THE HARD PROBLEM OF LEGALITY

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Does the Australian Constitution guarantee the rule of law? That is a hard question, and in this article, I seek to explain why. Put simply, the question is hard because our answer will depend on our broader theory of how to interpret a Constitution. If one commits to the theory of originalism, for example, one will conclude that the Constitution does not guarantee the rule of law. Yet if one commits to other popular and credible theories – such as perfectionism or pragmatism – one may reasonably form the view that the Constitution does substantially guarantee the rule of law. In the earlier parts of this article, I establish this link between interpretive theories and the rule of law under the Constitution. In the latter parts of the article, I go about discrediting one interpretive theory – originalism. Having discredited originalism, I conclude that we ought to take other interpretive theories, such as perfectionism and pragmatism seriously. Ipso facto, we must take seriously the possibility that the Constitution, on its best interpretation, does guarantee the rule of law. This conclusion is in tension with the work of Lisa Burton-Crawford, to which this article is a response.

I INTRODUCTION

Does the Australian *Constitution* guarantee the rule of law? In a recent work, Lisa Burton Crawford has offered a complex answer.[1] She has first observed that – like the concepts of liberty and justice – the concept of the rule of law is a contested concept. That is to say, different people are liable to advocate for different conceptions of what the rule of law is.[2] On some of these conceptions ('moral conceptions'), the rule of law is a moral ideal, only attainable by a system of laws that treats citizens with dignity, and preserves the citizenry's fundamental rights and liberties. On other conceptions ('formal conceptions'), the rule of law represents a far more limited and austere commitment: merely, a commitment to government under rules that are prospective, clear, general, public, stable and consistent.[3]

Returning her attention to the Australian *Constitution*, Crawford observes that the *Constitution* does not contain an express guarantee of the rule of law, let alone endorse any one particular conception of the rule of law.[4] And so – Crawford reasons – the relationship between the *Constitution* and the rule of law is weak and

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[1] Lisa-Burton Crawford, *The Rule of Law and The Australian Constitution* (2017, Federation Press).

[2] Ibid, 10.

[3] Ibid, chs 2-3.

[4] Ibid, 170.

contingent.[5] The *Constitution* does secure what most will agree are important elements of the rule of law, such as an independent judiciary, a supreme law-maker in the legislature, and the legal supremacy of the *Constitution*. But what we must not do, according to Crawford, is view these features of the *Constitution* as veiled commitments to some particular and complete conception of the rule of law – be it the conception advanced by Raz, Dicey, Bingham, Allan, Fuller or any other thinker – and then suppose that the *Constitution* impliedly enforces all of the other standards set by that conception of the rule of law. To approach the *Constitution* in this way would be to succumb to pareidolia, and to read requirements into the *Constitution* that are in no way communicated by the Constitution's text. As Crawford writes:

> [The] constitutional limitations on government power] do not correspond to any of the laundry lists of rule of law requirements that have been offered by legal theorists. They do not marry up with any particular conception of the rule of law, be it ['moral'], ['formal'], or somewhere in between. Thus the federal government is legally capable of acting in a way that is contrary to the rule of law (as it is understood in legal theory).[6]

This is not to say that the *Constitution* wholly fails to protect the rule of law. Rather, Crawford contends, it is to say two other things. Firstly, the Constitution's protection of the rule of law is indirect.[7] That is, the *Constitution* does not establish the rule of law as a free-standing norm against which legislation may be invalidated. Instead, the *Constitution* only protects the rule of law in the indirect sense that certain features of the *Constitution* are conducive to the rule of law. Secondly, the Constitution's protection of the rule of law is incomplete.[8] That is to say, while the constitutionally prescribed system of government is conducive to the rule of law, it is by no means the embodiment of the rule of law. Indeed, our *Constitution* seemingly permits our government to do many things that would offend the various "comprehensive conceptions" of the rule of law. Not only in theory, but in practice, our *Constitutio*n permits our government to administer laws that are unstable, retrospective, unclear, and that are even disrespectful of our most fundamental rights. Or so Crawford argues.[9]

This argument is not only compelling on its face. It also seems to take a putatively hard problem – the problem of determining whether the *Constitution* provides a minimum guarantee of the rule of law – and then reveal it to be no problem at all. Before Crawford wrote her work, High Court Justices dimly

[5] Ibid, 172-3, 199-202.
[6] Ibid.
[7] Ibid, 82, 85-92, 96, ch7, 138-155.
[8] Ibid, 199-201.
[9] Ibid, 84-5, 94-5, 137, 173.

speculated as to 'whether the exercise of legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law.'[10] They spoke of the rule of law being an "assumption of the *Constitution*" in the same breath that they struck down odious legislation.[11] They increasingly spoke of the rule of law as being an assumption to which the *Constitution* "gives practical effect",[12] and an assumption "upon which the *Constitution* depends for its efficacy".[13] In speeches and journals, judges appeared to wargame even, asking (it seemed rhetorically) whether statutes conferring contemptibly broad executive discretions could be "law, within the meaning of a *Constitution* which assumes the rule of law".[14] They suggested that such questions may have to be answered in response to "developments which may, although we hope they never will" demand answers.[15] If tyranny or its antecedents were ever to befall Australia, it was as if a constitutional guarantee of the rule of law might emerge, like Yeats' "rough beast, its hour come at last, slouch[ing] toward Bethlehem to be born".[16]

But no: if Crawford's argument holds, there is no rough beast, and there is no hard problem. There is only the text and structure of the *Constitution*. And, Crawford soberly reminds us, nothing in the text and structure of the *Constitution* communicates a direct or complete guarantee of the rule of law.

In this article, my aim is only to establish that things are not as simple as Crawford seems to suggest. Pace Crawford, the problem of determining the relationship between the rule of law and the *Constitution* is not the easy problem of determining the linguistic meaning of the Constitution's text, in light of the Constitution's structure. Rather, it is the hard problem that it was otherwise suspected to be. To solve the problem, our judges must proffer an interpretation of the *Constitution*, and that interpretation must be defensible within a general theory of constitutional interpretation, which in turn must also be defensible. All said, to solve the problem will require judges to confront a complex set of questions, concerning the relative capacities and incapacities of the judicial and other branches of government, the connection between morality and law and – in the event that such a connection exists – the relevant requirements of morality.

[10] *Union Steamship Co of Australia Pty Ltd v* King (1988) 166 CLR 1, 10.
[11] *Australian Communist Part v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
[12] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 [50] (Gleeson CJ and Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); see also *Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165, 1193 [168] (Kirby J).
[13] *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 42 [61] (French CJ).
[14] Murray Gleeson, 'Courts and the Rule of Law' (Lecture, Melbourne University, November 2001).
[15] Robert French, 'Common Law Constitutionalism' (Robert Cooke Lecture) 17.
[16] William Butler Yeats, 'The Second Coming'.

What will be the solution to this hard problem? Ought the *Constitution* be interpreted as providing some direct, minimum guarantee of the rule of law? I do not attempt to give definitive answers. In this article, I only seek to throw better light on the path to the answers, so that the path may be better navigated by judges and the academy in the future, as the need arises.

The article is structured as follows.

In Part II, I explain how some questions of constitutional law – what I call "hard questions" – can only be satisfactorily answered once we have committed to a theory of interpretation. In Part III, I argue that the question of the connection between the *Constitution* and the rule of law is a "hard question": that our answers to the question will depend on the theory of interpretation to which we commit. In Part IV, I consider the theory of originalism, and I explain how that theory (perhaps uniquely) can support Crawford's view that the *Constitution* offers only indirect and incomplete protection of the rule of law. In Part V, I offer criticisms of originalism. These criticisms then pave the way for my conclusion, in Part VI, that once one eschews originalism, the path is laid open to adopt a non-originalist theory, and to argue that the *Constitution*, properly interpreted, provides a direct and substantial guarantee of the rule of law.

II PROBLEMS EASY AND HARD

Some questions of constitutional interpretation are easy. "When must Australian judges retire, under the Constitution?" Everybody will and must agree upon the answer: "seventy years of age". Why? We will want to say: "Because the *Constitution* clearly says so".[17]

Other questions of constitutional interpretation seem, however, to be hard. "Is there an effective separation of powers at the state level, under the Constitution?" "Can the legislature enact laws that discriminate against a particular race to the detriment of that race?" In response to these questions, people have disagreed vociferously over the years.[18] Whereas an easy question – like the "age of retirement" question – seems only to require that we read the *Constitution*, these hard questions have caused disagreement between people who have already read the *Constitution*, and who know full-well what the *Constitution* says. Indeed, these hard questions seem to trigger a kind of descent, wherein judges and lawyers find the need to go beneath the plain meaning of the Constitution's text, and to contest deeper matters of principle, such as the proper role of the judiciary, the proper

[17] See s72 of the *Constitution*.
[18] For controversy concerning the first question, see, eg, Jeffrey Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (2013) 40 *Monash University Law Review* 75, 77-93. For controversy concerning the second question, see, eg, the split of opinions in *Kartinyeri v Cth* (1998) 195 CLR 337.

significance of the constitutional framers' intentions, and even the very nature of law.[19]

The crux of my argument in this paper is that a certain interpretive question – the question of the relationship between the *Constitution* and the Rule of Law – is a hard question, not an easy question, and that any convincing answer to the question must come supported by a plinth of well-defended interpretive theory. But at this early stage, it will be helpful to lay some staging for that argument. In particular, it will be helpful to briefly explore the following basic matters: why are some constitutional questions apparently easy and others hard? And why do hard questions seem to demand a settlement in the realm of theory and principle, whereas easy questions seemingly do not? Ronald Dworkin famously gave an explanation of these matters, and the explanation that I will now offer is roughly the same.[20]

As Dworkin once observed, before one can address any particular question of constitutional interpretation, one must logically address a more fundamental, anterior question, which we here can call the Fundamental Question. The Fundamental Question is: how generally speaking is one to determine the law of the *Constitution*?[21] And that question is terribly complex. The reason that the Fundamental Question is complex is that it begs countless further questions, many of which are timeless and vexing. For example, the Fundamental Question begs that we ask: should judges strictly adhere to the letter of the *Constitution*? Or, if adherence to the letter would cause injustice and inefficiency, should the Court depart from the Constitution's text to do justice and improve the public welfare? If so, how far can judges permissibly depart from the Constitution's text? What weight should be given to the intentions of the framers? If our political institutions somewhat outgrow the Constitution's vision for those institutions, and if the political institutions adopt practices and structures that are no longer obviously authorized by the *Constitution*, ought judges to invalidate these structures and practices come what may, and apply the *Constitution* as if it were a corset? Or should the *Constitution* sometimes be interpreted liberally so as to accommodate welcome change? Should judges simply act upon utilitarian principles in all constitutional cases? Or should their interpretations arch towards the protection of the people's basic political rights and liberties? Or is the law of the *Constitution* an

[19] See, e.g., Goldsworthy above n 18, 104-114; Justin Malbon, 'The Race Power under the Australian Constitution: Altered Meanings' (1999) 21 *Sydney Law Review* 80, 81-5; Alexander Reilly, 'Reading the Race Power: A Hermeneutic Analysis' (1999) 23 Melbourne University Law Review 476.
[20] See Ronald Dworkin, *Law's Empire*, Chs 1 and 2.
[21] Dworkin's terminology differed slightly from mine. Rather than referring to a Fundamental Question, Dworkin referred to the "grounds of law". The grounds of law, for Dworkin, were the conditions in virtue of which any legal proposition would be true. Dworkin also saw that the Fundamental Question that I refer to is only one part of a bigger question, which is: what the correct grounds of law in are general: see Dworkin above n 20, chs 1, 3 and 10.

objective, positive standard, which exists and binds judges independently of considerations of the law's utility or justice?

