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Responsive Constitutionalism in Australia

Rosalind Dixon*

Abstract

Responsive constitutionalism is a theory of constitutionalism that starts from the idea that democracy involves two overlapping commitments — to a relatively thin 'minimum core' set of norms and institutions and thicker, more contestable set of rights and deliberative commitments. It then proceeds to affirm a commitment both to legal and political constitutionalism. This article explores the relevance of this theory for Australian constitutionalism and suggests that it in fact has strong resonance with the Australian constitutional tradition. First, the capital 'C' Constitution gives strong legal protection to the 'minimum core' of democracy in ss 7, 24 and the High Court's decisions on the implied freedom of political communication and access to the franchise. Second, the small 'c' constitution adopts norms that help protect the democratic minimum core and advance a responsive approach to thicker democratic commitments to rights. Third, there are important connections between the idea of responsive constitutionalism and limits on the scope legal constitutionalism and judicial review in Australia. Yet, there are also ways in which a responsive approach points to potential reforms of the Australian constitutional model — to include more robust rights-based constitutional protections, albeit in ways that are premised on a notion of shared legal and political authority and enforcement, and therefore involve a 'weak-form' national rights charter or extended principle of legality.

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I Introduction

Australian constitutional law is shaped by longstanding common law traditions and principles. And because of this, many lawyers and judges suggest that it is best analysed in these terms, rather than through a more theoretical prism.[1] The article suggests otherwise: it explores the relationship between Australian constitutional law and a 'responsive' theory of constitutionalism and suggests

1. Mark Aronson, 'Public Law Values in the Common Law' in Mark Elliot and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134.

* Scientia Professor of Law, UNSW Sydney. The author thanks Will Bateman, Lynsey Blayden, Lisa Burton Crawford, Brendam Lim, Ashleigh Barnes and Will Partlett for helpful comments on previous versions of the article, and Hayden Clift for outstanding research assistance. The author also thanks the Australian Research Council for research (FT210100667) support. The article is dedicated to Sir Anthony Mason, a great friend, and exemplar of a market responsive approach to constitutionalism and judicial review.

there is in fact considerable overlap between the High Court's capital and small 'c' constitutional role and responsive constitutional ideas. At the same time, it argues that a responsive constitutional lens points to a case for broadening the role of the High Court in human rights enforcement, either through an expanded, more normative approach to the principle of legality, or statutory model of rights protection similar to the one proposed by the *Australian Human Rights Commission* in its recent Position Paper.[2] In this sense, it is both a theory that has plausibility or 'fit' within the existing Australian constitutional context and that offers normative arguments for reform.[3]

The idea of 'responsive regulation' is well known in Australia, in part because of the role of John Braithwaite and other Australian scholars in developing this pathbreaking idea.[4] The idea of 'responsive constitutionalism' ('RC') or 'responsive judicial review' ('RJR') picks up on these ideas — of flexible, shared regulatory models — and adapts them to a constitutional context.[5] First, they suggests, constitutional theory must be sensitive to commitments to democracy and hence leave scope for both legislative as well as judicial constitutional judgments. Second, they suggests that both legislative and judicial processes are subject to a range of forms of democratic dysfunction, which point to the value of shared and *overlapping* institutional authority in respect of constitutional implementation. And third, they argue that shared authority of this kind will generally involve courts exercising a mix of weak and strong — not purely narrow and weak common law-style. In this sense, a theory or RJR or RC is the opposite of many monolithic accounts of courts and judicial review, that assume *either* a heroic conception of courts and their capacity to promote democracy and human rights, or the primacy of judicial restraint or rule-bound approaches to constitutional construction (such as constitutional originalism). It is also a complement, and update, to existing theories of representation-reinforcement in Australia that rely heavily on John Harty Ely's *Democracy and Distrust*.[6]

How do responsive ideas fit with Australia's existing constitutional system and practices? Australia's 'Washminster' system of government has an inbuilt commitment to shared forms of legal and political responsibility for constitutional implementation: the Commonwealth Constitution gives the High Court prime responsibility for enforcing US-style commitments to federalism and an

