conflicting decisions of the Queensland and Victorian appellate courts on an issue concerning

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40 As has been said, the rule reflects a 'compromise between the desirability of achieving uniformity and the undesirability of repeating gross error': *Totaan* (n 39) 35 [75] (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ agreeing), quoting Justice JD Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9(1) *Oxford University Commonwealth Law Journal* 1, 27.

41 See above n 12 and accompanying text.

42 See above n 14 and accompanying text.

43 *R v White* [1967] SASR 184.

44 Ibid 202 (Hogarth J, Mitchell J agreeing).

45 *Re J & E Holdings Pty Ltd* (1995) 36 NSWLR 541.

the *Corporations Law*. The Victorian appellate court had declared the Queensland decision to be plainly wrong. In resolving this conflict, the New South Wales Court of Appeal followed the Victorian decision as the most recent IAC decision on point.[46] Sheller JA stated that '[c]ertainty in the law' requires

> that only in an extreme case would an intermediate appellate court or a judge of first instance not follow the latest decision by an intermediate appellate court if, in that latest decision, the arguments have been fully reviewed and a conclusion reached that an earlier decision of another intermediate appellate court was plainly wrong.[47]

In *Patrick Stevedores*, the Victorian Court of Appeal faced conflicting decisions of the Full Court of the Supreme Court of Victoria and the Full Federal Court on an issue concerning the principles of procedural fairness.[48] The Full Federal Court had departed from the earlier Victorian decision, stating that it no longer reflected a correct statement of law. The Full Federal Court decision had been followed, in preference to the Victorian decision, in other states such as South Australia. The Court determined that the circumstances before it were ultimately distinguishable from that raised in the conflicting case law.[49] However, had the cases been directly on point, the Court found that it was 'not bound to follow any one of those decisions'.[50] This position was contrasted to a circumstance where, post *Farah Constructions v Say-Dee*, a later IAC decision finds an earlier IAC decision to be plainly wrong. In that situation, the Court concluded that it 'might be bound to follow the later decision unless [it] took the view that the later decision was "plainly wrong"'.[51]

The second category of case includes those that consider the relevant issue afresh. In *Joyce v Grimshaw*, the Full Federal Court was confronted with conflicting decisions of its own Court and a Queensland appellate court on the interpretation of a provision of the *Crimes Act 1914* (Cth).[52] The Court stated:

> There is obviously a degree of tension, and potential conflict, between the need for there to be comity between decisions of the Full Court of this Court and other intermediate State appellate courts, and the need for there to be comity as between differently constituted Full Courts of this Court.[53]

In reconciling this conflict, the Full Court interpreted the provision in the context of its history and background, and then assessed the weight of authorities.[54] The Court ultimately favoured the interpretation previously reached by a differently constituted Full Court.

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46 Ibid 551 (Sheller JA, Priestley and Powell JJA agreeing).

47 Ibid. This was quoted with apparent approval in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 272 (Gummow J, Brennan CJ, Dawson, Gaudron and McHugh JJ agreeing). See also *Spicer Thoroughbreds Pty Ltd v Stewart* [2023] NSWCA 82, [56] (Leeming JA, Mitchelmore JA and Griffiths AJA agreeing); *Trans Pacific Investment Corporation Pty Ltd v Rusty Rees Pty Ltd* (1995) 57 FCR 210, 214 (Black CJ, Davies and Beaumont JJ).

48 *DPP (Vic) v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81.

49 Ibid 107 [118] (Maxwell P, Weinberg JA and Ferguson AJA).

50 Ibid 109 [128] (Maxwell P, Weinberg JA and Ferguson AJA).

51 Ibid.

52 *Joyce v Grimshaw* (2001) 105 FCR 232.

53 Ibid 241 [47] (Miles, Mathews and Weinberg JJ).

54 Ibid 241 [48] (Miles, Mathews and Weinberg JJ).

In *R v XY*,[55] the New South Wales Court of Criminal Appeal faced a situation like that hypothesised in *Patrick Stevedores*, with a later Victorian decision finding an earlier New South Wales decision to be plainly wrong (in this case, on the approach to prejudicial evidence). However, Basten JA considered that the approach put forward in *Patrick Stevedores* should not be followed because (1) it implies that *Farah* is the final statement of the High Court on the doctrine of precedent; and (2) it is not conducive to the orderly administration of justice for IACs to routinely characterise other IAC judgments as plainly wrong.[56] His Honour concluded:

> Uncertain though the state of current authority is, the course this court should take in all the circumstances is to determine for itself the correct approach to the statutory provision, giving proper consideration to the reasoning and conclusions of earlier authorities, both in this court and in the Victorian Court of Appeal.[57]

In *R v Kinghorn*, the New South Wales Court of Criminal Appeal was presented with conflicting approaches to an issue under taxation legislation of its Queensland counterpart on the one hand, and an earlier decision of its own Court (allied with its Western Australia counterpart) on the other. Notably, no reference had been made in the Queensland decision to the earlier New South Wales and Western Australian decisions. The Court found that it was 'not constrained by the principles laid down in *Farah*' and proceeded to resolve the issue by construing the legislation itself with the benefit of the other decisions.[58]

With these foundations laid, it is convenient to examine the principled approach to the question raised on this High Court appeal.

B *The Principled Approach*

An IAC should depart from its own previous decision 'cautiously and only when compelled to the conclusion that the earlier decision is wrong'.[59] Much like the plainly wrong rule governing inter-hierarchical relations, this reflects the need for 'restraint in departing from previous decisions in order to foster stability and

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55 *XY* (n 21).