These are clearly complicated matters, and so the Fundamental Question ("how generally speaking is one to determine the law of the *Constitution*?') is a complex question. And that complexity has two important upshots. Firstly, well-considered answers to the Fundamental Question are liable to be complex answers; so complex that they will present as comprehensive "theories of interpretation". (The better known theories of interpretation have come to be given rather daunting names like originalism, perfectionism, pragmatism, and have attracted devotees who work to perfect and defend their preferred theories in judgments, journals and books).[22] Secondly, because the Fundamental Question is complex, different people are liable to give different answers to the question. That is to say, different people are liable to hold different theories of interpretation, some inevitably more comprehensive than others.

If we suppose that different people hold different interpretive theories, we can explain the difference between easy and hard questions in this way. Easy questions, on the one hand, are questions over which different interpreters, with different credible interpretive theories, can agree upon, despite their theoretical disagreements.[23] Or to borrow Cass Sunstein's phrase: easy questions are questions whose answers may be the subject of an "incompletely theorised agreement".[24]

To give an example, recall this easy question: "When must Australian judges retire, under the *Constitution*?" On the above model, the reason that this is an easy question is that, no matter what credible interpretive theory we subscribe to, we will give the same answer. An originalist, for example, will answer "70 years of age" for such is the apparently intended meaning of the Constitution's text. On the other hand, a pragmatist – someone who would interpret the *Constitution* in whatever way will reliably maximize utility – will also answer "70 years of age". Afterall, it seems that any other answer would bring on a crisis of legitimacy, attended perhaps by fear, economic disruption, and political instability, and certainly a reduction in overall utility. Meanwhile, a stricter textualist – someone who thinks the law of the *Constitution* should be its literal meaning – will too answer "70 years of age" for such is the Constitution's literal meaning. And so on. Because these different interpreters will be able to agree on the answer to the question without first agreeing upon the best interpretive theory (i.e. they may come to an incompletely theorised agreement concerning the answer to the question), the interpreters needn't even

[22] The theories of originalism, perfectionism and pragmatism are introduced in Parts III and IV below.
[23] Dworkin above n 20, 350-4.
[24] Cass Sunstein, 'Incompletely Theorised Agreements' (1995) 108 *Harvard Law Review* 1733.

reflect very much upon their own interpretive theories before answering the question.

Hard questions, on the other hand, are questions that do drive disagreement between individuals committed to different interpretive theories. Because a judge's answer to a hard question will depend on what the judge's interpretive theory is, a judge will need to reflect upon and defend her interpretive theory in order to convincingly defend her answer to the hard question. For hard questions there can be no incompletely theorised agreement.[25]

For example, recall one of our hard questions: "Can the legislature enact laws that discriminate against a particular race to the detriment of that race?". As has been learnt through debate, originalists will likely answer yes.[26] Given the permissive text of the *Constitution*, stricter textualists would certainly answer yes. But certain judges have answered no, and it is not hard to find a theoretical justification for their position. The theory of pragmatism for example, with its eye for welfare-maximizing outcomes, might commend a "no" on the grounds that the public welfare will be diminished if the government is legally permitted to enact detrimental and racist laws. Indeed, near any theory that militates against unjust legal interpretations would endorse a "no".

In that case, the interpreters may disagree over the correct interpretation of the *Constitution*, and that disagreement may stem from the justices' deeper disagreements over the correct theory of interpretation. In that circumstance, if any interpreter is to convincingly defend their interpretation of the *Constitution*, they will need to descend to the level of theory. Each interpreter will need to defend the theory upon which their controversial interpretation rests and discredit those alternative credible theories of interpretation that would mandate different answers. In virtue of the fact that the interpretive question is not susceptible to an incompletely theorised agreement, the question is, in a meaningful sense, a hard question.

III LEGALITY AS AN EASY PROBLEM

The above model of theoretical disagreement is popular and, I submit, broadly accurate.[27] But it is also simplified. Were there the space, the model could be supplemented with an account of what makes an interpretive theory a "credible"

[25] See Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.
[26] Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 702-3.
[27] For a canvassing of the different understandings of hard cases, see Frederic R Kellogg, 'What Precisely Is a Hard Case? Waldron, Dworkin, Critical Legal Studies, and Judicial Recourse to Principle' (April 2013) available at SSRN.

theory.[28] The model might also be supplemented with an account of how it is that judges – not being philosophers – develop and apply theories of interpretation in practice.[29] An account might also be given of how constitutional questions can be made harder by empirical, rather than moral and theoretical, uncertainties.[30] Here, I can only direct the reader to discussions of those matters, conducted elsewhere.[31] The model of easy and hard questions that I have presented is only intended to bring out certain core features of constitutional adjudication that are pertinent to the main project of this article.

Now I turn to that main project, which is to consider the following question: what is the relationship between the rule of law and the Australian *Constitution*? In particular, I will probe whether the question is easy or hard. To answer the question, is it enough that we look to the text and structure of the *Constitution*, the history of the Constitution's drafting and of its interpretation? Or is it that harder kind of question: the kind that requires us to first defend and apply a theory of interpretation?

In her recent work, Crawford has sought to answer the above question on the basis that it is an easy question. That is, she has sought to determine the relationship between the rule of law and the *Constitution* without first defending any interpretive theory. It is convenient to commence now by explaining Crawford's approach, and by considering whether the approach succeeds. To get slightly ahead of the story, Crawford's approach does not succeed. Crawford's interpretation of the *Constitution* (that the Constitution's protection of the rule of law is indirect and severely incomplete) may be correct. But before that or any opposing interpretation can convince, the interpretation will, it turns out, need to be backed by a well-defended theory of interpretation.

A *Description of Crawford's Argument*

I begin then with a description of Crawford's argument. As adverted to, Crawford claims to determine the relationship between the *Constitution* and the rule of law without committing to or defending a general theory of interpretation. Crawford is candid about the matter. She observes that, in arguing that the Constitution's protection of the rule of law is indirect and incomplete, she 'makes no particular claims about how the *Constitution* should be interpreted', nor does

[28] See Dworkin, above n 20, ch 3.
[29] In Australia, see J D Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) NSW Bar Journal 12.
[30] Cass Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.
[31] See the above three footnotes.

she '[explain] the methodology of constitutional interpretation or adjudication that [she] intend[s] to employ'.[32]

Because Crawford lacks a theory of interpretation, her argument is necessarily founded upon a set of undefended propositions of constitutional law. Crawford's foundational propositions are, however, credible propositions, for which reasons could clearly be supplied. The propositions concern the scope of legislative, executive and judicial power under the *Constitution*.

With respect to legislative power, it is proposed:

> [t]he legislative power of the Federal Parliament is subject only to those limitations expressed or necessarily implied by the *Constitution*. And it is for Parliament (not the Courts) to decide which laws are necessary for the 'peace, order and good government' of the Commonwealth.[33]

With respect to executive power, it is proposed:

> [t]he executive government is subject to the law, but the law is that found in the *Constitution*… The *Constitutio*n authorises the High Court to ascertain and enforce those limitations, but constrains their ability to enforce broader principles of political morality…[34]

And with respect to judicial power, Crawford proposes:

> It is the role of the High Court to interpret the *Constitution*, but in doing so, it cannot alter the *Constitution*". "[Australia's rigid *Constitution*] can only be improved by formal amendment, and not the fluid process of the common law. The High Court is bound by the Constitution's silences.[35]

Taken together, these propositions seem to describe a familiar picture of the constitutional division of powers, which I will call the "standard picture".[36] Within this standard picture, the framers of the *Constitution* fulfilled the norm-setting function of determining the law of the *Constitution*. The law of the *Constitution*, as set by the framers, then allocated further norm-setting functions to three further entities. The people, under s128, were empowered to re-determine the laws of the *Constitution*. The Commonwealth parliament, under s 1, was empowered to determine the law as it relates to certain subject-matters listed in the *Constitution*. And the executive, under s 61, was empowered to exercise authoritative discretions conferred (mainly, as it happens) by legislation.

[32] Crawford above n 1, 6-7, 174.
[33] Ibid, 96.
[34] Ibid, 131.
[35] Ibid, 174.
[36] I borrow this notion of the "standard picture" from Mark Greenberg, 'The Standard Picture and it Discontents' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Law* (2011, OUP).

As for the judiciary, it was not given a norm-setting function, or at least not an expansive one. Instead, under s71, the judiciary was principally given the epistemic function of accurately perceiving the legal norms set by the various norm-setting authorities (the framers, the people, the legislature and the executive), and then authoritatively applying those norms to settle disputes.

Crawford appears to appreciate that, within this standard picture, the laws of the *Constitution* are necessarily positive. That is to say, the laws of the *Constitution* are one thing, and their merits another. In Crawford's words: "laws made in compliance with the *Constitution* seem to derive binding legal authority from that very fact, regardless of whether they might be construed as just or unjust"; and "government action [cannot be invalidated] on the basis that it does not conform to norms [such as norms of justice] that are not derived from the *Constitution*".[37] It follows:

> When confronted with a truly offensive law, the High Court may well conclude that it has a moral obligation to ignore it, or else refuse to give it force. But in doing so, the Court would be acting beyond the realm of… judicial power…[38]

The standard picture necessitates these conclusions because – within the standard picture – the law of the *Constitution* was determined by the choices of the framers, and those choices may have been meritorious or unmeritorious, just or unjust. After all, the framers were people, and people have vices, and people make mistakes.