2. Australian Human Rights Commission, 'Free & Equal: A Human Rights Act for Australia' (Position Paper, December 2022) ('Free & Equal').
3. On fit, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) ch 4. In the context of debates about Australian constitutional law and the principle of legality, see also *Murphy v Electoral Commissioner* (2016) 261 CLR 28; Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *University of Melbourne Law Review* 372 ('*Normativity*').
4. Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). See also John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475; Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7(1) *Regulation and Governance* 2.
5. See, eg, Malcolm Langford, *Responsive Courts and Complex Cases* (forthcoming); Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) (*'Responsive Judicial Review*'); Rosalind Dixon, 'The New Responsive Constitutionalism' *The Modern Law Review* (advance).
6. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) ('*Democracy and Distrust*'); Rosalind Dixon and Michaela Hailbronner, 'Ely in the World: The Global Legacy of Democracy and Distrust Forty Years On' (2021) 19(2) *International Journal of Constitutional Law* 427. For reliance, see Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987), 17(3) *Federal Law Review* 162, 195; Stephen Gageler, 'Implied Rights', in Michael Coper and George Williams (eds) *The Cauldron of Constitutional Change* 83, 84 (Centre for International and Public Law, Australian National University, 1997). See also Julian R Murphy, 'Institutionally-Informed Statutory Interpretation: A Response to Crawford' (2023) 46(3) *Melbourne Law Review* 780.

entrenched separation of federal judicial and non-judicial power, but follows the British tradition of leaving prime responsibility for advancing broader commitments to rights and deliberation to the Commonwealth Parliament.[7] In addition, the High Court has construed its constitutional function as involving the combination of a strong role in the protection of 'core' political freedoms such as access to the franchise and freedom of political communication, and weaker protection for broader civil rights and liberties.

At the same time, RC suggests that commitments to rights and deliberation should be subject to weak but broad-ranging judicial review. The High Court also currently has a quite limited role of this kind in protecting rights. As an account of the Australian constitutional system, RC therefore has both explanatory value and critical bite: it helps make sense of the Court's differential approach to the protection of various small 'c' and capital 'C' constitutional freedoms and rights, but also points to the value of an expanded, more explicitly democratically sensitive approach to the principle of legality, either driven by the Court itself of through statutory reform aimed at partially (though not fully) closing that gap in protection.

The remainder of the article is divided into four parts following this introduction. Part II sets out the core ideas behind a theory of RC, and its implications for the scope and strength of judicial review. Part III outlines the core contours of the Australian constitutional system of rights protection and maps the overlap between this system and RC ideas. Part IV highlights the gap between RC and the Australian approach to the protection of rights beyond the core rights protected indirectly by the implied freedom of political communication, and the argument, in an RC, for closing that gap — through the introduction of an expanded, and re-calibrated, principle of legality. Part V offers a brief conclusion.

II Democracy and Responsive Constitutionalism

In *Democracy and Distrust*, John Hart Ely famously argued that the US Supreme Court should adopt a 'representation-reinforcing' approach to judicial review, which focused on protecting 'the channels of political change' and 'discrete and insular minorities', but was otherwise more restrained in scope. This idea was also picked up and adapted to an Australian context by Justice Stephen Gageler, first as counsel, and then in academic writing as Solicitor-General.[8] It also arguably informed the High Court's development of the implied freedom of political communication (IFPC) in *Australian Capital Television v Commonwealth*.[9]

A responsive theory of constitutionalism likewise picks up on and adapts Ely's ideas, but in ways designed to capture comparative constitutional experiences beyond the US and modern social science understandings about the promise and limits of various institutions — including courts.[10] Like most representation-reinforcing theories, responsive constitutional theory starts with a relatively thin understanding of democracy and suggests that it should be understood as the 'minimum

