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Functionalism and Australian Constitutional Values

ROSALIND DIXON

IN MANY COUNTRIES worldwide, the practice of judicial review involves open and consistent engagement with ‘constitutional values’. In Canada, for example, the Supreme Court of Canada regularly looks to values both explicit and implicit in the 1982 Charter of Rights and Freedoms as a guide to determining the requirements of ‘fundamental justice’ or a ‘free and democratic society’ under sections 7 and 1 of the Charter.¹ In South Africa, section 1 of the 1996 Constitution lists human dignity, human rights and freedoms, non-racialism and non-sexism, the rule of law and democracy as ‘founding values’, and the Constitutional Court has suggested that attention to these values is essential to repudiating the past legacy of ‘arid formalism’ under apartheid, and moving towards a new more meaningful democratic constitutional jurisprudence.² And in Latin America, Manuel Cepeda J links this to a turn on the part of many courts in the region towards a form of ‘new constitutionalism’.³

Australia, in contrast, lacks any express statement of constitutional values: the Constitution of the Commonwealth of Australia (Australian Constitution) from the outset adopted a ‘thin’ approach to defining constitutional values.⁴ Subsequent attempts to amend the Constitution to expand these values, including attempts to incorporate a new preamble or comprehensive national bill of rights, have also

¹ See, eg, *R v Keegstra* [1990] 3 SCR 697; *Reference Re BC Motor Vehicle Act* [1985] 2 SCR 486.

² See A Chaskalson, ‘Law in a Changing Society: The Past Ten Years: A Balance Sheet and Some Indicators for the Future’ (1989) 5 *South African Journal on Human Rights* 293; A Sachs, ‘Towards a Bill of Rights for South Africa (1991) 35 *Journal of African Law* 21; D Moseneke, ‘A Jurisprudential Journey from Apartheid to Democratic Constitutionalism’ (speech delivered at the 62nd Annual Meeting of American College of Trial Lawyers, New York City, 19 October 2012); D Moseneke, ‘Courage of Principle’ (speech delivered at the Ruth First Memorial Colloquium, Johannesburg, 17 August 2012); J van der Westhuizen, ‘A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy’ (2008) 8 *African Human Rights Law Journal* 251; Zakeria Mohammed Yacoob, ‘South Africa: The Road to Democracy’ (speech delivered at Francis King Carey School of Law, University of Maryland, 16 October 2012).

³ MJ Cepeda Espinosa, ‘The Judicialization of Politics in Colombia: The Old and the New’ in R Sieder, L Schjolden and A Angell (eds), *The Judicialization of Politics in Latin America* (New York, Palgrave Macmillan, 2005) 67.

⁴ E Arcioni and A Stone, ‘The Small Brown Bird: Values and Aspirations in the Australian Constitution’ (2016) 14 *International Journal of Constitutional Law* 60.

consistently failed. Indeed, since the adoption of the Constitution in 1901 there has been no revolutionary constitutional break in Australia.⁵ The closest to such a ‘revolution’ occurred with the adoption of the *Australia Act 1986* (Cth), and the severing of formal legal ties to the UK. This revolution, however, was limited in scope: it arguably gave new meaning and force to popular sovereignty, as a value underpinning the Australian constitutional system. But it otherwise had a largely procedural rather than substantive effect. Other possible candidates for constitutional ‘revolutionary moments’, such as the 1967 constitutional referendum expanding the scope of the race power, had similarly muted values-based dimensions.⁶

This does not mean, however, that there is no role for values in Australian constitutional law or discourse. Whether explicitly or not, Australian courts routinely consider a range of political and moral values in making constitutional decisions—the question is simply when and how openly they do so, and on what sources they rely in giving content to relevant values.

I. THE ROLE OF VALUES IN AUSTRALIAN CONSTITUTIONAL LAW

Processes of constitutional decision-making in Australia, as elsewhere, involve processes of both ‘interpretation’ and ‘construction’ by the High Court.⁷ As Jeffrey Goldsworthy usefully explains in his chapter, ‘interpretation refers to revealing and clarifying the pre-existing linguistic or communicative content of a constitutional provision’, whereas ‘construction is a more creative process which must be resorted to when clarification is unable to resolve an interpretive difficulty, and [a] constitution’s communicative content or meaning is relevantly indeterminate’.⁸ Values-based considerations will also inevitably play a role in processes of construction of this kind. They may even play a role in helping resolve ambiguity in the process of interpretation in certain contexts.

Take the marriage power in section 51 of the Constitution: the word ‘marriage’ could potentially be understood to refer only to opposite-sex marriage or both opposite *and* same-sex marriage. Which interpretation one prefers depends on the level of generality at which the concept of marriage is understood—ie, the union for life of a man and woman to the exclusion of all others,⁹ or any officially sanctioned lifelong union between two consenting adults.¹⁰ Even moderate originalists, such as Lawrence Solum and Goldsworthy, suggest that the choice between these understandings may legitimately be guided by the purposes or values embedded in the Constitution—or values such as uniformity and effective national government, in

⁵ This has led leading scholars such as Geoffrey Sawer to describe Australia as the ‘frozen continent’, see: G Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

⁶ R Dixon, ‘Amending Constitutional Identity’ (2012) 33 *Cardozo Law Review* 1847.

⁷ L Solum, ‘The Interpretation/Construction Distinction’ (2010) 27 *Constitutional Commentary* 95.

⁸ See ch 3 by Jeffrey Goldsworthy in this collection, p 51.

⁹ See, eg, the traditional view of marriage expounded in *Hyde v Hyde* (1866) LR 1 P & D 130.

¹⁰ See, eg, *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; *Fourie and Another v Minister of Home Affairs and Another* [2004] ZASCA 132.

the face of truly national problems such as divorce and child custody (in all family forms).¹¹

The application of the marriage power may also call for the Court to engage in additional forms of constructional choice: in the 2013 *Same-Sex Marriage Case*, for example, the High Court was required to determine the relationship between Commonwealth and territory marriage law.¹² This also required the Court to make an important form of constructional choice as to how broadly or narrowly to approach the concept of an implied intention on the part of the Commonwealth to cover the field of marriage for the purposes of section 28 of the ACT *Self-Government Act (1988)* (Cth), which in the circumstances the Court held had a relevantly similar operation to section 109 of the Constitution.¹³ Statutory (or constitutional) constructional choices of this kind are also inevitably informed by broader values-based considerations—or attitudes to federalism, and same-sex marriage itself.

Values-based considerations also inevitably play a role in the application of ‘savings’ tests, such as tests of reasonable proportionality. The idea of proportionality in a constitutional context is generally understood to encompass four broad requirements—ie, the requirements that: (i) the government shows a legitimate purpose for enacting a particular law; (ii) there be a ‘rational connection’ between the legislature’s stated purpose and the means it selects to pursue that objective (‘suitability’); (iii) a law be ‘narrowly tailored’ to its purpose (‘reasonable necessity’); and (iv) truly proportionate, in the sense that it achieves greater benefits in terms of this objective, than it does equivalent costs on other constitutional values or commitments (true proportionality, or proportionality *stricto sensu*).¹⁴

Both the third and fourth stages of this analysis also invite attention to substantive constitutional values. In making judgments about necessity, for example, the Court must first identify a substantive set of norms against which such judgements are to be made: the notion of ‘minimal impairment’ is that a law minimally impairs certain constitutionally privileged norms or values. Sometimes, these norms may take the form of independent constitutional protections—such as an implied freedom of political communication. In others, however, they may simply be constitutional values that inform the scope and application of other provisions.

In the *Communist Party Case*, for example, Dixon J found that the Commonwealth law dissolving the Communist Party was not reasonably necessary for the defence of the Commonwealth. One of his reasons for reaching this conclusion was also that the law in question went further than necessary in impairing common law

¹¹ Goldsworthy largely bases this on his theory of rectification: see ch 3 by Jeffrey Goldsworthy in this collection, pp 54–55; see further J Goldsworthy, ‘Implications in Language, Law and the Constitution’ in G Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Sydney, Federation Press, 1994) 183. See also J Goldsworthy, ‘Interpreting the Constitution in Its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 699–700; Solum, above n 7.

¹² *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (*Same-Sex Marriage Case*).

¹³ (2013) 250 CLR 441, 465–66 [50]–[53], 468–69 [58]–[61].