Working within this standard picture, the remainder of Crawford's argument follows naturally. Because the law of the *Constitution* is taken to be the positive law which was written and decided upon by the framers, the question becomes this simple one. Does the positive law of the *Constitution* implement the rule of law? Or put another way: does the "text and structure" of the *Constitution* as it is (not as it should be) guarantee the rule of law?[39]

As adverted to earlier, Crawford begins her answer by noting that there is no one authoritative definition of the rule of law. As Crawford observes, there are different comprehensive conceptions of the rule of law which have been developed and advocated for within different academic circles.[40] Some of these conceptions – which we may call formal conceptions – hold the rule of law to be a kind of legal technology that may be used for good or for evil. The rule of law, on this

[37] Crawford above n 1, 156, 200.
[38] Ibid, 173.
[39] Ibid, 174.
[40] Ibid, chs 2-3.

conception, obtains when our laws are sufficiently prospective, clear, general, public, stable and consistent.[41] The significance of these criteria is that, if they are satisfied by a legal system, the legal system is likely to be more effective in altering the conduct of its citizens (again, for better or for worse). Afterall, even where the laws are backed by the state's coercive force, how can citizens be expected to conform their behaviours to laws that are retrospective, or hopelessly unclear, inconsistent and changeable? In such a situation, law might nominally exist, but it could not rule.[42]

Crawford then identifies a very different conception of the rule of law: what we may call the moral conception.[43] According to the moral conception, the formalist's ideals of prospectivity, clarity and generality (etc.) are not morally neutral ideals. After all – the question is asked – would it not be a morally bad thing for our governments to punish us under retrospective laws, or under ad hominem bills of attainder? Would it not be morally undesirable for our government to require our compliance with a tangle of unclear and contradictory standards? Or to punish us for failing to comply with laws that we cannot access, and which are kept a state secret? Would not all this deprive us of our dignity? Answering yes to this last question, some theorists conclude that law must have an "inner morality".[44] In other words, they conclude that law's characteristic forms do serve certain moral purposes. From there, it is a small step to the conclusion that the apparatus of law cannot be put to ends that flagrantly contradict these moral purposes. If law is intrinsically protective of certain morally valuable rights and liberties, then an enactment that asserts to gratuitously mow down such rights and liberties could not be a "law", or so the argument goes. What are the rights and liberties that the law intrinsically protects? That is said to be a matter for philosophical exploration;[45] but they are commonly said to include the liberal canon of political liberties and human rights.[46]

Crawford, looking on, first considers whether the positive law of the *Constitution* – the "text and structure" of the *Constitution* – implements the formal conception of the rule of law. She concludes that the *Constitution* does not, as nothing in the text and structure of the *Constitution* even adverts to the formalist's laundry list of rule of law requirements. As Crawford writes, "the *Constitution* does not expressly impose any of the requirements traditionally associated with the

[41] Joseph Raz, *The Authority of Law* (1979, OUP) 214-18.
[42] Ibid 224-6.
[43] Crawford above n 1, Ch 3.
[44] See Lon Fuller, *The Morality of Law* (1964, Yale); Kristen Rundel, *Forms Liberate* (2013, Hart) chs 1 and 4; Nigel Simmonds, *Law as a Moral Idea* (2008, OUP) chs 4 and 6.
[45] Ibid.
[46] See TRS Allan, *The Sovereignty of Law* (2013, OUP) Ch 3; See also Tom Bingham, *The Rule of Law* (2010, Penguin) ch 7.

formal conception of the rule of law". "The *Constitution* does not require that the law be clear or predictable, and does not forbid retrospective legislation, or hold government actors to the expectations that they may create".[47]

Crawford then turns to consider whether the positive law of the *Constitution* implements the moral conception of the rule of law. Again – working within the standard picture – Crawford finds that the *Constitution* does not. The *Constitution*, Crawford writes, does not guarantee the liberal canon of rights and liberties. Indeed, the Constitution's protection of these rights and liberties is "patchy".[48] Accordingly, the parliament is legally free to enact "truly offensive laws".[49] Or to do away with euphemism: by hypothesis, the parliament is legally free to enact laws that debase our most fundamental rights and liberties. The Commonwealth government could, by hypothesis, legally torture you and I in the streets. Clearly then, ours is not a society that constitutionally guarantees a moral conception of the rule of law. And perhaps that is unfortunate. But on the standard picture, and as Crawford writes, '[i]f the *Constitution* is thought to be inadequate… the accepted method for remedying that inadequacy is to amend the text of the *Constitution* [by referendum].'[50]

B *Problematising Crawford's Argument*

That is the frame of Crawford's argument. But can the argument succeed?

As I have suggested, Crawford's argument bottoms-out not in a theory of interpretation, but in a set of rather bare assertions concerning the law of the *Constitution*. In essence, what is asserted is the "standard picture" of the constitutional division of powers: that picture in which the legislature and executive are free to create legal norms within the limits set by the positive law of the *Constitution*, and in which the judiciary is bound (also by the positive law of the *Constitution*) to give effect to those valid legal norms created by the legislature and executive. That standard picture is the mainstay of Crawford's argument. If the standard picture is accurate, then the judiciary's task must be the simple task of keeping fidelity to the text and structure of the *Constitution* as it is, whatever it is, without regard to what the Constitution's law ought to be. And if that is the task of the judiciary, then the judiciary could only join Crawford in concluding that the Constitution's protection for the rule of law is indirect and severely incomplete; for such is the connotation of the bare text and structure of the *Constitution*.

[47] Crawford above n 1, 82, 100.
[48] Ibid 156.
[49] Ibid 173.
[50] Ibid 156.

There is, however, a difficulty in Crawford's approach. In particular, there is a difficulty in Crawford's reliance upon the standard picture. To bring out the difficulty, it helps to dwell a moment longer upon what the "standard picture" is and is not.

The standard picture is not some conceptual truth concerning the functions of public institutions in modern liberal democracies. Public institutions in liberal democracies often depart from the standard picture, after all.[51] Nor is the standard picture something that is clearly or directly prescribed by the text of our *Constitution*. The Australian *Constitution* does vest the judicial, executive and legislative powers in distinct bodies – however, the *Constitution* does not extensively elaborate upon what these powers entail, or upon how the Constitution's conferrals of power are themselves to be interpreted.[52] Not being a truth about the black-letter contents of the *Constitution*, and not being a conceptual truth either, the standard picture can only be an interpretation of the *Constitution*. But interpretations of the *Constitution* are, as I have argued, post-theoretical. That is, one can only give an interpretation of the *Constitution* after one has an idea of how generally speaking one is to determine the law of the *Constitution*. If the standard picture is post-theoretical in this way, one could only assent to the standard picture once one is satisfied that the standard picture follows from the application of a defensible theory of constitutional interpretation.

That being so, the difficulty for Crawford is that the standard picture of the constitutional division of powers is, famously, not supported by every credible theory of interpretation. The standard picture is therefore not an effective placeholder for deeper theoretical disagreements. Many intelligent people will reject the standard picture precisely because their interpretive theories require them to do so.

For example, consider the theory of Pragmatism – a theory which has been defended in varying forms by Richard Posner, Cass Sunstein, Adrian Vermeule and Oliver Wendell Holmes Jr, among others.[53] According to that theory, the law of a *Constitution* is not positive. There is no law of the *Constitution* which exists like a rock exists. Nor is there any one theory of interpretation which is correct as a matter

[51] Certainly, judicial power in Australia and elsewhere does not conform to the standard picture: see Adrienne Stone, 'Judicial Power – Past, Present and Future – A Response to Professor Finnis', (available at https://judicialpowerproject.org.uk/judicial-power-past-present-and-future-a-comment-on-professor-finnis/); see further Pt III B (3) below.
[52] See ss 1, 61 and 71 of the Constitution.
[53] See Richard Posner, *The Problems of Jurisprudence* (1990, HUP); Richard Posner, *Law, Pragmatism and Democracy* (2003, HUP) 11-13 and ch 1; Adrian Vermeule, *Judging Under Uncertainty* (2006, HUP); Cass Sunstein, *A Constitution of Many Minds* (2011, PUP) Ch 1; Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 461.

of metaphysics, logic, divine law, or anything else. According to the pragmatist, law is simply the name we give to a pluriform activity undertaken by judges in adjudicating disputes.[54] How are judges to undertake that activity when adjudicating constitutional disputes? According to the pragmatist, because there is nothing that the law of the *Constitution* just is, and because there is "nothing that interpretation just is",[55] a judge interpreting the *Constitution* ought to give that interpretation, or apply that interpretive method, which is likely to have the best consequences out in the world, all things considered.[56] If this means adhering strictly to the Constitution's text, so be it. Or if it means reading novel requirements into the *Constitution* or reading the text to mean something other than what it was intended to mean: equally, so be it. The utility calculus will depend on the circumstances, and so different circumstances will call for different interpretive methods and outcomes.

If the theory of pragmatism is to be accepted, then the "standard picture" on which Crawford's argument rests is to be rejected. Furthermore, if pragmatism is to be accepted, then it could easily be that the *Constitution* ought to be interpreted as providing a direct and fairly comprehensive assurance of the rule of law. For on the pragmatist's view, the *Constitution* should be interpreted in that way if it would have the better consequences. Would better consequences flow if the *Constitution* is read as directly and/or robustly guaranteeing the rule of law? One should think: yes, given the appropriate circumstances.[57] But that is a subject for another paper. Needless to say, Crawford did not directly concern herself with the matter, and so has written little that would sway a pragmatist one way or another.

Pragmatism is one example of an interpretive theory that may endorse a close connection between the rule of law and the Australian *Constitution*. A second example – which I will now discuss – is the theory of perfectionism. Because perfectionism is lesser discussed in Australia, I will explain the theory and its implications at slightly greater length.

[54] Richard Posner, *The Problems of Jurisprudence* (1990, HUP) 225.
[55] Sunstein above n 53.
[56] Richard Posner, 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 4.
[57] It is at least certain that a direct, minimum guarantee of a moral conception of the rule of law could enhance overall utility in the right circumstances. Things are clearest at the extremes, so consider an extreme example. If the legislature passes an enactment that is to wreak massive disutility – say, the arbitrary imprisonment and "re-education" of millions of citizens, as is today occurring in Xinjiang China – then it would enhance utility if a) the High Court could declare these enactments Constitutionally invalid and b) the High Court's declarations are viewed as legitimate and are accordingly obeyed. In the circumstances, and all else being equal, if the High Court struck the enactment down as infringing a conception of the rule of law guaranteed by the Constitution, then this would clearly achieve a) above. Perhaps more than any other strategy, it would also achieve b) above.