56 Ibid 374 [38] (Basten JA, Hoeben CJ at CL agreeing).

57 Ibid 375 [40] (Hoeben CJ at CL and Simpson J agreeing). Further examples of courts considering a matter afresh where an earlier IAC decision has been deemed plainly wrong by a later IAC decision include *Xiao v The Queen* (2018) 96 NSWLR 1, 51 [278] (Bathurst CJ, Beazley P, Hoeben CJ at CL, McCallum and Bellew JJ) ('*Xiao*'); *R v Dyson* (1997) 68 SASR 156, 161–4 (Doyle CJ), 164 (Bollen J), 165 (Perry J), 165–6 (Duggan J), 166–8 (Debelle J) ('*Dyson*'). See also *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* (2018) 259 FCR 20, 41 [62]–[65] (Bromwich J, Kenny and Tracey JJ agreeing); *Rail Services Australia v Dimovski* (2004) 1 DDCR 648, 665 [84] (Young CJ in Eq, Hodgson JA agreeing).

58 *R v Kinghorn* (2021) 106 NSWLR 322, 351–4 [113]–[132] (Bathurst CJ and Payne JA, Bell P, Ward CJ in Eq and Bellew J agreeing) ('*Kinghorn*'). Further examples of courts considering a matter afresh where a later IAC decision did not find the earlier IAC decision to be plainly wrong include: *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303, 317 [52]–[54] (Markovic, Downes and Kennett JJ) ('*HBSY*'); *Obeid v Lockley* (2018) 98 NSWLR 258, 297 [170] (Bathurst CJ, Beazley P and Leeming JA agreeing) ('*Obeid*').

59 *Nguyen v Nguyen* (1990) 169 CLR 245, 269 (Dawson, Toohey and McHugh JJ, Brennan and Deane JJ agreeing).

predictability in the law'.[60] It follows that absent a decision of Court B, Proposition 1 reflects the correct starting point for Court A.

But how does this principle of *intra*-hierarchical deference interact with that of *inter*-hierarchical deference outlined above? The former cannot be viewed in isolation from the latter. As the New South Wales Court of Appeal stated in *Gett v Tabet*, in discussing the prevailing view that whether an IAC should depart from one of its previous decisions is a matter of practice for each IAC to determine itself:

> The constitutional importance of the doctrine of precedent cannot be entirely at large within a national integrated legal system to the extent that each intermediate appellate court is entitled to determine for itself its own practice with respect to following earlier decisions. That is particularly so … where … intermediate appellate courts are required to take into account, and in some circumstances follow, decisions of courts of coordinate jurisdiction.[61]

These constraints on the principles of intra-hierarchical deference are important. As established in Part III above, each IAC operates as part of a unified judicial hierarchy with the High Court at its apex. In modern times, and particularly in respect of issues of national operation, that is a system in which IACs exist as *equals* working together to achieve a *common goal*: the articulation of Australia's single common law. Taken to its logical end point, this means that institutional distinctiveness at the IAC level must be symbolic only. Beyond historical custom, an IAC has no principled reason to treat an *intra*-hierarchical IAC decision any differently to an *extra*-hierarchical IAC decision. Of course, institutional distinctiveness remains relevant to other parts of the precedential equation: for example, in accordance with ordinary rules of precedent in a hierarchical system, trial judges remain bound to follow their home IAC in the event of conflicting IAC decisions.[62] However, at the IAC level, a single common law dictates that the pursuit of *intra*-hierarchical consistency is but one component of, and must necessarily yield to, the pursuit of *inter*-hierarchical consistency.

Once the above is appreciated, Proposition 1 cannot stand.

Where one IAC has declared the decision of another IAC to be plainly wrong, as the Court in *Parkin* did the decision in *Wigmans*, there is no inconsistency in the law. After full consideration of the legal issue and Court A's earlier decision on that legal issue, Court B has, in accordance with the plainly wrong threshold, decided to depart from it. The palimpsest of the single common law has altered. The Court in *Pallas* therefore erred in asking itself whether *Wigmans* was plainly wrong. It would also have erred if it purported to consider the matter afresh without giving heightened

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60 *Gett* (n 30) 12 [286] (Allsop P, Beazley JA, Basten JA).

61 Ibid 10 [278] (Allsop P, Beazley and Basten JJA). See also Gageler (n 35) 33.

62 See, eg, *Lo Pilato v Kamy Saeedi Lawyers Pty Ltd* (2017) 249 FCR 69, 114 [234] (Katzmann J); *Chel v Fairfax Media Publications Pty Ltd [No 6]* [2017] NSWSC 230, [37] (Beech-Jones J). Only in one case did a trial Judge conclude that he was bound to follow the 'common law of Australia' over a binding decision of the home Court of Appeal: *Re Amerind Pty Ltd (in liq)* (2017) 320 FLR 118, 182–9 [334]–[372] (Robson J). This approach was rejected on appeal: *Commonwealth v Byrnes* (2018) 54 VR 230, 291 [286] (Ferguson CJ, Whelan, Kyrou, McLeish, Dodds-Streeton JJA).

deference to the decision in *Parkin*.[63] In a national judicial system of equals working together in a coordinated fashion to achieve a common goal, the New South Wales Court of Appeal owed a duty to follow *Parkin* unless it was itself convinced that the Full Court in *Parkin* was plainly wrong.[64] This is consistent with the reasoning in *Re J & E Holdings* and *Patrick Stevedores*. Basten JA's criticisms of this approach in *XY* are uncompelling. To the extent it could be said that at the time of that decision the precedential rules between IACs were still in a state of flux, the position is now relatively settled.[65] And while it may be undesirable for courts to declare others plainly wrong, this is a necessary consequence of a unified system in which the interests of consistency and correctness are to be balanced. As is explained below, this latter issue can at least in part be alleviated by a shift in the nomenclature used.