¹⁴ M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013); VC Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 12 *Yale Law Journal* 3094; A Stone Sweet and J Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 46 *Columbia Journal of Transnational Law* 72; DM Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2005).

rights, such as the right to property, and broader constitutional *values*, such as the rule of law.¹⁵ Similarly, in *Nationwide News*, three justices found that the law in question went further than was necessary to protect the institutional integrity of the Industrial Relations Commission, in part because it did not minimally impair the freedom of political communication.¹⁶ To apply a test of necessity, therefore, the Court must inevitably consider the values a constitution recognises as deserving of respect or protection. The question is simply whether it does openly, or in a more curtailed and elliptical way.

Similarly, in weighing the true costs and benefits of a law, it will often be necessary to consider how those costs and benefits are connected to broader constitutional values: one of the criticisms of balancing is that it often seeks to compare incommensurables.¹⁷ One of the responses, in turn, is that a focus on values can often provide a mediating principle that provides a more meaningful basis for making such comparisons.¹⁸

The language of proportionality is also playing an increasingly central role in Australian constitutional discourse. Some form of proportionality test has been endorsed by members of the Court as a basis for determining whether a law: is properly understood as ‘implementing’ an international treaty to which Australia is party;¹⁹ can properly be characterised as imposing a fine or penalty, or rather effects a compulsory acquisition of property other than on just terms;²⁰ or provides for a scheme of preventative detention, or rather a form of punitive detention that can only be authorised as an incident of the exercise of Commonwealth judicial power.²¹

More recently, the Court has held that in determining whether laws that burdened interstate commerce offended section 92 of the Constitution, it was necessary to determine whether the laws were proportionate, in the sense of being ‘not disproportionate’²² or ‘reasonably necessary’ to achieving a non-protectionist

¹⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 180–01, 193, 200–02 (*Communist Party Case*).

¹⁶ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50–53 (Brennan J), 79–80 (Deane and Toohey JJ) (*Nationwide News*).

¹⁷ See, eg, *Bendix Autolite Corp v Midwesco Enters, Inc*, 486 US 888, 897 (1988) (Scalia J); RA Epstein, ‘Are Values Incommensurable, or is Utility the Ruler of the World?’ (1995) *Utah Law Review* 683; D Luban, ‘Incommensurable Values, Rational Choice, and Moral Absolutes’ (1990) 38 *Cleveland State Law Review* 65; V Afonso da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’ (2011) 31 *Oxford Journal of Legal Studies* 273.

¹⁸ See, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 283–84 (Gordon J) (*McCloy*); WH Moore, *The Constitution of the Commonwealth of Australia* (London, John Murray, 1902) 328–29, as discussed by Joo-Cheong Tham, ch 9 in this collection, pp 164–65. See further R Dixon and MC Nussbaum, ‘Abortion, Dignity and a Capabilities Approach’ in B Baines, D Barak-Erez and T Kahana (eds), *Feminist Constitutionalism* (New York, Cambridge University Press, 2011).

¹⁹ *Victoria v Commonwealth* (1996) 187 CLR 416 (*Industrial Relations Act Case*).

²⁰ *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 449 (Gageler J).

²¹ See, eg, discussion in *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 33–34 (McHugh J).

²² *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473–74 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

purpose.²³ Similarly, in *McCloy*,²⁴ in determining whether a law effectively burdening freedom of political communication was consistent with the Constitution, the High Court recently refined the prior test for validity it developed in *Lange*²⁵ and *Coleman*,²⁶ to ask whether the law in question was *reasonably proportionate* to achieving a legitimate government purpose, in a manner compatible with the constitutionally prescribed system of representative and responsible government in Australia.²⁷ In doing so, the Court also explicitly adopted the structured approach to proportionality analysis set out above.²⁸

In recent cases such as *Murphy*, a majority of the Court cast some doubt on the idea that proportionality would continue to spread to apply to all areas of constitutional doctrine in Australia.²⁹ Indeed, a majority of the Court rejected the usefulness of notions of proportionality in assessing the compatibility of restrictions on access to the franchise with the constitutionally prescribed system of representative and responsible government. Gageler J also repeated the criticism, made earlier by his Honour in *McCloy*, of proportionality as too uniform an approach to assessing constitutional validity, which is insufficiently sensitive to differences in context, including most notably the degree to which legislative processes are functioning in an adequate and appropriate way.³⁰

There is, however, reason to believe that these reservations will be just that, and insufficient to halt the progressive turn towards a test that, logically at least, invites more open engagement by the High Court with constitutional values.³¹ Proportionality can be adapted to different contexts, including potential defects in the political process, or process-based concerns. The Supreme Court of Canada, for example, has progressively ‘nuanced’ its version of proportionality (the *Oakes* test) to create flexibility, but also greater sensitivity to a variety of contextual factors.³² In an

²³ *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477 [99]–[104] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) (suggesting that the language of ‘not disproportionate’ should be understood as equivalent in this context to a test of ‘reasonable necessity’). See also *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 269 (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 324 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁴ *McCloy* (2015) 257 CLR 178.

²⁵ *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 (*Lange*).

²⁶ *Coleman v Power* (2004) 220 CLR 1 (*Coleman*).

²⁷ *McCloy* (2015) 257 CLR 178, 194, 206–08 (French CJ, Kiefel, Bell and Keane JJ).

²⁸ *ibid* 194–95, 215–16 (French CJ, Kiefel, Bell and Keane JJ).

²⁹ *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 (*Murphy*); see also S Chordia, ‘Structured Proportionality after *McCloy* and *Murphy*’ (paper presented at the Australian Association of Constitutional Law, Federal Court of Australia, Sydney, 17 May 2017); J Griffiths, ‘Keynote Address: Judicial Review of Administrative Action in Australia’ (speech delivered at Public Law Weekend, Museum of Australia, Canberra, 28 October 2016) 11–12: <law.anu.edu.au/sites/all/files/media/documents/events/keynote_address_judicial_review_of_administrative_action_in_australia_-_griffiths.pdf>.

³⁰ *McCloy* (2015) 257 CLR 178, 235 [141]–[143].

³¹ In light of the recent decision in *Brown v Tasmania* [2017] HCA 43, there is reason to believe that these reservations will be just that, and insufficient to halt the progressive turn towards a test that, logically at least, invites more open engagement by the High Court with constitutional values.

³² See, eg, the discussion by Sopinka J in *R v Hebert* [1990] 2 SCR 151, [41] regarding the limiting effects on rights prescribed by law. Contrast with Anne Twomey’s concern that the ‘more rigid and mechanical the test becomes, with different layers of considerations and different factors applied at

Australian context, Shipra Chordia has likewise proposed one way in which the Court could potentially nuance its application of proportionality, so as to apply more or less demanding notions of the ‘minimal impairment’ requirement based on the perceived degree of threat to the constitutionally prescribed system of representativity and responsible government in various contexts.³³

In either event, constitutional values will also continue to play an important role in guiding the Court’s application of relevant ‘savings’ tests: in other areas of Australian constitutional law, while the Court does not use the language of proportionality, it asks whether a law can be considered ‘reasonably appropriate and adapted’ to a particular purpose.³⁴ While this does not require a court to engage in a form of ultimate balancing of legislative costs and benefits,³⁵ it does require a court to consider whether a law is narrowly tailored to a particular legislative objective.³⁶ The Court, as part of this process, will also inevitably be required to consider how a law impacts on other constitutional norms or commitments, including potentially substantive constitutional *values* as a baseline for judgements about reasonable necessity.

II. CONTINUED FORMALISM AND THE CALL FOR A FUNCTIONALIST TURN

Despite these developments, however, Australia remains a jurisdiction in which, in comparative terms, a great deal of constitutional argument remains firmly centred on questions of constitutional form, and where there is often little attention both by parties and members of the High Court to substantive questions of substantive constitutional justice.

This also has implications for the democratic legitimacy or desirability of judicial review. It affects the degree to which judicial review represents a meaningful attempt to resolve the actual political controversies at stake, in various settings; the degree to which the constitutional jurisprudence of the High Court is understandable to elected representatives, and citizens; and the degree to which it provides a sound and predictable basis on which citizens can order their lives.³⁷ It is thus one reason why, in recent work, I have called on both constitutional litigants and the

different stages, there is a real risk that we cease to see the woods for the trees’ in ‘*McCloy and the Revised Test of Proportionality*’ (speech delivered at the ALRC Freedoms Symposium, Federal Court of Australia, Sydney, 9 October 2015).