Perfectionism is a powerful theory, originally advanced by Ronald Dworkin.[58] According to the perfectionist, when a good judge interprets a *Constitution*, the judge will not go about her task as though she were a lexicographer, decoding the meanings of the Constitution's words, and declaring those meanings to be the Constitution's law. But nor will she act as would the pragmatist: a strategic utility maximiser, an economist in robes. The good judge, according to the perfectionist, acts instead as the custodian of a rich and complex social practice: namely our shared constitutional practice, wherein our polity has adopted a *Constitution* and accepted its legitimacy, and wherein the judiciary interprets the *Constitution* and those interpretations are treated as authoritative. Before the good judge interprets the *Constitution*, she reflects on this constitutional practice as a whole, with all its complexity and its history, and she then asks the following question. "Given my role within this practice, what does the practice require me to do in the present case?"[59]

To answer this question, the good judge then goes through the following steps. First, the judge looks upon our constitutional practice as being presumptively valuable, and so an enterprise capable of justification. Second, the judge seeks out the best justification for our constitutional practice – the justification that shows our constitutional practice in its best light. Third, and finally, she determines what the practice requires of her in the present case, now that the practice has been seen in its best light.[60]

If these are the steps that the perfectionist follows, how will a perfectionist go about specifically determining the relationship between the *Constitution* and the rule of law?

First, the perfectionist will look upon our constitutional practice as a whole and presume the practice to be justifiable. At this stage, the perfectionist will simply note the basic structure of our constitutional practice, along with those features of our constitutional practice that seem especially pertinent to the judge's subject: the connection between the *Constitution* and the rule of law. Among other things, she will note that our constitutional practice emphatically departs from the standard picture: that our judges do not take themselves to be "bound by the Constitution's silence", and that our judges frequently do hold the *Constitution* to implement laws not communicated by the Constitution's text or structure.[61] The perfectionist will

[58] Dworkin above n 20, chs 3, 6 and 7; The label "perfectionism" was given to Dworkin's theory after *Law's Empire* was published. See, eg, Cass Sunstein, 'Second Order Perfectionism' (2006) 75 *Fordham Law Review* 2867.
[59] See Dworkin above n 20, ch 7.
[60] Ibid 65-8, 87-100.
[61] See Pt III B below; See also the works of Jeffrey Goldsworthy, who has pointed out that certain foundational features of modern Constitutional law (like the implied freedom of political communication

further note that there are entire departments of judge-made law which constrain legislative and executive power, and which do so in the name of the rule of law. One such department is judicial review of administrative action, and it broadly governs the circumstances in which the judiciary can invalidate decisions made by the executive.[62] Another goes by the name of the principle of legality, and it governs the circumstances in which the judiciary may: a) look upon a piece of legislation which, if interpreted in the normal way, would infringe individuals' fundamental rights and then b) interpret that legislation to instead have legal effects that will not infringe individuals' fundamental rights.[63]

Second the perfectionist will seek to furnish the best justification for our constitutional practice. At the highest level, the best justification for our constitutional practice as a whole must be that it is an enterprise carried on for the purpose of establishing and maintaining just and fair basic institutions.[64] However, when the perfectionist looks at the particulars of our constitutional practice, she will see that they will need to be supplied with a finer-grained justification than that. After all, the particulars of our constitutional practice – the particular form of the *Constitution*, the particular interpretations that have been given of the *Constitution*, the particular activities that are undertaken by the arms of government and asserted to be in compliance with the *Constitution* – could only be justified by a suitably particular conception of what is just and fair.[65]

The perfectionist judge will not hope to articulate precisely the conception of justice and fairness that would best justify and unify the entirety of our

and the separation of powers at the state level) and less foundational features of our Constitutional law (such as the principle that state parliaments cannot pass strong privative clauses) depart from the apparently intended meaning of the Constitution's text: Goldsworthy, above n 18; Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 1; It has also been suggested that the eschewal of the reserved state powers doctrine – a bedrock principle of Australian constitutionalism – departs from the apparently intended meaning of the Constitution's text: *New South Wales v Commonwealth* (2006) 229 CLR 1, 119 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices*'), citing *Victoria v Commonwealth* (1971) 122 CLR 353, 396–7 (Windeyer J) ('*Payroll Tax Case*'). The asymmetries in Australia's separation of powers also arguably cannot be squared with the text and structure of the Constitution – but that is another paper.

[62] Mark Aronson, Matthew Groves, Greg Weeks, *Judicial Review of Administrative Action* (2016, 6th ed); On the asserted connection between the principle of legality and the rule of law, see: *Electrolux* (2004) 221 CLR 309, 329[21] (Gleeson CJ) ('[the principle of legality] is an aspect of the rule of law'). See also the cases collected in Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41 *Monash University Law Review* 329, fns 31-36.

[63] See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372. On the asserted connection between judicial review and the rule of law, see: *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 ('judicial review is nothing more nor less than the enforcement of the rule of law…'); *Plaintiff S157/2002* (2003) 211 CLR 476, [5], [31], [103]; Robert French, 'The Rule of Law as a Many Coloured Dream Coat' (speech, 18 September 2013), 10-13.

[64] Dworkin above n 20, ch 7.

[65] See Jeremy Waldron, 'The Circumstances of Integrity' (1997) 3 *Legal Theory* 1.

constitutional practice: that is the work of a life-time, or of a demigod perhaps.[66] (Although the judge, having been a lawyer for almost a life-time, will have some working theory of the unifying principles that best account for our constitutional practice as a whole). Instead, she will proceed initially by considering those aspects of our constitutional practice which bear a close connection to her subject of interest, the rule of law.[67] She will likely train her attention on the practices of judicial review and the principle of legality, which are asserted to be authorised by the *Constitution*, and to also be instantiations of the rule of law. She will then work parochially to craft the best justification for these practices.[68]

What will she judge to be the best justification for the principle of legality and judicial review? That will partly depend on her moral outlook. However, it is conceivable (I think probable) that her thought will go in the following direction. She may begin by accepting the received view that the practices of judicial review and the principle of legality are instantiations of the rule of law. She may then seek to describe the conception of the rule of law that would best justify judicial review and the principle of legality, and that would therefore show these practices in their best light. As for the conception of the rule of law that she will describe, it will undoubtedly be a moral conception, given that it must justify the principle of legality: a principle that protects rights and liberties in the name of the rule of law.[69] The conception would also be centrally concerned with obviating the abuse of power, given that judicial review is centrally concerned with that end.[70] But otherwise, the judge would fill in the details of the conception, partly by reference to the particular abuses of power that judicial review protects individuals against, partly by reference to the particular rights and liberties that the principle of legality protects, and partly by reference to the judge's own view of what conception of the rule of law is most worthy of our assent.

The conception of the rule of law that the judge does construct – the conception that best justifies those constitutional practices performed in the name of the rule of law – may be called the "constitutional conception" of the rule of law. Having established that the constitutional conception of the rule of law accounts well for a portion of our constitutional practice, the judge will want to take this newfound justification for a portion of constitutional practice, and then assimilate it to the judge's broader working justification for constitutional practice as a whole.

[66] Who Dworkin called Hercules. See Dworkin above n 20, ch 9.
[67] Dworkin above n 20, 250-4.
[68] Ibid.
[69] See fn 62 above.
[70] Paul Craig, *Administrative Law* (6th ed, 2008) 1-034; H.W.R. Wade, Constitutional Fundamentals (1980) 70; In Australia, see also, Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Judicial Review' (2017) 45 *Federal Law* Review 153, 176-9.

That will be a process of reflective equilibrium.[71] And given that other aspects of our constitutional practice are best justified by doctrines of parliamentary supremacy and democratic (as opposed to legal) accountability, the judge is unlikely to conclude that the best justification for our constitutional practice as a whole is simply the judicial enforcement of the constitutional conception of the rule of law. Rather the most flattering story of our constitutional practice will be more nuanced. It will be a story of a great social enterprise, carried on to the end of creating just and fair basic institutions, where justice and fairness are conceived of as requiring that the constitutional conception of the rule of law be maintained, but not absolutely, and only in a way compatible with counterpart "constitutional conceptions" of democracy and parliamentary supremacy.[72]

Third, the judge would reframe her basic question. Before, she asked: "what is the connection between the rule of law and the *Constitution*?" Now she will put that question to herself in a more sophisticated way. She will say:

> In the earlier stages of my analysis, I reached conclusions as to what our Constitutional practice is. I then reached conclusions about the principles of justice and fairness that would best justify and make sense of our constitutional practice as it is. Now, in this final stage, I am to look upon our Constitutional practice in its best light. That is, I am to look at our practice as being carried on in order to uphold those principles of fairness and justice which, in my judgment, do best justify the practice. Moreover, I am to take myself as being bound to decide cases in the way that will best keep faith with and continue our constitutional practice, seen in its best light. With all these premises established, I must now go about the following task. Having been posed the question "to what extent does the Constitution guarantee the rule of law?" I must now determine which answer to that question would best keep faith with and continue our constitutional practice, seen in its best light.

The perfectionist judge would then go about the task she has set for herself. How should she carry out that task, and what should be her final judgment? Suffice to observe, there is a strong chance that the judge's reasoning would run roughly as follows. Already, the judge has determined that our constitutional practice, seen in its best light, is an enterprise concerned with establishing just and fair basic institutions, where justice and fairness is seen as demanding – among other things – certain conceptions of democracy, and of the rule of law. And if that is the nature of our constitutional practice, then ours may be a constitutional practice in which

[71] Dworkin above n 20, 400-3.
[72] For the thesis that our various moral concepts and principles will be compatible when properly interpreted, see Ronald Dworkin, *Justice For Hedgehogs* (2013, HUP).

the *Constitution* is properly interpreted as containing an incomplete but direct guarantee of the (constitutional conception of the) rule of law.