7. William Partlett, 'Remembering Australian Constitutional Democracy' (2023) *Federal Law Review* (forthcoming); Adrienne Stone, 'More than a Rule Book: Identity and the Australian Constitution' (2024) *Public Law Review* (forthcoming) ('*More than a Rule Book*').
8. See Rosalind Dixon and Amelia Loughland, 'Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia' (2021) 19(2) *International Journal of Constitutional Law* 455; Amelia Loughland, 'Taking Process-Based Theory Seriously: Could 'Discrete and Insular Minorities' Be Protected under the *Australian Constitution*?' (2020) 48(3) *Federal Law Review* 324 ('Taking Process-based Theory Seriously').
9. (1992) 177 CLR 106 ('*ACTV*'). On the evolution and influence, see Dixon and Loughland (n 8).
10. Dixon, *Responsive Judicial Review* (n 5).

core' of what democracy requires.[11] This minimum is not purely procedural or focused solely on elections. For instance, for elections to be truly free and fair, there must be protection for political rights and freedoms, including rights to freedom of speech, association and assembly. There must also be institutions capable of protecting political rights and freedoms, and ensuring that elections are in fact regular, free, fair and based on terms of true multi-party competition.

Hence, the democratic minimum core is defined to include commitments to (i) free and fair multi-party elections, (ii) political rights and freedoms and (iii) independent institutions creating a system of 'checks and balances'.[12] There is clearly scope for disagreement about what these principles entail in practice. Political rights and freedoms, for example, can be understood as quite narrow and focused solely on certain 'core' forms of political speech, or else extending to a much broader range of expressive activity, including certain forms of protest and campaign spending. Rights of access to the franchise can be defined narrowly, as only applying to adult citizens, or else extended to encompass broader conceptions of the political community — including young people, or long-time residents. But the idea of 'minimum core' is that disagreement of this kind should generally be resolved in favour of a narrower approach: the whole idea of the minimum core is that it represents the set of norms that almost all theories of democracy suggest are necessary for constitutional democracy to exist, and that all extant constitutional democracies have in place, as part of their current system of self-government.

At the same time, RC also embraces the importance of thicker understandings of democracy, which emphasize the importance of broader commitments to individual rights and democratic deliberation. Commitments of this kind are essential to ensuring that democracy is truly a system of self-government conducted on terms of equality among citizens.[13] At the same time, RC holds that there is often disagreement among citizens about what these commitments entail in various concrete contexts. Moreover, if citizens are free to make up their own minds on these questions, it will be *reasonable* for them to disagree on questions of this kind.[14] This also means that the most principled way to determine the concrete content of these ideals is through democracy itself — or by considering how these commitments are understood by democratic majorities.

Combining these understandings, a responsive constitutional approach seeks to draw a distinction between the democratic minimum core, or thin commitments to democracy, and thicker notions, which it suggests are more contestable. As I note above, there may be disagreement at the margins as to what is in or out of the democratic minimum core, but its essential content is not open

11. Dixon, 'The New Responsive Constitutionalism' (n 5). See also Rosalind Dixon and David Landau, 'Competitive Democracy and the Constitutional Minimum Core' in Tom Ginsburg and Aziz Huq (eds), *Assessing Constitutional Performance* (Cambridge University Press, 2016) 268.
12. Rosalind Dixon and David Landau, Abusive Constitutional Borrowing; Legal Globalization and the Subversion of Liberal Democracy (Oxford University Press, 2021) ('*Abusive Constitutional* Borrowing'); Dixon, *Responsive Judicial Review* (n 5).
13. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1997) 17.
14. The leading account of the role of reasonable disagreement in constitutional theory in Australia is that provided by Adrienne Stone: see Adrienne Stone, 'Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28(1) *Oxford Journal of Legal Studies* 1. But see also Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346 ('Core of the Case'); Jeremy Waldron, *Law and Disagreement* (Claremont Press, 1999).

to reasonable disagreement among committed democrats.[15] Thicker understandings of democracy, in turn, are open to consistent, reasonable disagreement. This also suggests quite different understandings of the relationship between democracy and majority opinions or attitudes.