³³ See Chordia, above n 29.

³⁴ See, eg, *Nationwide News* (1992) 177 CLR 1. cp also *Communist Party Case* (1951) 83 CLR 1.

³⁵ This is one reason some scholars and commentators prefer this test to one of true proportionality: see, eg, Twomey, above n 31; M Wesson (Comment), ‘Crafting a Concept of Deference for the Implied Freedom of Political Communication’ (2016) 27(2) *Public Law Review* 101, 102–03; Sir Anthony Mason, ‘The Use of Proportionality in Australian Constitutional Law’ (2016) 27(2) *Public Law Review* 109, 121–23.

³⁶ See, eg, A Stone, ‘Proportionality: Between Substance and Method’ (paper presented at Comparative Constitutional Law Conference Round-Table, UNSW Law School, 7 August 2017) 5–6; S Evans and A Stone, ‘Balancing and Proportionality: A Distinctive Ethic?’ (2017) (unpublished, copy on file with author).

³⁷ J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346; R Dixon, ‘The Functional Constitution: Re-reading the 2014 High Court Constitutional Term’ (2015) 43 *Federal Law Review* 455.

High Court itself to adopt a more overtly ‘functionalist’, values-oriented approach to constitutional argument and reasoning.³⁸

Functionalism, as I note in the *Federal Law Review*, is a close relative of *realist* approaches to constitutional interpretation, which emphasise the role of individual judges’ moral and political outlooks as an influence on constitutional interpretation, and often call for more open engagement by judges with questions of political morality. It is also related to various forms of pragmatic, policy-oriented approaches to constitutional interpretation, which invite judges to pay explicit attention to questions of policy and practical impact, or the practical consequences of judicial decisions, as part of the process of constitutional construction. Indeed, as Jeffrey Goldsworthy notes in his chapter, in many cases functionalism will lead to results quite close to those produced by a realist or pragmatic approach.³⁹

Functionalism, however, also carries with it an explicit commitment to legal form, as well as substance. It suggests that any reliance by a court on ‘values’-based argument should first depend on serious engagement with the text, history and structure of a constitution, as well as prior precedent. The text, history and structure of the Constitution may lend itself to different values-based understandings. But there is also important value from both a democratic and rule of law perspective to courts attempting to ground ethical or moral-political argumentation in formal legal materials or ‘modalities’⁴⁰—ie, in the Australian context, the text, history and structure of the Australian Constitution, or prior precedent.⁴¹

The Constitution, as Sir Anthony Mason has noted, is ‘itself a source of rights and values which can be used in the development of general principles of law’.⁴² To the maximum extent possible, members of the Court should thus attempt to rely on values in some way sourced in the Constitution—and not simply their own values, or those of the community—in engaging in processes of constitutional interpretation or construction.⁴³

Constitutional values could equally be regarded as constitutional ‘principles’ or purposes in an objective sense: as Allsop CJ notes in his illuminating discussion of ‘Values in Public Law’, values lie on a continuum with other norms, principles and rules: ‘the[y] are not clearly identifiable separate vehicles, but expressions along a gradation of particularity’.⁴⁴ But equally, as values or functions, they do not have the status of independent constitutional guarantees or norms equivalent to

³⁸ Dixon, ‘The Functional Constitution’, above n 37.

³⁹ See ch 3 by Jeffrey Goldsworthy in this collection, p 52.

⁴⁰ See P Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, Oxford University Press, 1982).

⁴¹ See ch 3 by Jeffrey Goldsworthy in this collection; J Goldsworthy, ‘The Case for Originalism’ in G Huscroft and BW Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York, Cambridge University Press, 2011); LB Solum, ‘What is Originalism? The Evolution of Contemporary Originalist Theory’ in G Huscroft and BW Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York, Cambridge University Press, 2011).

⁴² Sir Anthony Mason, ‘Rights, Values and Legal Institutions: Reshaping Australian Institutions’ (1997) *Australian International Law Journal* 1, 11.

⁴³ *ibid.* In some cases, as I note in ‘The Functional Constitution’, above n 37, it may be impossible to avoid ultimate reliance on personal or community values, but this should occur only after open and serious engagement with constitutional values.

⁴⁴ J Allsop, ‘Values in Public Law’ (2017) 91 *Australian Law Journal* 118, 121.

constitutional implications. As Appleby and Lim note in their chapter, constitutional norms cease to be (I would add *solely*) values, and instead become constitutional ‘rules [or] standards’, when they gain a sufficiently determinate and mandatory content.⁴⁵ But, short of this content, they may still be ethical commitments that find an important form of support in the text, history and structure of the Constitution, as well as prior constitutional case law.

III. THE CONTENT OF THE FUNCTIONALIST CONSTITUTION

A key question this raises, however, is how to define the specific *content* of the functional Constitution for Australia.⁴⁶ Disagreement about Australian constitutional values can come from a variety of different directions. How one answers questions of this kind will depend, in part, on one’s theory of constitutional interpretation: the more strictly textual or originalist one’s approach to constitutional meaning, the more difficult it will be to see how the text and structure of the Constitution provide support for a broad range of values; whereas the ‘looser’, or more hybrid one’s approach to interpretation of the text, the more scope there will be to find indirect sources of support for a variety of constitutional values.

There is also legitimate room for disagreement as to how constitutional values may, or may not, evolve over time. Under more originalist theories of interpretation, for instance, the text of the Constitution will have a relatively settled meaning or connotation; and so too one might argue, the content or connotation of various values will remain relatively unchanged. Under more ‘living’ or evolving approaches to constitutional construction, in contrast, both the connotation and denotation of various textual guarantees *and* values may be more open to change. As Goldsworthy notes in his chapter, this also raises complex questions about the ability of a functionalist as opposed to more pragmatic approach to interpretation.

Finally, there at least two possible understandings of what it means for the text and structure of the Constitution to provide support for various values in this context: one ‘stronger’ understanding, which focuses on the idea of *affirmative* support for various values, and another ‘weaker’ understanding, which requires only that certain values are consistent with the text and structure of the Constitution. When the High Court identifies a freestanding implication under the Constitution,⁴⁷ the current interpretive consensus in Australia is generally that it must show textual and structural support of a stronger, more affirmative kind.⁴⁸ But where values are relied

⁴⁵ I disagree with Appleby and Lim here as to the appropriate classification of ‘principles’.

⁴⁶ B Lim, ‘The Convergence of Form and Function: Commentary on Dixon’ (2015) 43 *Federal Law Review* 505.

⁴⁷ I use the term ‘implication’ here in its most widely understood sense, though I note the point made by Jeffrey Goldsworthy that many of the implications in this context are actually ‘fabricated’ rather than ‘genuine’ from the perspective of the original communicative meaning of the text of the Constitution. See, eg, J Goldsworthy, ‘Constitutional Implications Revisited’ (2011) 30 *University of Queensland Law Journal* 9, 18–22.

⁴⁸ See, eg, *Lange* (1997) 189 CLR 520; cp *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See also A Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 *Sydney Law Review* 29; A Stone, ‘The Limits of Constitutional Text and

on only as a source of additional guidance to the Court in interpreting and enforcing some other capital ‘C’ constitutional norm, it seems plausible to apply either a strong or weak notion of textual and structural support.

These are all important and difficult questions for any scholar, judge—or indeed any legislator or government officer—interested in the application of a functionalist approach to constitutional interpretation.⁴⁹ The aim of this collection is thus to contribute to debates over functionalist interpretation in Australia, and elsewhere, by inviting some of Australia’s leading constitutional scholars to reflect on these questions.