To state the position another way: the correct starting point is for Court A to recognise that the decision of Court B reflects the common law of Australia. True it is that Court A may, as in *Pallas*, disagree with whether the threshold has been met to justify the conclusion reached by Court B to depart from the original decision of Court A. But if Court B has fully considered the decision of Court A and applied the correct standard of departure (as the Full Court did in *Parkin*), Court A can only interrogate the reasoning of Court B to assess whether Court B's decision is plainly wrong, *not* to assess whether Court B's treatment of Court A's previous decision was persuasive enough to justify departure. To accept the alternative would undermine the premise of a requirement of heightened deference; it would mean that an IAC could always second-guess another IAC's 'plainly wrong' finding, generating a similar potential for inconsistency as would pertain if the plainly wrong rule did not exist. Of course, if Court B overlooked a critical issue (which may, but need not, have featured in Court A's original decision), this may provide a 'compelling reason' for Court A to depart from Court B's decision, but one would think that when an issue is being considered for a third time, even greater restraint is to be exercised.[66] The distinction we have drawn here is subtle but important. Proper framing of the

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63 Cf *XY* (n 21); *Xiao* (n 57); *Dyson* (n 57). The position might be different if the second decision had not considered the first decision or had applied the incorrect threshold to justify departure from that decision: see *Kinghorn* (n 58); *HBSY* (n 58); *Obeid* (n 58).

64 It might be said that Bell CJ's conclusion in *Pallas* (n 11) at 112 [119] that 'far from being "plainly wrong", *Wigmans* is correct' represents an implicit finding on the part of the New South Wales Court of Appeal that *Parkin* was plainly wrong. This is to be doubted: a finding that *X* is 'correct' does not necessarily equate to finding that *Y* is 'plainly wrong'. Nor should the latter finding too readily be implied, given that it alters the landscape of Australia's single common law and creates a new point of departure for all IACs across the country.

65 In *XY* (n 21) 375 [39] Basten JA was referring to the statement of McHugh J in *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632–3 [62] that a court in one jurisdiction should not 'slavishly follow' the decisions of others 'in respect of similar or even identical legislation' as '[t]he duty of courts, when construing legislation, is to give effect to the purpose of the legislation'. Once the rationale for the plainly wrong rule is appreciated, the reasoning in *Marshall* is sound. In respect of non-uniform statutes, the existence of a single common law does not demand a consistent outcome. Of course, it is logical and desirable that similar and identical statutes are to be interpreted consistently, but at a level of principle, this is not a 'corollary' of the single Australian common law.

66 See *Minister of Pensions v Higham* [1948] 2 KB 153, 155 (Denning J); *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80, 85 (Nourse J); *Willers v Joyce [No 2]* [2018] AC 843, 852 [9] (Lord Neuberger for the Court). Any contention that this affords an 'advantage' to the second court confronted with the relevant issue should be rejected. IACs are not competitive entities but equals in the pursuit of a common enterprise.

inquiry promotes convergence to a single answer, rather than divergence to potentially conflicting answers.

Ultimately, Proposition 1 insists upon an anachronism of a colonial epoch where IACs viewed comity as their only connecting force. That approach does not find favour in the modern authorities or at a level of principle. If Proposition 1 is incorrect, Proposition 2 falls away. There is no need to reconcile two *not* plainly wrong decisions. That logic would lead to an equally erroneous end point: Court A is left promoting *in*consistency by searching for *in*correctness.

In reaching this conclusion, one cannot be critical of the approach taken by the New South Wales Court of Appeal. There is an innate perplexity in reconciling the concept of a single common law with the existence of distinct judicial hierarchies and the historical context in which those hierarchies have evolved from independent colonies to a Commonwealth of common enterprise. There is also an inherent 'awkwardness' in the practice of an IAC declaring the decisions of another IAC to be plainly wrong, which is often 'likely to appear as a gratuitous insult when applied to another court'.[67] This appeal gives the High Court the opportunity to address both issues. As to the former, it is a matter of clarifying that IACs exist as equals within one system of law working together in a coordinated fashion to achieve a common goal. As to the latter, it is making clear that 'pejorative'[68] phrases such as 'plainly wrong' are not productive of that common goal and should be avoided; the focus instead should be directed to the 'quality and cogency of the case made out for departure from [an] earlier decision'.[69]

V Conclusion

The interaction between IACs in Australia's integrated judicial hierarchy has changed significantly since Federation. We have argued that the modern concept of a single common law of Australia and the corollary rules of heightened deference that govern IAC relations mean that where an IAC is considering an issue of national operation, institutional distinctiveness is symbolic only. It follows that the New South Wales Court of Appeal in *Pallas* erred in considering for itself whether it should depart from its earlier decision in *Wigmans*. It ought to have given heightened deference to the more recent decision of the Full Federal Court in *Parkin*, unless it was convinced that it should depart from that decision.

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67 *XY* (n 21) 373 [34] (Basten JA).

68 *Secretary, Department of Justice and Regulation (Vic) v Fletcher* [2017] VSCA 44, [45] (Maxwell P, Redlich and Beach JJA).

69 *Pallas* (n 11) 116 [140] (Leeming JA).

Review Essay

Protecting Sacred Sites

Land Is Kin: Sovereignty, Religious Freedom, and Indigenous Sacred Sites by Dana Lloyd (2023) University Press of Kansas, 224 pp, ISBN 9780700635894

Harry Hobbs*

Abstract

When Indigenous nations' sacred and cultural sites are threatened, legal disputes often frame land in one of two ways: either land is sacred, or it is property. In *Land Is Kin*, Dana Lloyd argues that this positioning is inadequate. Not only does it facilitate the damage and destruction of sacred sites, but it fails to appreciate the familial responsibilities we all have to Country. In this review essay, I outline Lloyd's argument and suggest that emerging treaty processes in Australia offer one way to ground a deeper appreciation of land within Australian law and society.

I Introduction

Aboriginal and Torres Strait Islander sacred and cultural sites are protected by legislation in Australia.[1] This does not prevent their damage or destruction. In only the last few years, carvings have been vandalised,[2] rock shelters exploded,[3] and work

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1 See, eg, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

2 Keira Proust, 'Bulgandry Aboriginal Art Site Vandalised for a Second Time in Brisbane Water National Park at Kariong', *ABC News* (online, 12 January 2024) <https://www.abc.net.au/news/2024-01-12/bulgandry-aboriginal-art-site-vandalised-again-nsw-central-coast/103301182>.