In thin understandings of democracy, expressions of majority opinion will be both an output and input of a well-functioning democratic system. The whole idea of the democratic minimum core is that it seeks to protect and enshrine institutions capable of promoting the responsiveness of a political system to the needs and aspirations of ordinary voters — and specifically the median voter, or democratic majorities. But it also starts from the premise that elections and competition among parties are necessary mechanisms for the structured expression of majority opinion. Without intermediation of this kind, majority opinion will often be incoherent or transient, or fail to respect even minimal conditions of rationality and coherence.[16] In thicker understandings of democracy, commitments to rights and deliberation are meant to constrain and modify the effect of democratic majority preferences. Majoritarianism is, therefore, an input not output of democratic decision-making — it can shape and inform how we understand commitments to rights and deliberation, but only within certain bounds, of commitments to mutual respect, dignity and equality.

Each of these versions of democracy can also be undermined by different forms of democratic 'dysfunction'. The idea of RC is based on there being three key risks of democratic dysfunction that courts are often well placed to help counter: first, the accumulation of electoral or institutional monopoly power by a single political actor or set of actors; second, 'democratic blind spots'; and third, 'democratic burdens of inertia'. Electoral and institutional monopoly power is a question of degree, and many well-functioning democratic systems will have some degree of asymmetry among political parties or some degree of market power for incumbents.[17] However, there is still some line between ordinary partisan advantage and the accumulation of electoral or institutional monopoly, which if crossed, means there will be a real risk to the minimum core of a democratic system — that is, the degree to which it is in fact well-functioning, even in a quite minimal or thin sense.

Other sources of democratic dysfunction, namely democratic blind spots and burdens of inertia, involve thicker conceptions of democracy and concerns about individual rights protection. Legislative blind spots are the product of capacity constraints, and bounded rationality, on the part of legislators, which mean that they do not have time to consider the full range of ways in which legislation may affect rights or other constitutional guarantees ('blind spots of application'), nor the expertise to understand the full range of ways in which rights or other constitutional norms may be accommodated consistent with achievement of the relevant legislative objective ('blind spots of accommodation').

Other forms of blind spot may arise because of the limits on the diversity, or experiences and perspectives of legislators. Legislators are certainly capable of representing the views and interests of citizens with different life experiences to their own.[18] They can also engage with the community in a range of ways designed to promote their understanding of these diverse perspectives.[19] But

15. Cf Stone (n 14). In this sense, responsive constitutionalism splits the difference between Stone and Jeffrey Goldsworthy on the scope for some forms of structural constitutional review to evade or at least substantially avoid the argument from reasonable disagreement: see Jeffrey Goldsworthy, 'Structural Judicial Review and the Objection from Democracy' (2010) 60(1) *University of Toronto Law Journal* 137.
16. For Arrow's impossibility theorem, see Kenneth Arrow, *Social Choice and Individual Values* (Wiley, 2nd ed, 1963). See further discussion in Daniel A Farber and Philip P Frickey, *Law and Public Choice: A Critical Introduction* (University of Chicago Press, 1991); Dixon, *Responsive Judicial Review* (n 5).
17. Joseph Fishkin and David E Pozen, 'Asymmetric Constitutional Hardball' (2018) 118(3) *Columbia Law Review* 915.
18. Waldron, 'Core of the Case' (n 14).
19. Dixon, *Responsive Judicial Review* (n 5).

there will also be limits to indirect representation of this kind, in ways that may contribute to legislative 'blind spots of perspective'.

Legislative processes can also be subject to 'burdens of inertia' — or dynamics that mean that legislation does not change in line with evolving democratic understandings, even where there is majority support for the expansion of constitutional rights or other guarantees. Inertia of this kind can arise for two reasons or take two forms. 'Priority-driven' forms of inertia can arise simply because of institutional capacity constraints on legislatures, that mean they are unable to consider the full range of issues of concern to citizens at any given time or in any given legislative sitting. Because of this, they will also tend to prioritize issues of greatest concern to a larger number of voters. This can mean that the constitutional claims of small minorities consistently fail to gain legislative attention, even when they enjoy (weak) majority support.[20] Problems of this kind are also likely to be far worse in systems subject to interest group dynamics in which small, well-resourced interest groups compete for legislative attention to their priorities, at the expense of issues of concern to the median voter.[21]

'Coalition-driven' burdens of inertia, in contrast, will arise where issues may be of greater salience to a larger number of voters, but tend to divide political parties internally. Because parties are an essential part of competitive democracy, a responsive approach recognizes the importance of internal party dynamics as part of a well-functioning democratic constitutional order. These dynamics can also mean that where issues divide parties, party leaders have an incentive to keep them off the legislative agenda, again, even if a majority of voters would support legislative change.