It takes as its starting point a list of values that could that be regarded as in some way connected to broadly recognised *structural* commitments under the Constitution, such as the commitment to representative and responsible government, federalism and an entrenched separation of judicial and non-judicial power.⁵⁰ It also invites authors to consider the *ultimate* values-based commitments that may be relevant to or implicated in these commitments. The Constitution, for example, clearly enshrines a clear structural commitment to ‘representative and responsible government’.⁵¹ At the same time, there remains controversy as to what this entails at the level of basic constitutional values, such as the idea of individual freedom or political equality among citizens,⁵² or notions of government or accountability. Similarly, in a comparative context, federalism is often understood to promote a range of different political values, including (a) government accountability; (b) democratic experimentalism; (c) the accommodation of diversity or pluralism, across states; and (c) government closer to the people. Which of these values embodied in the Australian federal system, however, remains an important open question.⁵³ It is likewise well settled that the Constitution recognises a separation of judicial and non-judicial power, and creates a similar, if somewhat weaker guarantee at a State level of the ‘institutional integrity and independence’ of State courts (the so-called

Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668; A Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 *UNSW Law Journal* 842; T Roux, ‘Re-Interpreting “The Mason Court Revolution”: An Historical Institutional Account of Judge-Driven Constitutional Transformation in Australia’ (2015) 43 *Federal Law Review* 1; R Dixon and G Appleby, ‘Constitutional Implications in Australia: A Tale of Acceptance and Resistance’ (2016) (unpublished manuscript, copy on file with author).

⁴⁹ On the relevance of these questions to a non-judicial audience, see, eg, G Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Oxford, Hart Publishing, 2016) 139–43.

⁵⁰ See C Saunders, ‘Constitutional Structure and Australian Federalism’ in P Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004); A Lynch and G Williams, ‘Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?’ (2008) 31 *UNSW Law Journal* 395; J Finnis, ‘Separation of Powers in the Australian Constitution’ (1968) 3 *Adelaide Law Review* 159; J McMillan, ‘Re-Thinking the Separation of Powers’ (2010) 38 *Federal Law Review* 423; C Parker, ‘Protection of Judicial Process as an Implied Constitutional Principle’ (1994) 16 *Adelaide Law Review* 341. But contrast F Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23 *Monash University Law Review* 248, questioning the firmness of the separation of powers commitment.

⁵¹ Constitution ss 7, 24. See discussion in *Lange* (1997) 189 CLR 520.

⁵² See, eg, *McGinty v Western Australia* (1996) 186 CLR 140; *Roach v Electoral Commissioner* (2007) 233 CLR 162.

⁵³ For an important attempt to begin to address this question, see P Kildea, A Lynch and G Williams (eds), *Tomorrow’s Federation: Reforming Australian Government* (Sydney, Federation Press, 2012).

Kable principle). Yet there is ongoing debate over the ultimate values served by these structural principles: are they important, for example, for ensuring *impartial* justice, a substantive commitment to individual liberty and the rule of law, or all these values?

The complex relationship between the Constitution and the common law in Australia means that the common law itself arguably provides an additional source of support for certain values as small ‘c’ constitutional in nature.⁵⁴ Sir Anthony Mason, for example, identifies personal liberty, freedom of expression, no imprisonment without trial, inviolability of the person, and procedural fairness as values long recognised by the common law.⁵⁵ Allsop CJ likewise identifies the values of ‘fairness, reasonableness and justice in the framing of legal rules and in the exercise of power in a free society’ as core public law values.⁵⁶ His Honour further notes that the criminal law has long recognised ‘fairness and equality’ as values;⁵⁷ equity values of fairness and protection of the vulnerable;⁵⁸ and common law administrative doctrines rule of law values such as certainty, and non-arbitrary government.⁵⁹ Broader common law doctrines (including tort and property law) also provide a rich source of support for various values, including values such as individual freedom of speech, movement, bodily integrity, privacy and protection for private property, and the rule of law.⁶⁰ Allsop even suggests that the common law supports the idea of individual ‘humanity and dignity’, as well as autonomy, as core public law values.⁶¹

The key focus of the collection, however, is ultimately on values that might be considered distinctive *Australian* constitutional values. Values of this kind inevitably overlap with and are complemented in an Australian context by a range of more ‘generic’ public law values, common to the Anglo-American world. But others have already done impressive work exploring the content of these more general, public law values derived from the common law tradition.⁶² The focus of the collection is

⁵⁴ Mason, ‘Rights, Values and Legal Institutions’, above n 42, 11. On the Constitution and the common law, see, eg, A Stone, ‘Choice of Law Rules, the Constitution and the Common Law’ (2001) 12 *Public Law Review* 9; A Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374; G Taylor, ‘Why the Common Law Be Only Indirectly Affected by Constitutional Guarantees: A Comment on Stone’ (2002) 26 *Melbourne University Law Review* 623. On the notion of small ‘c’ constitutional cp, eg, R Dixon and G Williams, *The High Court, the Constitution and Australian Politics* (Melbourne, Cambridge University Press, 2015).

⁵⁵ Mason, ‘Rights, Values and Legal Institutions’, above n 42, 8–11.

⁵⁶ Allsop, above n 44, 119. *cf* Griffiths’ discussion of public law values in judicial review, procedural unfairness and good administration: above n 29, 18–23.

⁵⁷ Allsop, above n 44, 131.

⁵⁸ *ibid* 126–27, 131.

⁵⁹ *ibid* 127–28.

⁶⁰ See, eg, *Coco v The Queen* (1994) 179 CLR 427; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Roberts v Bass* (2002) 212 CLR 1; *Communist Party Case* (1951) 83 CLR 1.

⁶¹ Allsop, above n 44, 121.

⁶² See, eg, P Cane, ‘Theory and Values in Public Law’ in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford, Oxford University Press, 2003); M Aronson, ‘Public Law Values in the Common Law’ in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (New York, Cambridge University Press, 2015) 134; D Davis, A Richter and C Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Oxford, Hart Publishing, 2015).

therefore largely on values that can potentially find support in the text, history and structure of the Australian Constitution.

In addition, the focus of the collection is on values that are not wholly co-extensive with—or protected by—independent constitutional guarantees, such as the guarantee of freedom of political communication, or protection of individual property from acquisition by the Commonwealth other than on just terms. Freedom of political expression, and some form of protection for private property, are arguably important values under our system of representative and responsible government, but they will generally be protected by independent limitations on Commonwealth legislative power, rather than interstitial judgments informed by values-based arguments. There is thus less utility, at this stage of the functionalist project, in attempting to clarify the values-based dimension to these constitutional principles, and commit to other principles that lack any independent institutionalisation.⁶³

Finally, the collection attempts to promote critical engagement with the idea of functionalist interpretation or construction, by inviting attention to certain more controversial—and potentially less normatively attractive—values. National security, for instance, is a value that commands broad public support, but also opposition from civil rights and liberties organisations as a basis for limiting individual rights and liberties.

Even with these caveats, however, there is clearly a much longer list of values that could potentially find at least some degree of weak support in the text and structure of the Australian Constitution—including values of individual dignity, pluralism, and social inclusion and protection. TRS Allan, for example, argues that in UK public law the commitment to the rule of law implicitly entails a further set of values-based commitments, including a commitment to human dignity: ‘the equal dignity of citizens’, he argues, ‘is the basic premise of liberal constitutionalism, and accordingly the ultimate meaning of the rule of law’.⁶⁴ Important common law decisions of the High Court, such as *Marion’s Case*,⁶⁵ arguably give important support to dignity as a fundamental small ‘c’ constitutional value in Australia. And one could argue that the constitutionally prescribed system of representative and responsible government, in sections 7 and 24, provides additional support, as does, over time, the external affairs power, which recognises Australia’s place in a global legal order now firmly committed to human dignity as a foundational principle.⁶⁶

⁶³ The chapter that comes closest to this is Gonzalo Villalta Puig’s on free trade in this collection, but here again there is an attempt to consider the relevance of such a value beyond the context of a provision such as s 92 of the Constitution.

⁶⁴ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press, 2001) 2.

⁶⁵ *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion’s Case*).

⁶⁶ On the role of human dignity as a foundational principle of international human rights law, see, eg, MS McDougal, ‘Perspectives for an International Law of Human Dignity’ (1959) 53 *Proceedings of the American Society for International Law* 107; AH Henkin (ed), *Human Dignity: The Internationalization of Human Rights* (New York, Aspen Institute for Humanistic Studies, 1978) and more recently C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655.