3 Calla Wahlquist, 'Rio Tinto Blasts 46,000-year-old Aboriginal Site to Expand Iron Ore Mine', *Guardian Australia* (online, 26 May 2020) <https://www.theguardian.com/australia-news/2020/may/26/rio-tinto-blasts-46000-year-old-aboriginal-site-to-expand-iron-ore-mine>.

undertaken on restricted sites without permission.[4] These are just some of the instances that attract media and other attention. Is this all that we can hope for? In *Land Is Kin: Sovereignty, Religious Freedom, and Indigenous Sacred Sites*,[5] Dana Lloyd examines the legal regime for the protection of Native American sacred sites in the United States. In outlining and tracing the unsatisfactory jurisprudence issued by the Supreme Court, Lloyd argues that protecting sacred sites requires stepping away from settler law and reconceptualising how we — members of non-Indigenous communities — understand land.

Settler colonial states like Australia and the United States were built on dispossession. Foundational narratives speak of taming the frontier and expanding colonial and national settlement. In this context, is it possible to reconceive our understanding of land, from economic and civilisational bounty — from hard-won property — to something else entirely? This essay argues that the emerging treaty processes in Australia could augur such a development in this country. This is because treaties serve both legal and relational goals. On the one hand, an Indigenous–state treaty would acknowledge that Aboriginal and Torres Strait Islander nations possess political and legal authority, carving space within Australian law for Indigenous communities to manage their responsibility and obligations to Country. At the same time, given treaties constitute promises between political communities to reconcile competing claims through dialogue and mutual agreement,[6] these concords provide an opportunity to develop relationships built on trust and respect. Through these sustained conversations, treaty-making could prompt a broader and deeper understanding among all Australians of land and our relationship to Country.

II A Discouraging Jurisprudence

In the late 1970s, the United States Forest Service developed plans to construct a six-mile road in the Six Rivers National Forest in northern California to facilitate timber harvesting. The road would traverse an area known as the High Country, a site of religious significance and core to the cultural identity of the Yurok, Karuk and Tolowa nations. Cognisant of the importance of the site, the Forest Service commissioned a report to assess the impact of the road. The report was clear: construction 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples'.[7] It recommended construction not proceed.

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4 Lorena Allam, 'Parks Australia Charged with Damaging Sacred Site in Kakadu National Park', *Guardian Australia* (online, 15 September 2020) <https://www.theguardian.com/australia-news/2020/sep/15/parks-australia-charged-with-allegedly-damaging-sacred-site-in-kakadu-national-park-northern-territory>.

5 Dana Lloyd, *Land Is Kin: Sovereignty, Religious Freedom and Indigenous Sacred Sites* (University Press of Kansas, 2024).

6 On the constitutional nature of Indigenous–state treaties in Australia, see Harry Hobbs, 'Anticipating and Weathering Storms to Modern Treaties in Australia' (2024) 35(4) *Public Law Review* (forthcoming).

7 Quoted in *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 442 (O'Connor J) (1988) ('*Lyng*').

The Forest Service rejected the report's recommendations and pressed forward. Several Native American groups, led by the Northwest Indian Cemetery Protective Association, and joined by environmentalists and the State of California, challenged the Forest Service's plans. At first instance they succeeded. In 1983, the US District Court for the Northern District of California issued a permanent injunction. Finding that the High Country 'constitutes the center of the spiritual world' of the Yurok, Karuk and Tolowa peoples,[8] the Court held that construction would 'seriously damage' the qualities that make the site sacred.[9] The Forest Service plan thus violated the free exercise clause of the First Amendment, which holds that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...'.[10] The decision was affirmed on appeal to the Ninth Circuit,[11] but the Forest Service pushed on to the Supreme Court.

In *Lyng v Northwest Indian Cemetery Protective Association*,[12] the Supreme Court handed down 'one of the worst Indian cases ever decided'.[13] Despite accepting evidence that the road would 'virtually destroy the … Indians' ability to practice their religion',[14] the Court allowed the appeal in a 5:3 decision. Writing for the majority, Justice Sandra Day O'Connor held that the free exercise clause only prohibits government action that either coerces an individual into violating their religious beliefs or penalises religious activity by denying a person an equal share of the rights, benefits and privileges enjoyed by other citizens. On this account, Justice O'Connor reasoned that a law excluding the Yurok, Karuk and Tolowa nations from the High Country may violate the clause.[15] The construction of the road would not, however, because it neither penalises the Indigenous nations for expressing their faith, nor coerces them to violate their faith.[16] In an incredulous dissent, Justice William Brennan remarked that the 'cruelly surreal result' means that 'government action that will virtually destroy a religion is nevertheless deemed not to "burden" that religion'.[17]

Ultimately, the road was not built. Responding to significant outcry, in 1990 Congress passed the *Smith River National Recreation Area Act*.[18] The Act designated the proposed road corridor a 'wilderness' under the *Wilderness Act of 1964*,[19] preventing construction. The designation was a victory for the Yurok, Karuk and Tolowa nations. As Dana Lloyd draws out in *Land Is Kin*, however, that victory is incomplete. *Lyng* remains the law of the land.

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8 *Northwest Indian Cemetery Protective Association v Peterson*, 565 F Supp 586, 594 (Weigel J) (1983).

9 Ibid 594–5.

10 *United States Constitution* amend I.

11 *Northwest Indian Cemetery Protective Association v Peterson*, 795 F 2d 688 (9th Cir, 1986) ('*Northwest 1986 Decision*').

12 *Lyng* (n 7).

13 Walter R Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum, 2012) 345.

14 *Lyng* (n 7) 451 (O'Connor J), citing *Northwest 1986 Decision* (n 11) 693 (Canby J).

15 *Lyng* (n 7) 453.

16 Ibid 449.

17 Ibid 472.

18 Pub L No 101-612, 104 Stat 3209.

19 16 USC § 1131.