Incomplete, because our constitutional practice – on the above picture – is not just about upholding the ideal of the rule of law. It is also about upholding a sometimes competing ideal of democracy. If ours is a constitutional practice that seeks to accommodate both democracy and the rule of law, then where the two ideals conflict, our constitutional practice will not always insist that the rule of law comes up trumps. And indeed, our practice reflects this. For example, judicial review and the principle of legality operate to conform our legal system to the constitutional conception of the rule of law. However, the presumptions through which judicial review and the principle of legality operate may be displaced by an emphatic enough expression of the democratic will, through legislation.[73]

Direct, because the story of our constitutional practice – on the above picture – is a story in which the constitutional conception of the rule of law operates as a direct check on the legislature and executive. On the one hand, this is because certain of our historical practices – judicial review and the principle of legality – are already best understood as instances where the constitutional conception of the rule of law does directly affect legal rights and obligations.[74]

On the other hand, there is this other consideration. On the above picture, our constitutional practice is one of upholding democracy not as an end in itself, but as a means to embodying a certain conception of what is just and fair. Suppose then that the legislature passes a law so odious as to be an assault on the very principles of justice and fairness that justify our constitutional practice of democratic law-making. Suppose, for example, this democratically enacted law deeply offends the ideas of human equality and dignity which justify our commitment to democracy in the first place. In that situation, our constitutional practice, seen in its best light, would thwart the enactment. For to thwart such an enactment would be consistent with the conceptions of justice and fairness that best account for our constitutional practices, while to recognise and legitimate such an enactment would run contrary to those notions of justice and fairness.

Seen in its best light, how would our constitutional practice thwart the odious enactment? As has been observed, our constitutional practice does already enforce the rule of law as a check against the abuse of power and the infringement of rights and liberties. Our constitutional practice does this through judicial review and the principle of legality. In the novel and terrible situation, we now imagine, that same check might simply be enforced more firmly, and the odious enactment held invalid

[73] *Saeed v Minister for Immigration* (2010) 241 CLR 252, [15].
[74] See footnotes 61-2 above.

as a contravention of the constitutional conception of the rule of law. Such a path forward would have the greatest consistency – in form and in principle – with the path of the law so far.

Or so the perfectionist judge might reason.

C *Legality as a Hard Problem*

In the way that I have just described, certain theories of interpretation may (if we accept them) require us to disagree with Crawford's interpretation of the *Constitution* and may require us to view the *Constitution* as providing a direct and rather comprehensive guarantee of the rule of law. From the pragmatist's perspective, such a guarantee will exist if only it would bring about better consequences than a weaker guarantee. From the perfectionist's perspective, such a guarantee will exist if only it follows from the principles of justice and fairness that best justify and make sense of our constitutional practice as a whole. Though not considered here, there are other popular theories that may require similar conclusions.[75]

Must theories like perfectionism and pragmatism be taken seriously? Absolutely they must. For, major theories like these are the best theories we have. They are the theories that have been produced by the most insightful judges and legal scholars and that have been elaborated most systematically. Moreover, they are the theories that have best survived sustained scrutiny.

Of course, you may nonetheless find fault with the theories. Do you think pragmatism too cynical? Is the theory's consequence-oriented vision of adjudication too far removed from the reality of adjudication? Do you think judges ill-equipped to make the utilitarian judgments that pragmatism requires? Or regarding perfectionism – do you think that that theory is too abstract? Does it wrongly treat judges as grand philosophers, when in fact they are rule-following lawyers? Does it give too much power to unelected judges to decide what the law is?

These criticisms have all been made, and responses to them given.[76] My point for now is simply that one cannot remain neutral as between different theories and hope to give a persuasive interpretation of the relationship between the rule of law and the *Constitution*. As we have seen, credible theories of interpretation may

[75] See, eg, the liberal-democracy reinforcing theory expounded in Stephen Breyer, *Active Liberty* (2008, OUP); Or the common law constitutionalist theory expounded in David A Strauss, *The Living Constitution* (2010, OUP).
[76] For criticisms of perfectionism, see the entries in Justine Burley (ed), *Dworkin and His Critics: With Replies from Dworkin* (2007, Blackwell); For criticisms of pragmatism, see eg Dworkin above n 20, 151-75.

endorse the position that the *Constitution* provides a direct if not substantial guarantee of the rule of law. As such, if one is to defend Crawford's opposing position – that the *Constitution* only guarantees the rule of law indirectly and severely incompletely – one must actively defend some theory of interpretation that supports the position. As a part of that exercise, one would also need to discredit those alternative theories, like pragmatism and perfectionism, that could support a closer connection between the *Constitution* and the rule of law.

IV THE VIEW FROM ORIGINALISM

Crawford has argued that 'the [Australian] *Constitution* does not "guarantee" the rule of law' — 'does not implement the rule of law'.[77] But before this interpretation of the *Constitution* can convince, it must be demonstrated that the interpretation follows from a credible theory of interpretation. That is what I have sought to establish in the preceding discussion. If a theory of interpretation must support Crawford's interpretation of the *Constitution*, we might now enquire: what theory might that be?

In this concluding Part, I introduce the theory of originalism. I seek to show that, if originalism is to be accepted, Crawford's overall argument must also be accepted, and the constitutional protection of the rule of law in Australia must indeed be minimal.

On one view, this is something of a boon for Crawford. Next to pragmatism and perfectionism, originalism is one of the great theories of interpretation. Certainly, it is a theory that has been built up by generations of thinkers, and that persuades many. However, like every theory, originalism has its difficulties. In my own view, which I share in this Part, originalism's difficulties are very substantial. In outlining the difficulties of originalism in this Part, I hope to encourage others to take alternative theories more seriously, and thus to take more seriously the possibility that the *Constitution*, properly interpreted, does provide a direct and fairly comprehensive guarantee of the rule of law.

A *The Originalist Reading of the Constitution*

I begin then by explaining what originalism is. By now, originalism has been reformulated and finessed by so many thinkers, over so many decades, that the theory has frayed at the edges – has come to have many subtly different versions,

[77] Crawford above n 1, 170, 202.

which modern academics label and distinguish between.[78] The core thesis of originalism, however, remains stable and clear enough, and can be cleanly stated.

Perhaps surprisingly, the originalist thesis begins not with any claim about laws, judges or constitutions, but with some simple observations about language.[79] The originalist first observes that – pace humpty dumpty – words have definite and objective meanings. These meanings, which we can find in dictionaries, are what we may call the literal meanings of words. The originalist then observes that, in using words, speakers often intend to communicate meanings other than the literal meanings of the words that they use. For example, if I mean to be sarcastic, I might say "Gee, this dish is terrible!", when I actually intend to communicate something like "this dish is fantastic!". The subjectively intended meaning of a sentence (here: "this dish is fantastic!") may be called the sentence's speaker meaning.

Finally, the originalist observes that, when we listen to a speaker, we will try to ascertain their speaker meaning – the meaning that the speaker intended to communicate. However, what the speaker appears to have intended, and what the speaker did intend, may be two separate things. For example, if I do say to you "Gee, this dish is terrible!", my speaker meaning may be that "this dish is fantastic!"; but if my tone of voice does not betray my sarcasm, and if nothing about our shared context suggests that I am being sarcastic, then you will – tragically, but reasonably – take me to have intended to mean just what I said: that the dish is terrible. This apparently intended meaning, which may differ from the speaker meaning and literal meaning of a sentence, may be called a sentence's utterance meaning. Importantly, the utterance meaning of a sentence is objective: it is the meaning that a reasonable person would take to be the intended meaning of an utterance, given the context in which the utterance was made.[80]

Having made these distinctions, the originalist returns their attention to the realm of laws, judges and constitutions, and makes the following claims. The originalist claims that the law of a *Constitution* is the utterance meaning of the *Constitution*. In other words, the law of the *Constitution* consists not in the Constitution's literal meaning, or even in the meaning that the framers subjectively intended to convey through the Constitution's text. Rather, the law of the *Constitution* resides in the linguistic meanings that the framers appear to have intended to communicate through the Constitution's text. The originalist then

[78] See Cass Sunstein, 'Originalism' (2018) 93 *Notre Dame Law Review* 1671, 1673-80; Lawrence Solum, 'What is Originalism? The Evolution of Contemporary Originalist Theory' (April 28, 2011) 27-37. Available at SSRN: https://ssrn.com/abstract=1825543 or http://dx.doi.org/10.2139/ssrn.1825543 .
[79] Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft (ed) *The Challenge of Originalism* (2011, CUP) 45-51.
[80] Ibid.

claims that, because the utterance meaning of the Constitution's text is objective (remember, utterance meanings are objective) the law of the *Constitution* is also objective, and so exists independently of the interpretations that judges give to the *Constitution*.[81]

What does all this mean for judges? According to the originalist, it means that judges, in interpreting a *Constitution*, are limited to performing two roles. On the one hand, where the apparently intended meaning of the *Constitution* is clear, the judge must treat this meaning as being the law of the *Constitution*.[82] If the judge instead declares the law of the *Constitution* to be something other than what is communicated by the Constitution's text, then the judge's interpretation will – on the originalist view – simply be incorrect. Worse, if the judge knowingly holds the law of the *Constitution* to be other than what the *Constitution* says, then the judge may have simply lied about what the law is (originalists don't pull punches).[83]

On the other hand, originalists do understand that not every constitutional dispute can be settled by reference to the linguistic meaning of the Constitution's text. Afterall, the text may be vague, may leave certain matters unaddressed, or may even contain drafting errors and internal contradictions. Accordingly, originalists accept that judges may perform an additional role of occasionally supplementing the meaning of the constitutional text by establishing common law doctrines that remove the legal uncertainty.[84]

However, originalists take this supplementing function to be tightly circumscribed. The originalist insists that: 1) judges may only supplement the meaning of the *Constitution*, and may not fail to give effect to the meaning of the *Constitution* to the extent that that meaning is clear;[85] 2) judges may only supplement the meaning of the *Constitution* to the extent that it is necessary for the Constitution's efficacy;[86] and 3) in supplementing the original meaning of the *Constitution*, judges must do so in the way that is most consistent with the spirit of the *Constitution* as it is written – judges must not opportunistically fill gaps in the *Constitution* in ways that reflect their personal policy preferences.[87]

[81] Ibid.
[82] Ibid 60-1.
[83] See Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: *The Coxford Lecture*' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305.
[84] See Lawrence Solum,'Originalism and Constitutional Construction' (2013) 82 *Fordham Law Review* 453, Pt I.
[85] Goldsworthy above n 79, 60-1.
[86] Jeffrey Goldsworthy, 'Clarifying, Creating and Changing Meaning' (2013) 14 *German Law Journal* 1279, 1281-2.
[87] Randy Barnett and Evan Bernick 'The Letter and the Spirit: A Unified Theory of Originalism' (2018) 107 *Geoergetown Law Journal* 1, 32-6.