The Constitution likewise could be seen to provide at least some weak support for commitments to social welfare. The benefits clause, for example, could arguably be understood not just as a formal source of legislative power, but an implicit recognition of a broader commitment in Australia to an active role for government in guaranteeing minimum social protection for all citizens, in circumstances of vulnerability. There are undoubtedly also many other values, some more or less normatively attractive in nature, which could be attributed to the Australian constitutional order. Some, for example, might suggest that the Australian Constitution goes beyond simply entrenching Indigenous non-recognition as a value. By failing to acknowledge Australia's First Peoples, and their traditional ownership of land, and potentially allowing for various racially discriminatory laws under the race power, it in fact affirmatively entrenches a form of institutionalised racism.

IV. THE COLLECTION AND THE FUNCTIONALIST CONSTITUTION

The remainder of the collection is divided into six parts. Part I of the collection focuses on various methodological questions, including the relationship between theories of constitutional interpretation and the scope and content of various constitutional values.

Nicholas Aroney, in his chapter on the justification of judicial review, explores the foundations for the exercise of judicial review in Australia in the text and structure of the Constitution. He further suggests that the institution of judicial review can be understood to serve a range of values or purposes explored in later chapters, including federalism, accountability and free trade.⁶⁷ But equally, he suggests that these textual and structural sources do not tell us how the power should be exercised: this is a question that can only be answered by appropriate attention to a range of different modalities of constitutional argument in dialogue with each other, including the constitutional text, structure, history and ethical principles and empirical consequences.

Jeffrey Goldsworthy, in his chapter on constitutional functions, purposes and values, provides a helpful restatement of the idea of functionalism, and its relationship to notions of constitutional interpretation and construction. At the same time, he poses a challenge to the stability of functionalism as a distinctive approach: he argues that if values are used by the Court to resolve true ambiguities in constitutional meaning, reliance on values will simply involve a form of 'purposive formalism'.⁶⁸ The 'function of a constitutional provision', according to Goldsworthy, 'is to achieve a purpose, which is an intention to achieve something believed to be of value'.⁶⁹ Further, 'the purposes of constitutional provisions are often crucial

⁶⁷ See ch 12 by Gabrielle Appleby and Brendan Lim; ch 6 by Janina Boughey and Greg Weeks; and ch 15 by Gonzalo Villalta Puig in this collection.

⁶⁸ See ch 3 by Jeffrey Goldsworthy in this collection, pp 43, 50.

⁶⁹ *ibid*, p 59.

to clarifying their meanings', and hence 'sensible formalists who strive to clarify meanings of constitutional provisions must ... be purposive formalists'.⁷⁰

Conversely, if values are used to resolve vagueness in constitutional meaning—ie, to aid in processes of construction, or what Goldsworthy calls supplementation—they will rarely be sufficient to resolve relevant controversies. Goldsworthy references my notion of 'intermediate' and 'ultimate values', and generalises this idea by developing the idea of a 'chain of linked purposes and values', which could be either progressively more concrete or abstract in nature.⁷¹ But even the most concrete, ultimate values, Goldsworthy argues, will often be quite abstract in nature. Values may also conflict in ways that create new forms of indeterminacy. In both cases there will thus be the need to supplement constitutional values with other extra-constitutional values, in ways that closely resemble ordinary forms of pragmatic or realist approaches to constitutional interpretation. Indeed, Goldsworthy suggests that pragmatism may be defensible in these circumstances, even for a moderate originalist such as himself, 'because it is much less vulnerable to the originalist objection that it amounts to amending the constitution contrary to the prescribed amendment procedure'.⁷²

Goldsworthy also usefully draws attention to one studied ambiguity, and another question left open by my own prior work on functionalism: the ambiguity, explored above, relates to the degree of support (ie, strong or weak support) required for a value to count as 'sourced' in the text, history and structure of the Constitution. The second question, which I address more directly but leave open in the 'Functional Constitution' relates to the degree to which values may be understood in a more or less intentionalist, or what I call 'backward' versus 'forward' looking way. As Australia's leading originalist scholar, Goldsworthy also goes on to defend at least a partially backward-looking approach to defining relevant values, suggesting that the purposes of constitutions are primarily the purposes of those responsible for creating or amending them, or that 'true purposivism is inherently originalist'.⁷³

Jonathan Crowe, in his chapter on functions, context and constitutional values, takes up this distinction between more or less backward-looking approaches to defining constitutional purposes or values, or what he calls an 'intentionalist' and 'contextualist' approach to defining the content of constitutional values. An intentionalist approach, Crowe suggests, means that constitutional values 'should have some basis in the intentions of the framers of the constitutional document', whereas a contextualist approach means that we should focus on the functions or purposes of constitutional provisions and structures from a more contemporary perspective, or by reference to 'contemporary beliefs and attitudes'.⁷⁴ This approach, Crowe argues, provides greater guidance in giving concrete content to constitutional values 'when its meaning is in dispute', and an account of how to resolve conflicts between law's

⁷⁰ *ibid.*

⁷¹ *ibid.*, p 44.

⁷² *ibid.*, pp 59–60.

⁷³ *ibid.*, p 59.

⁷⁴ See ch 4 by Jonathan Crowe in this collection, p 73.

‘intended and socially accepted functions’.⁷⁵ In this way, he, like Goldsworthy, offers a distinctive—and distinctly more fleshed out—functionalist account than I offered in my earlier work on this question.

Parts II–VI of the collection focus on various substantive values that might be considered candidates for recognition as ‘constitutional’ in Australia. It invites contributors to consider three core questions—ie, the degree to which (1) the text of the Australian Constitution provides support for such a value as ‘constitutional’ in nature; (2) various constitutional structures provide support for such a value as constitutional; and (3) existing decisions of the High Court explicitly or implicitly endorsed the relevance of such a value to constitutional interpretation in Australia.

Contributors were also invited to reflect on the degree to which, if such values *were* clearly recognised as constitutional in nature, this might reshape existing constitutional discourse in Australia. A functionalist approach does not simply seek to describe existing constitutional practice in Australia. It also seeks to critique and reorient that practice. The collection thus invites contributors to reflect on how, if certain values were in fact recognised by the Court as constitutional in nature, greater attention to such values could change existing approaches to interpretation or construction across two to three different areas of Australian constitutional law.

As one would expect, contributors to the collection reach a range of quite different answers to these questions. Lisa Burton Crawford, in her chapter on the rule of law, suggests that the Constitution *as a whole* supports the rule of law as a constitutional value. The idea of the rule of law denotes the existence of a legal system, she suggests, and ‘the Constitution brought such a system into being’. More importantly, the system created by the Constitution is one in which all government power is limited by law—found in the Constitution itself or statutes validly enacted thereunder—which is enforced by an independent judiciary. She further points to specific textual provisions, such as sections 51, 52, 71 and 75, and the *Communist Party Case*⁷⁶ as providing additional support for the rule of law as a *constitutional* value in Australia.

Such a value, Crawford argues, can also usefully inform the Court’s approach to statutory and constitutional interpretation in a range of areas. Yet she cautions against too broad, or uncritical, an application of the rule of law idea in this context: unlike TRS Allan, who sees a commitment to government under law as a paramount value, to be applied consistently in all public law cases,⁷⁷ Crawford argues that the Australian Constitution supports a narrower, more historically contingent understanding of the rule of law, which emphasises the primacy of the text and structure of the Australian Constitution, and the importance of the distribution of powers that it effects. For example, the rule of law is understood to impose limitations on the power of the executive, but also on the power of courts to supervise execution action. Crawford demonstrates this by discussing the treatment of no-invalidity clauses in federal legislation. She argues that, while Parliament can define the scope

⁷⁵ *ibid.*

⁷⁶ *Communist Party Case* (1951) 83 CLR 1.

⁷⁷ Allan, above n 64.

of executive power, it cannot assert its validity. Thus, properly understood the rule of law supports the view that Parliament has some—but not unbridled—power to use these devices to constrain judicial review.