The *Lyng* case has attracted substantial criticism since it was handed down over three decades ago.[20] Much of this scholarship critiques the Supreme Court's narrow understanding of the free exercise clause and its application to Indigenous peoples' sacred sites. There is much to critique. Although the Court was not able to accommodate the place-based nature of Indigenous religions, many have wondered whether it would have had the same difficulty preventing proposed action that would damage the Wailing Wall in Jerusalem,[21] or the desecration of the Arlington National Cemetery in Washington DC.[22] Despite an apparent constitutional bar on government action that prohibits the free exercise of religion, government agencies may damage and destroy Native American cultural and religious sites on public lands.

Judicial authorities continue to permit such activity on questionable bases. In *Navajo Nation v United States Forest Service*, for instance, the United States Court of Appeals for the Ninth Circuit applied *Lyng* and dismissed a challenge brought by several Indigenous nations. The Forest Service had approved a plan to pump 1.5 million gallons of sewage effluent per day to manufacture artificial snow on the San Francisco Peaks in Arizona to improve the economic viability of a private ski resort. The Court accepted that the Peaks are 'the most sacred mountain of southwestern Indian tribes',[23] and that the use of recycled wastewater would 'spiritually contaminate the entire mountain and devalue their religious exercises',[24] but because this neither coerced nor penalised the exercise of their religious beliefs, the plaintiffs lost.[25]

A legal claim must be prepared in a way that is comprehensible to a court. While some scholars have suggested that Indigenous nations seeking protection of their religious sites on public land should adopt arguments from property law,[26] it is understandable that many will choose to frame their dispute through the lens of religious freedom. As Lloyd argues, however, religious freedom 'and settler law more generally' cannot provide the answer that Indigenous communities seek.[27] This is because the law positions Native American sacred sites cases within a binary in which they are predetermined to lose. In a dispute between an Indigenous community's religious freedom and property rights, the courts choose to protect the

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[20] Lloyd draws substantially on this literature. The general tenor of the reception of the decision is identifiable in the titles of case notes on the judgment. See, for a representative sample, Donald Falk, '*Lyng v Northwest Indian Cemetery Protective Association*: Bulldozing First Amendment Protection of Indian Sacred Lands' (1989) 16(2) *Ecology Law Journal* 515; Camala Collins, 'No More Religious Protection: The Impact of *Lyng v Northwest Indian Cemetery Protection Ass'n*' (1990) 38(1) *Journal of Urban and Contemporary Law* 369; W Pemble DeLashmet, 'The Indian Wars Continued' (1990) 10(1) *Mississippi College Law Review* 79.

[21] Robert J Miller, 'Correcting Supreme Court "Errors": American Indian Response to *Lyng v Northwest Indian Cemetery Protection Association*' (1990) 20(4) *Environmental Law* 1037, 1037.

[22] Stephanie Hall Barclay and Michalyn Steele, 'Rethinking Protections for Indigenous Sacred Sites' (2021) 134(4) *Harvard Law Review* 1294.

[23] *Navajo Nation v United States Forest Service*, 535 F 3d 1058, 1080 (9th Cir, 2008) (Fletcher J) ('*Navajo Nation*').

[24] Ibid 1063 (Bea J for the Court).

[25] For a very recent case, see *Apache Stronghold v United States* (9th Cir, No 21-15295, 1 March 2024).

[26] See, eg, Kristen A Carpenter, 'A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners' (2005) 52 *UCLA Law Review* 1061; Patrick E Reidy, 'Sacred Easements' (2024) 110(4) *Virginia Law Review* 833.

[27] Lloyd (n 5) 1.

latter. The religion–property binary is set out explicitly in these judgments. In *Lyng*, Justice O'Connor noted that '[w]hatever rights the Indians may have to the use of the area … those rights do not divest the Government of its right to use what is, after all, its land'.[28] In *Navajo Nation*, the Court characterised the case as concerning 'whether … government-approved use of artificial snow on government-owned park land violates' the law.[29] Lloyd rejects this positioning. As she explains, understanding the cases — and Native American sacred sites — in this way 'sets two (ostensibly) mutually exclusive conceptions of land against each other: either land is sacred or it is property'.[30] For Lloyd — and for the Indigenous nations in question — land is so much more.

III Understanding What Is at Stake

Land Is Kin begins by asking 'what land means — and what it *could* mean — to the different parties involved in Indigenous sacred sites cases'.[31] As Lloyd notes, reading *Lyng* and later cases like *Navajo Nation* through the lens of religion or property misses the significance of sacred sites and how Indigenous nations understand their Country and the responsibilities that flow from their relationship to land. It is also for this reason that Lloyd argues that protecting the High Country as 'wilderness' is only a partial victory. While the designation precluded the construction of the road and the consequent destruction of the sanctity of the High Country, it failed to properly understand and account for Indigenous peoples' relationship to land.[32] Across five rewarding and engrossing chapters, Lloyd reads *Lyng* as revealing five dimensions to land: land as home, as property, as sacred, as wilderness and, finally, as kin. By uncovering these multilayered dimensions, Lloyd seeks to impress upon her reader an ethic of responsibility and to reconceive our relationships with the more than human world.