B *Originalism Secures Crawford's Argument*

What I have just described is the positive thesis of originalism. It is, if you like, originalism's basic prescription for judges. What I have yet to describe are the normative foundations of the originalist's prescription: the deeper reasons that originalists give for insisting that the Constitution's linguistic meaning ought to be treated as its law, and for insisting that the interpretive powers of judges ought to be so cabined.

As one would expect, the reasons that originalists give are reasons of democracy, judicial accountability, and analytic clarity; and it will be convenient to consider these reasons in a moment. For now, however, I want simply to show that the originalist's prescription (described above) would – if accepted – steadfastly validate Crawford's argument that the Constitution's protection of the rule of law is indirect and severely incomplete.

It should first be noted that originalism validates a number of Crawford's "standard picture" assumptions. First, originalism entails what we can call the positivity thesis: the thesis that the *Constitution* is positive in the sense that its law is one thing, and its merits another. For according to the originalist, the law of the *Constitution* is the law posited by the constitutional framers and expressed by the apparently intended meaning of the Constitution's text. As such, the law of the *Constitution* (its linguistic meaning) will be one thing, and its merit another.

Second, originalism supports the cabined judiciary thesis: the thesis that, under the positive law of the *Constitution*, the judicial function is essentially the limited epistemic one of describing and applying the positive law validly created by the framers, the people, the legislature and the executive. Originalism supports this thesis because a plausible argument can be made that s 71 – in stating that "the judicial power vests" in Ch III courts – apparently intends to confer very limited powers of constitutional interpretation upon the judiciary. The argument I refer to has been perfected by the Australian originalist Jeffrey Goldsworthy.[88] In its frame, the argument goes: s 128 of the *Constitution* provides that "the *Constitution* shall not be altered except" by the people; accordingly when the framers conferred the judiciary with "judicial power", they should not be taken to have conferred a power to change the law of the *Constitution* through creative or constructive

[88] Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 683-90.

interpretations.[89] That the framers apparently intended to limit the powers of the judiciary can also be inferred from the tripartite separation of powers.[90]

Thirdly, originalism supports the harmful powers thesis: the thesis that, within an area prescribed by the positive law of the *Constitution*, the legislature and executive are free to alter our legal rights and obligations in ways that deeply offend the standards of the rule of law, including those rights and liberties said to be protected by a moral conception of the rule of law. Originalism comports with this thesis partly because, although the *Constitution* seems to confer the legislature its powers on the condition that they are exercised for the "peace, order and good government of the people", these words were not, at the time of the Constitution's framing, understood to be words of limitation.[91] According to the originalist then, they are not words of limitation, for the framers cannot be taken to have intended them to be.[92] The originalist will then add that there are no other words in the *Constitution* which evince an apparent intention to restrain the legislature or the executive from using their powers in ways that infringe basic rights and liberties. It follows, for the originalist, that the legislature and executive can legally commit grave wrongs against the Australian people.[93]

To now step back and see the bigger picture: because originalism supports the positivity and cabined judiciary theses, originalism precludes the possibility that judges may legitimately interpret a guarantee of the rule of law into the *Constitution* on normative grounds. Then, because originalism supports the harmful powers thesis, it nails the coffin of any purported constitutional guarantee of a moral conception of the rule of law.

On the other hand, originalism supports the positive conclusion that the *Constitution*, on its correct interpretation, does not guarantee the rule of law. According to originalism, the law of the *Constitution* is its apparently intended linguistic meaning. And it is clear enough from the words of the *Constitution*, read in their historical context, that the framers did not intend for the *Constitution* to communicate a guarantee of the rule of law.[94]

V THE DISCONTENTS OF ORIGINALISM

[89] Ibid.

[90] Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 20.

[91] Goldsworthy above n 88, 681.

[92] Ibid 681 ff.

[93] See Goldsworthy above n 90, 47-9.

[94] Crawford above n 1, ch 4.

In the way just described, Crawford's argument can be defended on originalist grounds. With its new originalist foundations, Crawford's argument will seem more complete. The argument will now run as follows:

The law of the *Constitution* is its apparently intended meaning. Considering the Constitution's text in its historical context, the framers did not apparently intend to communicate through the Constitution's text a direct or complete guarantee of any conception of the rule of law. Therefore, the *Constitution* does not guarantee any conception of the rule of law.

Along with its new strength, however, Crawford's argument will gain a new vulnerability. Now premised upon the theory of originalism, Crawford's argument might live or perish by the theory. At the very least, if it turns out that originalism is a defective theory, then Crawford's argument will need to find an alternative supporting interpretive theory. Yet as we noted in the previous section, it is clear that the major alternative theories will not necessarily support Crawford's argument.

The question arises then: is originalism a defective theory? If it is a good theory, then for the reasons given by Crawford, the Australian *Constitution* almost certainly does not guarantee the rule of law. If originalism is an invalid theory, on the other hand, there will at least remain the possibility that the *Constitution*, on its best interpretation, does give direct effect to a comprehensive conception of the rule of law.

A *The Case for Originalism*

There is, undoubtedly, a strong case to be made for originalism. Ipso facto, there is a strong case to be made that the *Constitution* does not implement the rule of law. But while the case for originalism persuades some, it does not persuade others. Let me now state the originalist's case, and then afterwards explain why, in my view, we ought not to be persuaded.

There are, in effect, two varieties of argument for originalism, and one variety is more promising than the other. The less promising variety of argument is a metaphysical argument, and it holds the bold aspiration of proving that originalism just is the one true and correct method of interpretation. The argument goes roughly as follows:

> It is in the nature of all linguistic communication that the speaker (or writer as it may be) will try to convey some intended meaning, and that the audience will cooperatively try to grasp that intended meaning. Because the *Constitution* is an instance of linguistic communication, it follows that judges – who form part of the Constitution's audience – must

> cooperatively grasp the Constitution's intended meaning. If judges do anything else, then they are not truly "interpreting" the *Constitution* at all, because – on the above view of things – the interpretation of a linguistic text just is to assess its apparently intended meaning.

While some originalists – most notably Richard Ekins – have sought to make this metaphysical argument,[95] most originalists have wisely declined to rest upon it.[96] The argument is a non-starter. As Sunstein has observed, the argument proceeds by insisting upon a particular definition of the word "interpretation".[97] This is firstly problematic because, surely, the word "interpretation" denotes a family resemblance concept, and so is not susceptible to any simple definition. But secondly, and more importantly, it is altogether unclear how the definition of a word could impact upon what judges, in interpreting a *Constitution*, ought actually to do. A judge (against her better judgment) could grant that "interpretation" refers solely to the activity of recovering speaker intentions, and yet it seems she would still remain at square one. She would be no better prepared to answer her fundamental question: "How should I determine the law of the *Constitution*? Should I simply engage in the activity of recovering speaker intentions? Or should I determine the law of the *Constitution* in some other way?".[98]

Owing to the weakness of the above metaphysical argument, originalists have tended to rely more heavily on moral-political justifications for originalism; and here we come to originalism's second, more promising variety of justification. There are two major strands of moral-political justification for originalism. On the one hand, there is an argument from democracy. On the other hand, there is an argument from liberty.

1 *The Argument for Democracy*

The argument from democracy focusses initially upon the democratic origins of a *Constitution*. In Australia, the argument begins by observing that the Australian *Constitution* was adopted via "reasonably democratic processes".[99] In particular, the *Constitution* was approved by the electors of the various colonies, prior to being passed into law by the parliament of the United Kingdom.[100] For this reason, it may be said, the original meaning of the Australian *Constitution* has some democratic pedigree. Certainly, to observe the original meaning of the *Constitution* is, in a

[95] Richard Ekins, 'Objects of Interpretation' (2017) 32 *Constitutional Commentary* 1.
[96] See eg Lawrence Solum, 'The Constraint Principle: Original Meaning and Constitutional Practice' (April 13, 2018) 80-1. Available at SSRN: https://ssrn.com/abstract=2940215 or http://dx.doi.org/10.2139/ssrn.2940215; Keith Whittington 'Originalism: A Critical Introduction' (2013) 82 *Fordham Law Review* 375, 395.
[97] Cass Sunstein, 'Formalism in Constitutional Theory' (2017) 32 *Constitutional Commentary* 27.
[98] Ibid.
[99] Goldsworthy above n 88, 689.
[100] Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (2010, Hart) Ch 1 Pt II.

sense, to observe the collective will of a significant proportion (effectively the white male proportion) of a people that once lived here.

Having established that the *Constitution* has some democratic pedigree, the originalist will then point out that the *Constitution* has a further democratic virtue. S 128 of the *Constitution* vests in the people of Australia the exclusive power to change the *Constitution*. This, it is said, is a gift of extraordinary significance. It is nothing less than the gift of ultimate self-governance: the power of a people to collectively and ultimately determine how their affairs will be ordered under law.

The originalist now comes to the heart of their argument from democracy.[101] The originalist first argues that the Constitution's gift of ultimate self-governance is of immense moral value, because collective self-governance (i.e. democracy) is what allows individuals' interests to be represented equally and fairly in the process of collective decision making. The originalist then argues that, owing to this moral importance of constitutional self-governance, judges come to be bound by two moral constraints when interpreting the *Constitution*. On the one hand, judges are morally bound to actively respect and uphold the *Constitution* as being an instrument of and by the people, and so a vehicle for self-governance. On the other hand, they are morally bound not to unilaterally change the *Constitution*, for to do so would be to rob the people of the gift of self-governance, and to infringe the principle of human equality that self-governance protects.

In the final act, it is argued that originalism uniquely satisfies both of the above moral constraints, and that judges are therefore morally bound to practice originalism. On the one hand, originalism is said to satisfy the first moral constraint by requiring judges to treat the *Constitution* as an expression of a collective will deserving of obedience. By ensuring that judges do treat the *Constitution* as an authoritative expression of the polity's will, originalism uniquely ensures that the law of the *Constitution* will in fact be determined by the polity's will, such that the *Constitution* will remain an effective vehicle for self-governance. On the other hand, originalism satisfies the second moral constraint in that it suitably cabins judges' powers. As the argument goes, originalism prevents judges from substituting their own will for that of the polity, and from determining the law of the *Constitution* by reference to the judges' own parochial beliefs and values.