Janina Boughey and Greg Weeks, in their chapter on government accountability, suggest that accountability should be understood broadly as ‘the basic idea that the executive branch and its delegates must be answerable, and as a general principle justify their actions, to the public, the Parliament, the courts or any administrative agency’.⁷⁸ On this basis, they also go on to identify several sources of support for ‘government accountability’ as a constitutional value in Australia: section 75(v) of the Constitution, and its guarantee of legal accountability; and sections 49 and 64 and their guarantee of responsible government, and thus a system of political accountability. They also note some support, albeit limited, for this understanding in judgments of the High Court such as *NEAT*,⁷⁹ *Jia*⁸⁰ and *Patterson*.⁸¹

This form of accountability, Boughey and Weeks argue, is necessarily shaped by its source in the text and structure of the Constitution, or the basis of its entrenchment. It does not, for example, extend to providing a complete form of legal accountability, or encompassing perhaps the most important modern form of accountability—ie, administrative accountability. But within these bounds, it may still be useful in resolving potential areas of uncertainty or ambiguity in construing various provisions of the Constitution, such as the scope for the Commonwealth Parliament to compel the production of documents by the Commonwealth executive, the ambit of the term ‘government’ for the purposes of sections 75(iii) and 75(v), and the scope for Parliament to impose invalidity clauses.

Sarah Murray, in her chapter on impartial justice, notes the degree to which such a value intersects with, but is also distinct from, the concept of independent justice. Impartial justice, she argues, ‘refers to whether a decision-maker remains open-minded’, whereas judicial independence ‘is concerned with whether a decision is made without interference’.⁸² She also suggests that impartiality may in some cases have a broader reach or ‘wider berth’.⁸³ Having defined the relevant value in this way, Murray also goes on to identify support for this value in various provisions in Chapter III of the Constitution, such as sections 71 and 72, broader provisions—including sections 99 and 102 of the Constitution, as well as the High Court’s Chapter III case law.

More direct engagement with the idea of impartial justice, Murray further argues, could usefully guide the Court in the application of principles such as the open court principle, and the *Boilermakers* principle.⁸⁴ In *Hogan v Hinch*,⁸⁵ for example, Murray suggests that the application of this principle was guided by a focus on the

⁷⁸ See ch 6 by Janina Boughey and Greg Weeks in this collection, p 103.

⁷⁹ *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 (*NEAT*).

⁸⁰ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 (*Jia*).

⁸¹ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 (*Patterson*).

⁸² See ch 7 by Sarah Murray in this collection, p 122.

⁸³ *ibid.*

⁸⁴ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (*Boilermakers*).

⁸⁵ *Hogan v Hinch* (2011) 243 CLR 506.

impact of relevant procedures on impartial and independent justice as the ultimate value, or touchstone. Similarly, she argues that a focus on these values could provide the basis for a reorientation of both Chapter III and *Kable* jurisprudence towards a more flexible approach, which focuses on notions of ‘contextual incompatibility’.⁸⁶ She also points to the potential relevance of such a value to the application of the rule against bias. At the same time, she notes dangers or limitations in any such exercise: if over-stretched to include too many other decision-making contexts, the value could lose ‘its utility as a precise constitutional value’.⁸⁷ It is also a value that invites difficult questions about the ultimate values served by the Constitution—the kind of ‘chain logic’ Goldsworthy notes in his chapter. It could be, Murray argues, that in fact impartial justice is better understood as serving a range of ultimate or ‘primary’ values, including fairness, accountability, justice, dignity and welfare of the person.

Scott Stephenson, in his chapter on democratic deliberation, argues that the text and structure of the Constitution provide clear support for deliberation as a constitutional value: provisions such as sections 7, 24, 49, 51, 53, 64 and 109 clearly enshrine a commitment to institutions such as federalism, responsible government, bicameralism, and representative democracy, and these institutions, he suggests, all ‘require mediation through discourse’, and in most cases, ‘discourse that is of a deliberative standard’.⁸⁸ While in most cases the Constitution contemplates that Parliament, and/or the people, will be responsible for promoting deliberation of this kind, there are also limited areas where the High Court could legitimately consider deliberation as a value. For instance, in giving effect to the notion of indirect inconsistency under section 109 of the Constitution, the Court could ‘allow[] more scope for complementary State legislation, which would help protect deliberation between the Commonwealth and the States’.⁸⁹ In interpreting section 61, it could consider the value of deliberation within Parliament, and in the broader public sphere, in determining the scope of the executive government’s power to spend and contract. And in construing section 71, and the scope of the Commonwealth’s judicial power, the Court could rely on notions of democratic deliberation to favour a more flexible view of the scope of Commonwealth judicial power (or I might add, at least powers incidental to it).⁹⁰

Joo-Cheong Tham, in his chapter on political equality, effectively adopts a strong notion of what it means for the text and structure of the Constitution to support the identification of relevant constitutional values: despite its invocation by the High Court in *McCloy*, he argues that political equality does not find sufficient support in the text, history and structure of the Constitution to count as a true *constitutional* value or principle. Indeed, he cites provisions such as sections 25, 41 and 128 of the Constitution, and historical sources (such as statements by Harrison Moore), as negating the existence of such a constitutional principle. Even if it does find

⁸⁶ See ch 7 by Sarah Murray in this collection, pp 126–27.

⁸⁷ *ibid*, p 129.

⁸⁸ See ch 8 by Scott Stephenson in this collection, p 136.

⁸⁹ *ibid*, p 134.

⁹⁰ See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 223 [589] (Crennan and Kiefel JJ).

some support at an abstract level, Tham further suggests, its internal complexity means that as a value it provides limited guidance in deciding concrete constitutional controversies: to whom, for example, does such a principle extend? Does it imply a formal or substantive understanding of equality of arms in the political process? How we answer these questions will clearly lead to quite different conclusions about the validity of campaign finance and other forms of electoral regulation under the implied freedom of political communication.

James Stellios, in his chapter on liberty, traces a wide variety of potential textual and structural sources of support for liberty as a constitutional value. The constitutionally prescribed system of representative and responsible government, and federalism, are both important guarantors of individual liberty in the positive sense, of a right to participate in processes of self-government. They also serve to protect negative liberty, or the freedom of the individual from arbitrary interference with their person, possessions, or bodily movement. This, Stellios argues, is also true both generally and for specific provisions such as sections 61 and 109 of the Constitution, which respectively require legislative authorisation for Commonwealth executive action, and protect individuals from certain kinds of state action. The Constitution's provision for a system of separated powers may likewise be understood as an important guarantee of both positive and negative liberty: the separation of judicial and non-judicial power is arguably the most important protection for liberty in this context, but limitations on delegation imposed by the separation of legislative and executive power may also play a role. Additional protections for negative liberty, or freedom from arbitrary interference by the state, can arguably be found in the entrenchment of judicial review over executive action (ie, section 75(iii) and (v)), and various rights-based protections or limitations, including section 51(xxxi) and the just terms requirement, and section 80 and the guarantee of trial by jury. But other provisions such as sections 116 and 117, which seem rights-inflected, may ultimately be better understood as designed to promote values of federalism.⁹¹ Stellios further notes the overlap between common law protections of liberty and the potential constitutional value, as well as support in the common law for such a value. The most notable example is, of course, the reasoning of Dixon CJ in the *Communist Party Case*,⁹² but Stellios draws attention to the more recent reasoning of Gageler J in *Magaming* in this context.⁹³

At the same time, Stellios notes the potential ambiguity and complexity behind the idea of liberty as a constitutional value. Liberty, as already noted, can be understood as having both negative and positive connotations, and each has different sources of support in and relationships to constitutional text, structure and construction. It can also be understood in more or less substantive terms (as is evidenced by the High Court's approach to section 80 of the Constitution). Stellios further argues that the text and structure of the Constitution point to the Commonwealth

⁹¹ For my own arguments along similar lines about other rights-based provisions, see R Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14 *International Journal of Constitutional Law* 80.

⁹² (1951) 83 CLR 1.

⁹³ *Magaming v The Queen* (2013) 252 CLR 381, 400, 401 (*Magaming*).

Parliament, rather than the High Court, as the prime institutional guarantor of liberty. For a constitutional notion of ‘liberty’ to play a useful role in processes of judicial decision-making, Stelliós argues therefore, it must ultimately be combined with or underpinned by a more fully developed account of the judicial role—that is also consistent with the text, structure and history of the Constitution.

Amelia Simpson, in her chapter on equal treatment and non-discrimination, notes the variety of different sources of support for a norm of non-discrimination in the text of the Constitution, including sections 7, 51(ii), 51(iii), 88, 92, 99, 102 and 117, and broader structural provisions of representative and responsive government, and federalism. At the same time, she identifies four different potential understandings of equality or non-discrimination as a constitutional value: formal and substantive equality of persons; and formal and substantive equality of units within the federal system. Individual equality values, she argues, are also quite distinct from federal equality values. They find different sources of support in the text and structure of the Constitution, and imply quite different approaches to constructional choice.