Each of these dimensions captures only a small part of the meaning of land. They may also be inconsistent or even in conflict at times.[33] The Yurok, Karuk and Tolowa nations have managed the High Country and relied on its tranquillity for meditative and ceremonial religious practices for thousands of years, but wilderness implies an untouched and pristine environment free from human activity. In positioning their legal claim as one concerning the exercise of their religion, Indigenous witnesses at trial described the High Country not merely as a sacred place but as their home. The three nations also characterise their relationship to the High Country and land in familial terms, but they have purchased large areas of their traditional Country. Can you own kin? Lloyd acknowledges these complications but

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28 *Lyng* (n 7) 453.
29 *Navajo Nation* (n 23) 1063 (Bea J for the Court).
30 Lloyd (n 5) 2.
31 Ibid 1 (emphasis in original).
32 Ibid 124.
33 For a similar argument examining the basis of Indigenous rights claims, see Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34(1) *New York University Journal of International Law and Politics* 189.

argues that the productive tension between these logics allows us to escape the religion–property binary.[34]

It also allows us to expand our field of vision beyond the judgment. The sharp words of the majority decision cannot account for the multilayered understandings of land, nor for how colonisation has affected the relationship Indigenous peoples have with their sacred sites. Neither can the more generous dissent of Justice William Brennan, which 'depoliticizes religion and essentializes indigeneity'.[35] Lloyd skilfully weaves testimony from the first instance trial, where witnesses compellingly spoke of the centrality of the High Country to their life and culture, with broader meditations on colonisation, anthropology and religion. Of these, colonisation features most heavily. Indeed, underlying the dispute in all Indigenous sacred sites cases is colonialism. Only by reading the decision against long histories of state-sanctioned murder and dispossession, of broken or unratified treaties,[36] and of concerted efforts to destroy Indigenous religious practices, can a deeper picture of the meaning of the High Country and of land emerge. As Lloyd persuasively argues, the process by which the High Country became 'public land' is not explored in *Lyng*, even though it should be critical to assessing whether and how the Yurok, Karuk and Tolowa First Amendment rights to exercise their religion can be protected.[37]

Combining a clear understanding of legal doctrine but embedded in humanities scholarship that emphasises law as storytelling, *Land Is Kin* does not only demonstrate the complexity of land but outlines a potential path forward. In the penultimate chapter, Lloyd examines a 2019 resolution by the Yurok Tribal Council that extended rights to the We-Roy or Klamath River. Part of an emerging global approach that recognises the rights of nature by granting legal personality to rivers, mountains, and other natural features and ecosystems, Lloyd identifies the resolution as an assertion of sovereignty, a claim of right to 'make decisions about Yurok everyday life based on traditional values'.[38] Like the water protectors challenging the Dakota Access Pipeline,[39] the Yurok Tribal Council's resolution reflects their inherent and continuing sovereignty. It is also an acknowledgment of ongoing kinship relations that have not been severed by colonialism.[40] To Lloyd, this aspect is more important. Indeed, Lloyd acknowledges that it may be hard to imagine private corporations accepting Yurok jurisdiction and appearing before the Tribal Court to answer for their alleged harms, but the resolution nonetheless articulates the responsibility we have to the more than human world.[41]

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34 Lloyd (n 5) 5.
35 Ibid 83.
36 Eighteen treaties between California Native American nations and the United States government were negotiated between 1851 and 1852. However, in the face of settler opposition, Congress failed to ratify the treaties: see '1851–1852: Eighteen Unratified Treaties between California Indians and the United States' (2016) *US Government Treaties and Reports* 5.
37 Lloyd (n 5) 21, 42.
38 Ibid 143.
39 See, eg, Nick Estes and Jaskiran Dhillon (eds), *Standing with Standing Rock: Voices from the #NODAPL Movement* (University of Minnesota Press, 2019).
40 Lloyd (n 5) 128.
41 Ibid 151.

Uncovering the multidimensional nature of land does not mean that 'rights' are unimportant. Lloyd's emphasis on the significance of the Tribal Council's resolution confirms her argument that broader notions of kinship and sovereignty should guide the resolution of these disputes. In this, Lloyd concurs with scholars of law and religion that see the fundamental problem in Indigenous sacred sites cases as their funnelling through the First Amendment.[42] The challenge for Indigenous nations is that within settler courts this dialogue inevitably assigns Indigenous peoples 'a status at or near the very bottom'.[43] Lloyd's response is to recentre jurisdiction to the Yurok themselves, away from the settler courts. The resolution is one example of how Indigenous nations across North America are living sovereignty by assuming jurisdiction and making decisions to manage their kinship responsibilities to and for the land.

IV Treaty-Making

Land Is Kin is focused entirely on the *Lyng* case and the way the High Country — and land more generally — is more than property. The problem Lloyd identifies, however, is one common to settler colonial states and an Australian reader would identify many parallels. Although the *Australian Constitution* protects few rights, it does expressly protect freedom of religion in similar, albeit narrower, terms to the First Amendment of the *United States Constitution*. Section 116 precludes the Commonwealth Parliament from making laws for establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion. The High Court of Australia has adopted a strict interpretation of the provision, including the free exercise clause.[44] In *Kruger v Commonwealth*, for example, the Court held that a 1918 Ordinance that forcibly removed Indigenous children from their families did not violate the guarantee in s 116.[45] This was because the Ordinance was not enacted for the purpose of prohibiting religious practices even though it had that effect.

The protection of Aboriginal and Torres Strait Islander sacred sites in Australia is also inconsistent. Often such protection is subsumed beneath other considerations such as economic use. Infamously, in the 1990s following a political and legal storm, the Commonwealth Parliament passed legislation to facilitate the construction of a bridge to Hindmarsh Island despite concern it would damage or destroy sites sacred to Ngarrindjeri women.[46] In the course of a High Court challenge to the legislation, the Commonwealth asserted that it possessed the power to enact Nazi-style laws against Indigenous peoples.[47] Even beneficial laws have significant

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42 See generally Michael D McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton University Press, 2020).

43 Lloyd Burton, *Worship and Wilderness: Culture, Religion, and Law in Public Lands Management* (University of Wisconsin Press, 2002) 292.

44 Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018).

45 *Kruger v Commonwealth* (1997) 190 CLR 1.

46 *Hindmarsh Island Bridge Act 1997* (Cth).