1 *The Argument for Liberty*

The argument from liberty is related to the argument from democracy, but is to be distinguished.[102] The argument from liberty fixes upon the fact that, if a polity

[101] Here I try to capture the essence of the argument. But for particular renditions, see: Goldsworthy above n 83, Pt IV; Whittington above n 96, 398; Solum above n 96, 73-5.
[102] See Solum above n 96, Pt IV A.

commits to originalism, then the polity will be committed to viewing the *Constitution* as having an objective law which exists independently of the interpretations that judges give to the *Constitution*. Accordingly, the argument goes, so long as a polity commits to originalism, the polity will be given a yard stick against which to criticise judicial interpretations of the *Constitution*. That is, if a polity commits to originalism, judges may be held accountable to the law, and thus the rule of law may finally ascend over judges.[103]

What has this to do with liberty? The originalist argues that if the above state of affairs is not achieved, there will exist the risk of judicial tyranny. If judges are freely able to eschew originalism and are able to determine the law of the *Constitution* on grounds other than the Constitution's objective linguistic meaning, then the exercise of constitutional interpretation will lose its objectivity. The law of the *Constitution* might then become whatever judges will it to be and, in that situation, the people will cease to be ruled by the law. Instead, they will be ruled by the will of judges.

In such a situation, the fear is not so much that judges will turn despotic and deprive us of our basic "negative liberties": our liberties to be, to move about unmolested, to speak and associate, and so on. Judges lack a standing army, and so haven't the coercive powers to truly oppress a population. The originalist's fear, rather, is that in wresting control of the Constitution's laws, judges will have deprived us of our so called "republican liberty": our status as individuals who are self-governing, and who are not dominated by the wills of others.[104]

B *The Case against Originalism*

Those at least are originalism's two most powerful, and most common justifications.[105] But are the justifications adequate? Do they establish that judges are in fact morally bound to practice originalism? I believe not. In part this is owing to inadequacies in the originalist's arguments from democracy and liberty. And in part it is because originalism struggles to contend with certain further objections. As I will later suggest, because originalism faces these difficulties, there remains a real possibility that the most defensible theory of interpretation is a non-originalist theory, and that our *Constitution*, on its best interpretation, does provide a direct and fairly substantial guarantee of the rule of law. It is in order to bring us to that conclusion that I now elaborate upon the discontents of originalism.

[103] Ibid.
[104] Ibid; see also Steven Calabresi, 'On Originalism and Liberty' (2015-2016) *Cato Supreme Court Law Review* 17; Ilya Somin, 'How Constitutional Originalism Promotes Liberty' (available at: https://www.lawliberty.org/liberty-forum/how-constitutional-originalism-promotes-liberty/).
[105] Although other justifications have been given too. See Whittington above n 96, 397-9.

1 *Testing the argument from democracy*

First, reconsider the argument from democracy. According to that argument, the *Constitution* has some democratic pedigree and, in virtue of s 128, is also a vehicle for democratic self-governance. Because originalism uniquely respects the Constitution's democratic pedigree and maintains the Constitution's effectiveness as a vehicle for democratic self-governance, judges are said to be morally bound to practice originalism.

The first difficulty (a relatively minor difficulty) with this argument is that the *Constitution* of Australia does not have a democratic pedigree, or at least none of moral significance. It is true that white men, and white women in South Australia, were permitted to vote on the *Constitution*. However, it is also true that most white women, and some indigenous people, in the colonies were not permitted to vote.[106] A vote in which most women and some indigenous people are arbitrarily excluded on grounds of sex and race is a procedure that does not respect – that indeed disrespects – the principle of human equality, such that the procedure cannot be considered democratic in any morally significant sense.

I say this is a minor difficulty for originalists because, even if the *Constitution* lacks a morally significant democratic pedigree, the originalist can still argue that, owing to s 128, the *Constitution* retains the democratic virtue of being a serviceable vehicle for democratic self-government. From there originalists can argue that because only originalism will preserve that democratic virtue of the *Constitution*, originalism must be practiced.

However, there seems to be difficulties with that remaining line of argument. The major difficulty with the argument is that it seems to treat democracy as an unqualified good, and one that judges must therefore do their part to maximise, irrespective of other considerations. But that is not a defensible view. Some do defend the position that democracy has some intrinsic value.[107] For the most part, however, democracy is to be cherished for its instrumental value.[108] Underlying our commitment to democracy is our belief that it helps us to achieve other valuable things, such as a government that serves and that does not oppress its people,[109] a

[106] On women's sufferage at the time of federation, see Helen Irving, 'Who Are the Founding Mothers? The Role of Women in Australian Federation" (Papers on Parliament No 25) available at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/link.aspx?_id=B9378B5C2AB54D38A3C993BF4F182AA8&_z=z; on the political position of indigenous peoples at the time of federation, see, eg, Bain Atwood and Andrew Markus, *Referendum: Race, Power and the Australian Constitution* (2007, AIATSIS) ch 1.
[107] Carol Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economics and Society* (1988, CUP) 45-85.
[108] Amartya Sen, *Development As Freedom* (1999, Knopf), 152.
[109] Richard Posner, *Law, Pragmatism and democracy* (2005, HUP) ch 5.

flourishing civic life that enriches the character of its participants,[110] and a process of collective decision making that gives political legitimacy to the state.[111] On the other hand, because we see democracy as having this instrumental value, we also recognise that democracy should not be practiced in its purest form, or to the greatest possible extent, if this will diminish the instrumental value of democracy. To give the obvious example: we practice representative rather than pure democracy, because pure democracy would probably lead to a precipitous decline in our collective security and welfare.

If judges, in interpreting the Australian *Constitution*, were to adhere to originalism, they would certainly be fostering a purer form of democracy – one in which the people are relied upon to update and cure defects in their own *Constitution*. However, in fostering this purer democracy, it would appear that the judges would be fostering a form of democracy that has a diminished instrumental value. By contrast, a non-originalist interpretation of the *Constitution* may be less purely democratic but may achieve more of democracy's instrumental values.

For example, one of democracy's instrumental values is that it enhances the legitimacy of the state. Yet, given the current form of the Australian *Constitution*, an originalist interpretation of the *Constitution* will tend to decrease the legitimacy of the state.[112] The reason for this is that, on an originalist reading, the Australian *Constitution* essentially fails to protect our basic rights and liberties, and creates the conditions for a majority to infringe upon the rights and liberties of a minority. And yet, a commonly accepted measure of a state's legitimacy is the security it gives to the fundamental rights and liberties of all its citizens.[113] On the other hand, a non-originalist interpretation of the *Constitution* may hold that the *Constitution* does protect certain fundamental rights and liberties, thus improving the legitimacy of the state.[114]

[110] John Stuart Mill, *Considerations on Representative Government*, (Prometheus Books, 1991) Ch 3.
[111] See Jeremy Waldron, 'The Core Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1386-1394.
[112] Interestingly, some American originalists argue that originalism ought to be practiced in the US because the US Constitution, with its bill of rights, does establish the framework for a just society, such that judges are given reason not to interfere in the Constitution's originally intended scheme. The same logic points away from the legitimacy of originalism in Australia, where there is no constitutional bill of rights. See: Randy Barnett, 'An Originalism for Non-Originalists' (1999) 45 *Loyola Law review* 611, 636-43.
[113] See eg Allen Buchanan, 'Political Legitimacy and Democracy' (2002) 112 *Ethics* 689.

[114] Non-originalist theories like pragmatism and perfectionism are also asserted to be consistent with democracy. For an extended argument that reconciles pragmatism with democracy, see Richard Posner, *Law, Pragmatism and Democracy* (2004, HUP); For the perfectionist's commitment to democracy, see: Ronald Dworkin, *Freedom's Law* (1997, HUP) 123 ('[a] constitution of principle, enforced by independent judges, is not undemocratic').

There is then a weightier example. Another of democracy's instrumental values is that it may enhance the public welfare. However, an originalist interpretation of the *Constitution* might diminish the public welfare. This is partly because originalism separates what the law is from what it ought to be, and so inherently is more liable to giving the *Constitution* legal effects that, all things considered, a *Constitution* ought not to have.

In further part, originalism may diminish the public welfare because the people may not be able to discharge the unusual responsibilities that originalism would place on them. On the originalist interpretation of the *Constitution*, the Australian people under s 128 must take direct responsibility for controlling, updating and repairing the *Constitution*, in a way that we (the Australian people) are not required to do with respect to legislation. In the domain of legislation, we permit the state to exercise authority over what the law will be. As Raz explains, we give the state this authority because we accept that the state often knows better than we do what we have most reason to do, individually or collectively. (e.g. the state likely knows better than you or I where, when and how we have reason to build dams, administer vaccines, raise armies, and so on). In this way, by exercising authority, the state provides a service to the people.[115]

In the domain of the *Constitution*, it has been judges who have long provided the "service" of authority. That is, Australian judges have broadly taken a non-originalist approach to the *Constitution*, allowing the judges to determine the law of the *Constitution* on normative grounds, and to improve the Constitution's efficacy, relevance and legitimacy over time.[116]

A significant problem with originalism, then, is that it would radically and suddenly deprive the people of the service of authority. Bereft of this service, the people are unlikely to maintain and improve the *Constitution* in the way that they have most reason to do, for three reasons. First, there are enormous transaction costs involved in bringing a proposition to a referendum, and then conducting a vote. Second, "alarming[ly] few" Australians know of the contents, workings or significance of our *Constitution*,[117] and so cannot necessarily be entrusted to make good judgments regarding its design. And third, when Australians come to cast a vote at a referendum, they are liable to be "rationally ignorant" concerning the subject matter of the vote. That is to say, given the limited impact of each

[115] Joseph Raz, *Between Authority and Interpretation* (2009, OUP) ch 5.
[116] For examples, see subsection 3 below.
[117] A claim made on the Constitution Education Fund Australia website: http://www.cefa.org.au/about-constitution-education-fund

individual's vote, individuals will act rationally in not investing time or energy in informing themselves on the subject matter of the referendum.[118]

To bring the discussion to a point: if originalism will achieve less of democracy's instrumental values than non-originalism, it is hard to see how judges could be morally compelled to practice originalism for reasons of democracy. Given the extent to which originalism is likely to detract from such things as the public welfare, and the legitimacy of the state, it seems reasonable to expect that a non-originalist approach to the *Constitution* – one that respects democracy but that does not strive for pure democracy – may better achieve democracy's instrumental values.

2 *Testing the argument from liberty*

What of the argument from liberty? According to that argument, if judges do not practice originalism, judges will be able to conform the law of the *Constitution* to their will. Then, Australians might be governed not by law, but by the will of judges, and so judges will diminish Australians' so-called republican freedom: our freedom from being dominated by another's will. Upon re-examination, this argument is also troubled.