There is also utility, she argues, to distinguishing more clearly between individual equality and federalism values in different areas of constitutional discourse. The Court, Simpson suggests, often seems to search for a unified approach to questions of discrimination under the Constitution, when the quite different values served by different provisions in fact point towards the desirability of a much more varied, context-dependent approach. For instance, in *Cole v Whitfield*,⁹⁴ Simpson suggests that the Court quite properly relied on federalism-based values (rather than individuals’ equality values) to inform the interpretation of the words ‘absolutely free’ under section 92 of the Constitution. In *Street*,⁹⁵ Simpson argues that the Court could usefully have relied on federalism values to inform, and clarify, its interpretation of section 117 and its guarantee of freedom of movement across State lines. And in *Fortescue*,⁹⁶ and like cases involving the relationship between section 51(ii) and section 99, Simpson argues that a focus on substantive federal equality could usefully have guided the Court in reconciling these provisions. Indeed, she notes that in *Fortescue*, in adopting a three-pronged approach to the question of ‘discriminatory’ taxation, French CJ seems to have adopted just this kind of functionalist (ie, federalism values-based) approach.

This, Simpson argues, is ultimately one of the benefits of a values-based approach: it helps support the development of an appropriately varied, as well as unified, constitutional jurisprudence across different contexts. To serve this function, however, Simpson argues that values must ultimately be understood in a sufficiently concrete way: if equality is understood too abstractly (as it arguably was in *Street*), she suggests, it may tend to obscure more than to clarify, or justify what is far from justifiable.⁹⁷

⁹⁴ *Cole v Whitfield* (1988) 165 CLR 360.

⁹⁵ *Street v Queensland Bar Association* (1989) 168 CLR 461 (*Street*).

⁹⁶ *Fortescue Metals Group Limited v Commonwealth* (2013) 250 CLR 548 (*Fortescue*).

⁹⁷ See ch 11 by Amelia Simpson in this collection, p 208.

Gabrielle Appleby and Brendan Lim, in their chapter on democratic experimentalism, provide an illuminating treatment of the idea of democratic experimentalism, drawing on the ideas of early twentieth-century American philosopher John Dewey. Experimentalism as Dewey understood it, they suggest, involves the idea of democracy as ‘provisional, dynamic and self-correcting’,⁹⁸ and as attuned to evidence of actual consequences. There is also ample scope for experimentalism of this kind under the system of political constitutionalism created by the Constitution in various contexts, as well as under the federal structure it creates. Neither structure *requires* experimentalism of this kind, but both allow scope for it. Federalism in particular can enable experimentalism in two important ways—by lowering the cost of particular experiments (by allowing them to occur in smaller sub-units, or States as ‘laboratories of democracy’) and by creating ‘multiple decision-making centres’,⁹⁹ which can generate multiple, overlapping experiments. In this sense, the structure of the Constitution may also be seen to provide some support for the idea of democratic experimentalism as a value, at least in the weak sense of being consistent with it. There is also some support for it as a value, in the drafting of the Constitution, and subsequent case law: while the framers of the Constitution were not directly influenced by Dewey, or his ideas, they were influenced by figures such as James Bryce, who was himself an influence on Dewey. More recent case law, and particular certain dissenting opinions of members of the Court, also endorse experimentation as a contemporary value of the federal system.¹⁰⁰

Appleby and Lim further note two areas in which, as a potential candidate constitutional value, democratic experimentalism could bear on questions of constitutional construction by the Court: section 99, where a focus on experimentalism might favour a narrower view of the scope of the guarantee, as permitting greater scope for the Commonwealth to engage in localised forms of experimentation, and section 109, where it could point towards a narrower view of indirect inconsistency (or the circumstances in which a Commonwealth law should be interpreted as impliedly covering the field). In the political domain, they further note ways in which fiscal federalism could be adapted to promote greater experimentalism—eg, through targeted grants, which require recipients to engage in experimentalist forms of information-sharing.¹⁰¹ At the same time, in these contexts as in others, they note that an emphasis on democratic experimentalism may come at the expense of other—potentially preferred—constitutional values. They thus do not necessarily endorse these approaches. Rather, consistent with the broader functionalist project, they suggest that there is benefit to the Court consciously engaging with ‘democratic

⁹⁸ See ch 12 by Gabrielle Appleby and Brendan Lim in this collection, p 222.

⁹⁹ *ibid*, p 230.

¹⁰⁰ See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 222 [534] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1, 96 [246] (Heydon J); *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343, 369 [61] (Heydon J).

¹⁰¹ See ch 12 by Gabrielle Appleby and Brendan Lim in this collection, p 239. *cp* also modern notions of the key features of modern experimentalist governance discussed in MC Dorf and CF Sabel, ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Columbia Law Review* 267.

experimentalism—together with all other relevant constitutional values¹⁰² in these and other relevant areas of constitutional discourse.

The final three chapters focus on values that might be regarded as more contestable, or indeed more problematic for the idea of a functionalist approach to constitutional construction. Dylan Lino, in his chapter on Indigenous recognition, notes the variety of ways in which Indigenous recognition could be understood as a value: in symbolic terms; in terms that focus on achieving a more inclusive and non-discriminatory settlement for Aboriginal and Torres Strait Islander peoples; and in terms that focus on ‘collective Indigenous empowerment’.¹⁰³ Overlaid with these three broad understandings is also the idea of ‘recognition’ involving legal and political acknowledgement of past historical injustices against Aboriginal and Torres Strait Islander peoples. ‘While the visions of recognition are varied’, he suggests, ‘the underlying value is about achieving respect for Indigenous identity’.¹⁰⁴

He further notes the degree to which the Constitution provides only limited textual and structural support for *any* of these different understandings of recognition as a value. Indeed, he argues, where First Nations have been concerned, the dominant purpose or function of the Constitution has been ‘consolidating Indigenous dispossession through the service of foreign forms of government, society and economy ... suppos[ed to] serve the values of progress and civilization’.¹⁰⁵ This is embedded in a variety of mundane constitutional provisions that helped to advance the ‘project of settler expansion’.¹⁰⁶ For the Constitution to support the value of Indigenous recognition, either symbolically or at the level of political empowerment, it thus clearly requires a process of formal constitutional change, not simply functionalist reinterpretation.

Yet Lino also offers a reading of the text, history and structure of the Constitution that emphasises its potential to support a more normatively attractive functionalist approach—ie, one that emphasises values of recognition over dispossession. Like Simpson, Lino notes the support in the text and structure of the Constitution for equality as a general constitutional value. He also notes the ‘egalitarian values’ embedded in the 1967 amendment to the race power. Either or both these values, he further argues, could be relied on to support a construction of the race power that limited its scope to positive forms of discrimination. Similarly, it could be relied on to support a construction of the term ‘race’ in the race power that gave First Nations ‘communal control over Indigenous community membership’,¹⁰⁷ itself a critical aspect of self-determination and thus recognition as a people.

Rebecca Ananian-Welsh and Nicola McGarrity, in their chapter on natural security, note the degree to which national security is itself a contested and protean concept. They follow Peter Hanks in suggesting that, at a minimum, it involves the

¹⁰² See ch 12 by Gabrielle Appleby and Brendan Lim in this collection, p 242.

¹⁰³ See ch 13 by Dylan Lino in this collection, p 252.

¹⁰⁴ *ibid.*, p 254.

¹⁰⁵ *ibid.*, p 246.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*, p 259.

idea of a collective attempt to ‘counter threats to the state’, but note the inherent ambiguities even in this quite thin, minimalist understanding.¹⁰⁸ They nonetheless identify a range of sources of textual support for national security as a potential Australian constitutional value: the defence power in section 51(vi) and related powers in relation to property, railways, immigration and taxation (section 51(ii), (xxxi), (xxvii) and (xxxviii)). They also note a strong degree of historical support for this as a value, including in the Convention debates.