47 Transcript of Proceedings, *Kartinyeri v Commonwealth* (High Court of Australia, A29/1997, Brennan CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan JJ, 5 February 1998). See also Megan Davis, 'Recognition of Aboriginal and Torres Strait Islander Rights' (2006) 5 *Journal of Indigenous Policy* 35, 46.

gaps. In Western Australia, the *Aboriginal Heritage Act 1972* allows land users including mining companies to lodge an application for permission to damage or destroy a registered Aboriginal heritage site.[48] The destruction of the 46,000-year-old sacred rock shelters at Juukan Gorge in May 2020 occurred in accordance with the State's heritage regime. An attempt to revamp and update that legal framework failed,[49] leaving sacred and cultural sites across Western Australia vulnerable.

Constitutional doctrine can sometimes complicate this area. In 2019, Parks Australia constructed a walkway near Gunlom Falls in Kakadu National Park. Parks Australia did so without seeking permission from the Aboriginal Areas Protection Authority and, after inadvertently damaging a site sacred to Jawoyn men, was charged with an offence under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). The Director of National Parks pleaded not guilty, submitting that, as a government instrumentality, Parks Australia enjoyed the full privileges and immunities of the Crown, including immunity from criminal liability. The argument succeeded in the Supreme Court of the Northern Territory,[50] but was overturned by the High Court in May 2024.[51]

In each of these cases we might say that the relevant sacred or cultural site was not treated with sufficient respect. But this is really to say that the relevant Indigenous nation was not treated with respect. Their responsibility to Country, their obligations to kin, were not considered or were actively ignored. Other concerns, be they majoritarian, financial or simple lack of care, took priority. Australian law facilitated this lack of respect — and almost allowed the attempt to avoid liability in the case of Gunlom Falls. There must be a better way. If we take seriously Lloyd's call to understand our relationship with land, these sorts of cases would begin from a different starting point. They would commence with the recognition of the legal and political authority of Aboriginal and Torres Strait Islander communities and nations. Respecting this status would require legislative amendment. Gaps within legal regimes that enable the destruction of sacred and cultural sites would be filled. It would also require cultural changes that deepen our understanding of Country and help to make inadvertent destruction less likely. As generations of Aboriginal and Torres Strait Islander peoples have argued,[52] treaty-making offers a useful vehicle to promote such change.

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48 *Aboriginal Heritage Act 1972* (WA) s 18.

49 Sarah Collard and Josh Butler, 'WA Premier Roger Cook Axes Aboriginal Cultural Heritage Laws after Outcry by Landholders', *Guardian Australia* (online, 8 August 2023) <https://www.theguardian.com/australia-news/2023/aug/08/wa-repeals-axes-aboriginal-cultural-heritage-laws-premier-roger-cook>.

50 *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1.

51 *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 259 LGERA 26.

52 See, eg, National Aboriginal Conference, 'The Makarrata: Some Ways Forward' (Position Paper, World Council of Indigenous Peoples, May 1981); Treaty 88 Campaign, 'Aboriginal Sovereignty: Never Ceded' (1988) 23(91) *Australian Historical Studies* 1, 1–2; Michael Mansell, 'Treaty Proposal: Aboriginal Sovereignty' (1989) 1(37) *Aboriginal Law Bulletin* 4; Hannah McGlade (ed), *Treaty: Let's Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2003); Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (Final Report, December 2000) 106; *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017).

In recent years, several governments across Australia have committed to pursuing treaty negotiations with Aboriginal and Torres Strait Islander nations.[53] However, the historical absence of treaty relationships on this continent means many Australians have little familiarity with the character and meaning of these agreements. In Canada, where modern treaty negotiations have been ongoing since the 1970s, it is recognised that treaties are complex instruments that serve both legal and relational goals. These complementary and mutually reinforcing dimensions could help support the development of a new understanding of land and Country on this continent.

Treaties create enforceable legal obligations. They constitute binding promises by both parties. What sort of promises do they contain? While each agreement will differ according to the aspirations of the parties, a treaty recognises the inherent sovereignty of Indigenous nations and establishes or empowers institutions that can exercise self-government powers within the state.[54] In Australia, this will likely include the power to make laws over cultural heritage. For example, the Parliament of Victoria may devolve legislative authority to the First Peoples' Assembly of Victoria, enabling the Indigenous body to issue legislative instruments concerning the protection of sacred and cultural sites across the state. These instruments will be given the force of law. Other parties, be they public authorities or mining companies, will be required to engage with the Assembly to understand their legal obligations when carrying out work that may impact a protected site. In this way, a treaty carves out space for self-governance, empowering Indigenous peoples to protect their heritage in the form and structure that makes sense to them. It also forces other actors to acknowledge the political and legal capacity and authority of Indigenous nations.

This is important because political and legal authority within Aboriginal and Torres Strait Islander communities and nations is tied to Country. Indeed, the complex religious, legal, political and cultural systems that structure and breathe life into these societies is intimately connected to place. Often poorly translated as the 'Dreaming', these knowledge systems — the *Nura* of the Dharug, the *Daramoolen* of the Ngunnawal and Ngarigo — '[encompass] all life as well as the connections that link life together'.[55] The Dreaming explains that all life, animate and inanimate, from humans and kangaroos to rocks and Country itself, is alive and 'exists in *relationship* to everything else'.[56] Law does not occur in isolation from this vision, but 'weave[s] us all together',[57] sustaining 'the web of relationships established by

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53 See Harry Hobbs, 'Taking Stock of Indigenous-State Treaty-Making: Opportunities and Challenges' (2024) 47(2) *UNSW Law Journal* 548. Though note that the failed Voice referendum has complicated these processes.

54 Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 7–14.

55 Blaze Kwaymullina and Ambelin Kwaymullina, 'Indigenous Holistic Logic: Aspects, Consequences and Applications' (2014) 17(2) *Journal of Australian Indigenous Issues* 34, 35.

56 Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34(2) *Journal of Australian Studies* 195, 196 (emphasis in original).

57 CF Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011) 5.

the Ancestors'.[58] In connecting the human and non-human world, the Dreamings envision a holistic, interconnected cosmos built on principles of balance, respect, symmetry and autonomy.[59] Empowering Indigenous nations with legal decision-making power over their Country should see this relationship strengthened and recognised in state law.