First, the argument seems to be that only originalism can render the law of the *Constitution* objective and thus bring judges beneath the rule of law. However, that seems untrue. It is true that originalism does render the law of a *Constitution* objective. But it is not true that non-originalist theories necessarily fail to render the law of the *Constitution* objective. For example, suppose that judges eschew originalism, and instead commit to this alternative theory:

The morality theory: the law of the *Constitution* is whatever judges ought morally to declare it to be, all things considered.

According to such a theory, claims about the law of the *Constitution* will not be descriptive claims (as they would be under originalism). Rather they will be moral claims. But moral claims, like descriptive claims, are objective: they may be true or they may be false. (Is it wrong to wantonly injure another? Ceteris paribus, yes. Is it wrong to walk down the street? Ceteris paribus, no).[119] Perhaps originalists would wish to take up a radical position, and deny the objectivity of morality. But originalists cannot coherently do so; for as has been noted, originalists typically justify their own theory on moral grounds, and so presuppose that moral claims may be true. So the originalist must accept that, when the judiciary and the public subscribe to a non-originalist theory of constitutional interpretation, the judiciary

[118] Ilya Somin, *Democracy and Political Ignorance* (2016, Stanford University Press) Ch 3.
[119] On the objectivity of morality, see Matthew Kramer, *Moral Realism as a Moral Doctrine* (2009, Wiley).

and the public may still have an objective yardstick against which to evaluate the correctness of constitutional interpretations. That yardstick will be morality.

Second, in the context of the Australian *Constitution*, originalism may exacerbate threats to our republican freedom posed not by the judiciary, but by the executive and legislative arms of government. On an originalist reading of the Australian *Constitution*, legislators do substantially dominate the Australian people, for legislators retain the legal right to enact legislation that will infringe the basic rights and liberties of Australians.[120] Similarly, on an originalist reading of the *Constitution*, state legislatures are probably able to enact privative clauses that prevent judicial review of the decisions made by state bureaucrats, thus permitting state bureaucrats to determine the legal rights and obligations of Australians according to those bureaucrats' arbitrary whims.[121] This would indeed diminish the republican liberty of Australians.

3 *Originalism does not fit our practices*

In the preceding sections, I have challenged the core arguments for originalism. Now I wish to briefly explore what I take to be a fatal, positive objection to adopting originalism in Australia. The objection is that originalism is so foreign to Australia's actual traditions of constitutional adjudication that originalism cannot be a plausible account of those traditions. If Australian constitutionalism is a cathedral, originalism is not one view of the cathedral. Originalism is a lament – can only be a lament – that the cathedral was not differently constructed.

The first matter to be observed is that the High Court has often defied or departed from the original meaning of the Constitution's text in order to ensure that the law of the *Constitution* will support important contemporary developments in the functions and workings of government. For example, consider the origins of the so-called "nationhood power". Over the course of the 20th century, it became apparent that the federal legislature and executive were passing and administering laws that were essential for the good government of Australia, but that were not explicitly authorised by the text of the *Constitution*. These laws pertained to such things as internal security and protection of the state, the conduct of scientific and technical research, inquiries and advocacy in relation to matters of public health and fiscal responses to economic crises.[122]

[120] On the fallacy that democratically elected legislators cannot deprive individuals of their republican freedom, see Matthew Kramer, 'Freedom and the Rule of Law' (2010) 61 *Alabama Law Review* 827, 842-44.
[121] Goldsworthy above n 18, 93-104.
[122] See Leslie Zines, *The High Court and the Constitution* (5th ed, Federation Pres, 2008) 411.

Nothing in the Constitution's original meaning would suggest that the Commonwealth government is empowered to govern with respect to scientific research, financial crises and so on. Accordingly, an originalist with the courage of her convictions must claim that the federal government is not constitutionally permitted to govern in these areas, even if that means catastrophe for the Australian people. The Court, however, has refused to treat the *Constitution* as a suicide pact (to borrow a phrase), and has instead acted pragmatically. The Court has interpreted the *Constitution* as empowering the executive and legislature to "engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation".[123] This "nationhood power" is asserted to include the power to govern with respect to scientific research, economic crises, and so forth, and it is asserted to be an interpretation of the constitutional text.[124] The power is said to be derived as an implication arising from s 61 (which grants executive power) and s 51 (xxxix) (which grants the legislature power to legislate in respect to matters incidental to the grant of executive power).[125] But to be clear, the nationhood power cannot be said to have its origins in an originalist interpretation of the Constitution's text, because nothing in the Constitution's text appears to linguistically communicate the power's existence.

There are then further instances where the High Court has departed from the Constitution's original meaning so as to prevent the *Constitution* from reeling-back desirable developments in the functions and workings of government. For example, despite the tripartite division of powers communicated by the Constitution's original meaning, the Court has interpreted the *Constitution* as permitting the executive to exercise delegated legislative powers.[126] Had the Court not interpreted the *Constitution* in this way, Australia could not have joined the other nations of the world in transitioning to the regulatory state.[127] Then there are sundry smaller examples. For instance, although a jury was likely understood by the founders to mean a jury of men, the right to a trial by jury in the *Constitution* has not been interpreted that way;[128] and although the founders would not have viewed the United Kingdom as a "foreign power" for the purposes of s 41(i) of the *Constitution* (which disqualifies those "under any… allegiance, obedience or adherence to a

[123] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397 (Mason J) ('*AAP Case*').
[124] Zines above n 122, 411, citing Barwick CJ, Gibbs, Mason and Jacobs JJ from *AAP Case* (1975) 134 CLR 338.
[125] *AAP Case* (1975) 134 CLR 338 at 397.
[126] *Victorian Stevedoring v Dignan* (1931) 46 CLR 73.
[127] Ibid, 117-18 (Evatt J).
[128] See *Eastman v The Queen* (2000) 203 CLR 1, 97-8 (Kirby J).

foreign power" from sitting in parliament), and yet the Court has held that the United Kingdom is a foreign power for the purposes of the section.[129]

These are all instances in which the *Constitution* has been interpreted in a non-originalist way so as to ensure that the *Constitution* conforms with and supports welcome social changes. Together, they demonstrate one respect in which Australian constitutionalism is not originalist. Namely, the Australian *Constitution* for the most part maintains its relevance and serviceability over time not through referenda, but through non-originalist judicial interpretations.

There is then a second aspect of Australian constitutionalism which jars with the originalist's thesis. Here I have in mind those many instances where the *Constitution* has been interpreted in a non-originalist way to the end of improving the justice and legitimacy of our public institutions. For example, the High Court has interpreted the *Constitution* as providing: that state and federal legislatures cannot impede freedom of political communication;[130] that there is an effective separation of judicial power at the state level;[131] and that state parliaments cannot legislate strong privative clauses preventing the judicial review of administrative action.[132] None of these settled doctrines are communicated by the apparently intended meaning of the Constitution's text. And so, none are consistent with the originalist's thesis, as at least one originalist has argued at length.[133]

Then there are other examples. Members of the High Court have held that the race power (which, under s51(xxvi) of the *Constitution*, allows the Commonwealth legislature to pass laws with respect to 'the people of any race for whom it is deemed necessary to make special laws') is limited, in that it cannot be "manifestly abused".[134] Yet the apparently intended meaning of s51(xxvi) does not communicate this limitation.[135] The Court has also interpreted s75(v) of the *Constitution* as establishing a minimum provision of judicial review which attenuates the powers of the Commonwealth legislature to prevent judicial review of Commonwealth administrative action.[136] And here again, no case has been made (and it seems no convincing case could be made) that the apparently intended

[129] *Sue v Hill* (1999) 199 CLR 462.
[130] *Australian Capital Television c Commonwealth* (1992) 177 CLR 106.
[131] Kable v Director of Public Prosecutions (NSW)(1996) 189 CLR 51.
[132] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
[133] See Goldsworthy above n 61; Goldsworthy above n 18; See also the views of James Allan expressed in James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary' (2009) 33 *Melbourne University Law Review* 1032, 1041.
[134] *Kartinyeri* (1998) 152 ALR 540, 567 (Gummow and Hayne JJ); see also Kirby J at 596–8.
[135] Alexander above n 19, 496-8.
[136] *Plaintiff S157/2002 v Commonwealth (*2003) 211 CLR 476, 513.

meaning of the text of s75(v) communicates such a guarantee. One can think of further examples yet.[137]

If our established practices of constitutional interpretation are not originalist, then originalism faces a strong Burkean objection. Because much of our constitutional practice offends originalism, originalism would require us to radically reform our constitutional practice. But given that our constitutional practice is not seriously defective as it stands, and so long as the defects in our practice can be resolved from within the practice, it is not clear that we should move our allegiance away from our present constitutional practice, and to a novel and radical theory of how our constitutional practice instead ought to be. For as Burke observed, 'it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society…'. [138]

Certain non-originalist theories may not have this problem, for they may beable to account for, rather than undermine the basic features of our constitutional practice. Pragmatism, for example, may account for the above-listed interpretations of the *Constitution* on the grounds that they were credible judgments about what was best for Australians, all things considered. Perfectionism – to use our other example – may account for the above-listed interpretations on the grounds that they were judgments about the interpretations that would keep faith with the principles of justice and fairness that best justify our constitutional practice as a whole.

VI CONCLUSION

Does the *Constitution* guarantee the rule of law? In this article, I have argued that a person's answer may depend on the interpretive theory to which that person is committed. If one commits to the theory of originalism, one will have grounds to give the answer that Crawford gives. That is, one will have grounds to argue that the *Constitution* provides merely an indirect and severely incomplete guarantee of the rule of law. On the other hand, the theory of originalism is contestable, and faces the difficulties that I have outlined. Moreover, there are competing theories of interpretation that, if accepted, could easily support the conclusion that the *Constitution*, on its best interpretation, in fact provides a direct and strong guarantee of the rule of law. The kind of guarantee that could be invoked in the High Court

[137] For example, it is unclear how the High Court's jurisprudence on intergovernmental immunities could be justified on originalist grounds. See the line of decisions collected in Zines above n 122, ch 14.
[138] Edmund Burke, 'Reflections on the Revolution in France' in Isaac and Kramnick (eds) *The Portable Edmund Burke* (1999, Penguin) 451.

to strike down legislation that contravenes the standards set by some particular conception of the rule of law.

What conclusion can be drawn from this? Only that, before we can say whether the *Constitution* guarantees the rule of law, we have some deeper questions of theory to address.