Reliance by the Court on national security as a value, they suggest however, is usually more dangerous than it is helpful. Like notions of ‘law and order’, appeals to national security tend to have a dominant, if not overriding—ie, ‘hegemonic’—force in constitutional discourse: examples that they point to include the role of security-based arguments in limiting the implied freedom of political communication, and modifying the application of prohibitions against administrative detention, and the content of procedural fairness and open justice principles. The challenge, they suggest therefore, is not so much to find adequate textual and historical support for national security as a value, but rather, to identify appropriate doctrinal and institutional means of *cabining* its role in constitutional construction. McGarrity and Ananian-Welsh further explore three potential restraints of this kind: the idea of treating national security as a preferred value only up to a certain threshold; linking it to other, ultimate values such as liberty and security *of the person*; or weighing it against liberty of the person, and the rule of law, as equally—if not preferred—constitutional values. None of these restraints are likely to be wholly stable, they suggest however. For both authors, this also calls into question the normative attractiveness of a functionalist approach.

Gonzalo Villalta Puig, in his chapter on free trade, identifies important support for free trade as a value in the text of the Constitution, including provisions such as sections 92, 99, 117 and arguably section 51(ii) as interpreted by the High Court in *Fortescue*, as well as broader structural provisions found in Part IV. Like Goldsworthy in his introductory chapter, Puig notes the importance of this value as a guide to resolving the ambiguity in the language of ‘absolutely free’ in section 92 of the Constitution. He further argues that it could legitimately inform the construction of other provisions, including section 51(i) of the Constitution. Yet he suggests that, to be legitimate, any reliance by the Court on free trade as a value must account for the conflict between free trade and other competing values, which itself is recognised in the text and structure of the Constitution (as, for example, in section 92).

V. LIMITS TO THE COLLECTION AND FUNCTIONALISM

These diverse conclusions, however, are ultimately entirely consistent with the aim and spirit of the collection. The aim of the collection is certainly *not* to ‘fix’ once and for all the content and scope of values under the Australian Constitution.

¹⁰⁸ See ch 14 by Rebecca Ananian-Welsh and Nicola McGarrity in this collection, p 268.

Indeed, if that were its aim, the collection would seem extremely ill-conceived: as already noted, the collection is far from comprehensive in the range of values it purports to explore. Constitutional values are often expressed in extremely broad and general terms, in ways that call for a great deal of further working out in various cases. The concrete scope or denotation of various values may change with time, along with changing social circumstances and understandings. The application of different values may vary, depending on a judge's broader theory of constitutional interpretation.¹⁰⁹ And constitutional values may conflict in various concrete cases, in ways that raise distinct and difficult questions about how best to balance or reconcile competing values and commitments.¹¹⁰

Some public law scholars, writing about values in administrative law, sometimes suggest that certain values carry with them a predetermined weighting, or lexical priority: Paul Daly, for example, suggests that various administrative law values—such as the rule of law, good administration, democracy, and the separation of powers—have varying 'weight', which can guide the resolution of values-based conflicts.¹¹¹

I am, however, more sceptical of this possibility in the Australian constitutional context. It seems to overstate the determinacy of the formal constitutional modalities, such as constitutional text, structure and precedent, and further to understate the importance of conceptions of the judicial role in determining the ultimate weight to be given to various values in different contexts. Like Allsop CJ, I believe that values can inform and guide processes of constitutional construction, but are unlikely to be 'dispositive': 'they are part of the legal framework against which law is construed and moulded', rather than 'providing the content for hard rules of law'.¹¹² Lim and Appleby make the point beautifully when they suggest, in their chapter, that values-based arguments are best understood as helping 'inform' rather than control choices about constitutional construction under the Constitution.¹¹³

Goldsworthy also makes this point lucidly in his chapter, and suggests it is one reason why processes of constitutional construction will ultimately end up being pragmatic in nature, even if they pass by the way-station of functionalism. My argument, however, is that this way-station matters a great deal to the legitimacy of judicial review by the Court: it represents an attempt by judges to ensure that their own subjective judgements about values (eg, their concrete content or relative priority)

¹⁰⁹ cp with the judgments of Gageler J in *Murphy* (2016) 90 ALJR 1027 and *McCloy* (2015) 257 CLR 178; see also S Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303, emphasising the importance of process-based approaches to judicial review as usefully guiding the application of constitutional norms, including implicitly the scope and weight to be given by the Court to various constitutional values.

¹¹⁰ See, eg, Mason, 'Rights, Values and Legal Institutions', above n 42, 9. Mason suggests that 'identification of values is not a major problem; assessment of their interaction or of their relationship with competing policy considerations is': at 14.

¹¹¹ P Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (New York, Cambridge University Press, 2012).

¹¹² Allsop, above n 44, 130

¹¹³ See the chapter by Gabrielle Appleby and Brendan Lim in this collection, pp 241–42.

play a role only where relevant objective ‘guideposts’ for making such judgements run out.¹¹⁴

The collection also only touches indirectly on what might legitimately be considered the most important values-based question of all—ie, the meta-value of judicial versus legislative supremacy in the resolution of various constitutional controversies. I have clear views on these questions, which I have explored elsewhere,¹¹⁵ and these are questions that I have suggested are put front and centre by a functionalist approach.¹¹⁶ They are also questions that are indirectly addressed, at various points, by various chapters, such as those on democratic deliberation and political equality.¹¹⁷ But they are also meta-theoretical, process-based questions that can only adequately be addressed in their own terms, distinct from an exploration of questions of constitutional substance. They are thus questions I leave explicit for another day.

Further, there are important potential questions, not addressed by this collection, as to the degree to which various constitutional values may legitimately be enforced, or recognised, via various quasi-constitutional constitutional principles, such as the principle of legality. The High Court, in recent years, has placed strong and consistent reliance on the principle of legality as a basis for a form of weak-form constitutional review, or sub-constitutional enforcement of common law rights and liberties.¹¹⁸ Yet an important, open question relates to the degree to which the principle of legality might apply or extend to the protection of other constitutional values of the kind addressed in the collection.

The turn to constitutional values, therefore, is in no way a turn to some new clear or determinate set of decisional criteria. Rather, it is a turn to an additional set of substantive arguments, which can enrich rather than resolve the need for political deliberation about questions of constitutional justice. The aim of the collection is to contribute to this process of constitutional deliberation—by highlighting the diverse and complex ways in which values-based constitutional arguments might play out, if the High Court were to endorse a more explicitly functionalist approach to constitutional interpretation. The project would not have been possible without the support of the UNSW Faculty of Law, the HSF Law & Economics Initiative and the outstanding research assistance of Amelia Loughland, Anna Rienstra and Melissa Vogt, and I offer them my warmest thanks.

¹¹⁴ For the language of guideposts, see US case law on their constitutional due process clause: *BMW of North America, Inc v Gore*, 517 US 559 (1996); *State Farm Mutual Automobile Insurance Co v Campbell*, 538 US 408 (2003).

¹¹⁵ See, eg, Dixon, ‘Amending Constitutional Identity’, above n 6.

¹¹⁶ Dixon, ‘The Functional Constitution’, above n 37, 480–81; see further Waldron, above n 37.

¹¹⁷ See especially ch 3 by Jeffrey Goldsworthy; ch 8 by Scott Stephenson; ch 10 by James Stellios; and ch 9 by Joo-Cheong Tham in this collection.

¹¹⁸ See, eg, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Momcilovic v The Queen* (2011) 245 CLR 1 (see especially French CJ, Crennan and Kiefel JJ). For discussion, see also D Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36 *Sydney Law Review* 413; J Gans, ‘Legality, Lenity and Responsibility’ (paper presented at The Principle of Legality in Australia and New Zealand Conference, Deakin Law School, 20 February 2015); B Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372; R Dixon (Comment), ‘A New (Inter)National Human Right Experiment for Australia’ (2012) 23 *Public Law Review* 69, 75.

I am particularly grateful to the many distinguished Australian public lawyers who agreed to join me in the task of exploring what a functionalist project could mean in practice. Not all of them agree with the basic tenets of the project, and yet all engage generously and thoughtfully with the questions it poses for the Court and debates over constitutional construction. They also embrace the broader academic vision that has guided me in producing this collection: the idea that, while the labels that structure the collection may be ones I have chosen as a means of guiding the conversation, the conversation only makes sense as a collaborative one, which draws on the insights and expertise of a vast array of scholars. I thus hope that this collection will be the beginning of a long-running and much broader conversation about what it would mean to take seriously the idea of distinctly *Australian* constitutional values.