Legal certainty is important, but it is the relational nature of treaties and treaty processes that offer the greater likelihood of grounding a reconceptualisation of land. Treaties obtain their legal force through enactment of legislation in Parliament. Without constitutional protection, a future parliament could revoke or rescind any element of a treaty. For this reason, the moral and political strength of the instrument is connected to the strength of the relationship produced through the process of negotiation. In conversations and dialogue, non-Indigenous Australians may begin to understand the relationship Aboriginal and Torres Strait Islander peoples have with Country; we may even begin to understand that, by our presence on this continent, we share those obligations and responsibilities.

Is this realistic? If we put to one side the very real political challenges to reaching meaningful settlements, another difficulty emerges. Treaties are fundamental instruments that constitute promises by diverse political communities to reconcile competing claims though dialogue and mutual agreement. However, colonisation and state formation have 'domesticated' these processes.[60] As such, Indigenous–state treaties will operate within the Australian legal order. Many Indigenous scholars have wondered whether a 'domestic' treaty can liberate Aboriginal and Torres Strait Islander peoples from colonial relations.[61] Can such an agreement catalyse the epistemic change required for non-Indigenous Australians to reconceptualise our understanding of and relationship to land and governance? I hope so.

In the United States, where historic practices of treaty-making grounded legal recognition of Native American sovereignty and self-government, similar challenges persist. Nevertheless, the sort of dialogue and discussion characteristic of modern treaty-making continues to occur, albeit with mixed results. The US Forest Service has broad discretion in determining whether and how to adopt policies that may impact sacred sites, but federal law requires the Service to conduct meaningful consultation with relevant Indigenous nations when the proposed impact may impose a substantial burden on sacred or religious sites. Todd Allin Morman's recent empirical study of these consultations reveals a nuanced picture where Indigenous nations have sometimes been able to protect the integrity of their sacred sites through

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58 Ambelin Kwaymullina, 'Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country' (2005) 6(11) *Indigenous Law Bulletin* 12, 13.

59 Deborah Bird Rose, 'Consciousness and Responsibility in an Australian Aboriginal Religion' in WH Edwards (ed), *Traditional Aboriginal Society: A Reader* (Macmillan, 2nd ed, 1998) 239, 243.

60 Miguel Alfonso Martinez, Special Rapporteur, *Studies on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) [192]; Harry Hobbs and Stephen Young, 'Modern Treaty Making and the Limits of the Law' (2021) 71(2) *University of Toronto Law Journal* 234.

61 Irene Watson, 'Aboriginal Recognition: Treaties and Colonial Constitutions, "We Have Been Here Forever …"' (2018) 30(1) *Bond Law Review* 7. See also Maurice Agale, 'Necrology: List of Recently Dead People' (2002) 5(21) *Indigenous Law Bulletin* 12; Bhiamie Williamson, 'Treaty: All Ship, No Cargo', *Arena* (online, 3 June 2021) <https://arena.org.au/treaty-all-ship-no-cargo>.

negotiation and consultation. The 'greatest strength of the consultation process', Morman explains, is its ability 'to open communications and bridge cultural gaps, bringing greater understanding of Indian rights and concerns to non-Indian communities'.[62] As Morman recounts, consultations ensured the Washoe Nation were able to secure a permanent climbing ban on Cave Rock in Nevada.

Dialogue and discussion can work both ways. After several rounds of consultation, the Lakota, Cheyenne and Kiowa nations decided to seek a voluntary (rather than permanent) ban on climbing their sacred Bear's Lodge. The nations came to understand that a voluntary ban provided an opportunity for non-Indigenous peoples to demonstrate their care and respect by refraining from climbing. It appears this is working; in 2023, the National Park Service reported an 85% reduction in the number of climbers.[63] A similar voluntary ban on climbing Uluṟu eventually transformed to a permanent ban once the number of visitors climbing fell below 20%.[64]

Consultations do not always produce good outcomes for Indigenous nations. And, as we have seen, the legal framework within which negotiations take place does not provide much support for the protection of sacred sites on public lands. The same is certainly true in Australia.[65] Nevertheless, as Marcia Yablon has argued, these processes do encourage flexible compromises that courts are often unable to offer.[66]

V Conclusion

Indigenous sacred and cultural sites do not receive adequate protection in the United States and Australia. Dana Lloyd's *Land Is Kin* argues that this will remain the case so long as disputes frame land as either property or sacred. Lloyd urges us to centre the protection of sacred sites on an understanding that land is kin. By focusing attention on the land itself, Lloyd calls for a rearticulation of sovereignty away from notions of jurisdiction and control. On her account, sovereignty is not 'the right to decide the fate of a territory' but 'a partnership with the land itself'.[67] Treaty-making processes in Australia offer one model to develop a similar understanding on this continent. A treaty could empower and respect the political and legal authority of Aboriginal and Torres Strait Islander nations. Even more significantly, by providing a language for citizens within and across political communities to talk with, engage and understand each other, these processes could ground a deeper appreciation of land among all Australians. Only by recognising that land is kin can we hope to protect sacred sites.

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62 Todd Allin Morman, *Many Nations under Many Gods: Public Land Management and American Indian Sacred Sites* (University of Oklahoma Press, 2024) 200.

63 National Park Service (US), 'Voluntary Climbing Closure in June' (News Release, 31 May 2023) <https://www.nps.gov/deto/learn/news/voluntary-climbing-closure-in-june.htm>.

64 Parks Australia, 'Uluṟu Climb Closure', *Uluru–Kata Tjuta National Park* (Web Page, 2019) <https://parksaustralia.gov.au/uluru/discover/culture/uluru-climb/>.

65 Joint Standing Committee on Northern Australia, Parliament of Australia, *Never Again: Inquiry into the Destruction of 46,000 year old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (Interim Report, December 2020).

66 Marcia Yablon, 'Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land' (2004) 113(7) *Yale Law Journal* 1623, 1658.

67 Lloyd (n 5) 154.