Democratic burdens of inertia can also arise in some areas in ways that involve the interaction between legislative and executive inaction. To be realized, some constitutional norms require complex and sustained state action. Think of rights such as the right of access to housing or health care, or new constitutional guarantees of environmental protection. If the executive lacks the willingness or capacity to take this action, and the legislature fails adequately to supervise the executive performance of its functions,[22] this will lead to a complex form of 'compound inertia'.[23] These complex forms of inertia can also further contribute to democratic dysfunction, even in well-functioning democratic systems, but especially in systems with weaker state capacity.

How can a constitutional system guard against these risks? The most important constitutional design choice in a responsive approach will arguably be the design of an electoral system. If electoral systems promote responsiveness by legislators to the will of the median voter, this will considerably reduce the risks of democratic dysfunction, particularly democratic burdens of inertia. But even with these structures in place, democratic dysfunction can still arise in the form of democratic blind spots, and in some cases, risks to the democratic minimum core. Legislative blind spots are the product of time-constraints and limited foresight on the part of legislators. Threats to

20. Ibid; Dixon, *The New Responsive Constitutionalism* (n 5).
21. Dixon, *Responsive Judicial Review* (n 5). Cf Lim, *Normativity* (n 3) 404.
22. On this duty to supervise in a US context, but with more general conceptual application, see, eg, Gillian E Metzger, 'The Constitutional Duty to Supervise' (2015) 124(6) *Yale Law Journal* 1836.
23. Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391; Dixon, *Responsive Judicial Review* (n 5).

the minimum core arise from deliberate attempts by would-be authoritarians to erode electoral and institutional pluralism — including by dismantling responsive electoral systems.

Even in well-functioning democratic constitutional systems, therefore, a responsive approach suggests there is a need to create a range of institutions capable of countering risks of democratic dysfunction — including courts and other independent 'fourth branch' bodies or 'guarantor institutions', such as human rights and electoral commissions, and ombudsmen and auditors-general.[24] And as the notion of the democratic minimum core makes clear, it suggests the need for a range of institutional checks and balances capable of maintaining and stabilizing commitments to regular, free and fair multi-party elections, based on the universal exercise of *political rights and freedoms*.

Courts often play an especially important role in this context — because of both their independence and public profile *and* capacity to pay attention to individual cases and circumstances and to provide individuals with concrete legal relief. Their independence and public profile can mean they are some of the last institutions to be fully captured or degraded in a country undergoing a process of democratic backsliding or 'abusive' constitutional change.[25] They can thus serve as a critical '*speed bump*' or deterrent against attempts to undermine other key institutional limits on the accumulation of power by a single political actor or set of actors — including limits imposed by parliament, fourth branch institutions and sub-national governments.[26]

In some cases, courts' profile can also mean that they are able to draw media and public attention to an issue in ways that increase the pressure on legislative and executive actors to overcome democratic inertia or the ongoing effects of democratic blind spots.[27] But human rights and equality commissions can also play an important role in drawing government, media and public attention to the ways in which legislation impacts on the enjoyment of human rights, including rights to equality and non-discrimination, or is subject to burdens of inertia.

Political institutions can likewise play an important role. For instance, legislative committees often play an important role in identifying and countering legislative blind spots, even before legislation is enacted. This is especially true of committees with a multi-partisan composition or special remit and responsibility that allows them to transcend immediate partisan perspectives and promote attention to constitutional requirements. Hence, a responsive approach favours the creation of a wide range of committees of this kind.

24. For a definition, see Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021); Tarunabh Khaitan, 'Guarantor Institutions' (2021) 16(S1) *Asian Journal of Comparative Law* S40. For exploration of the role of the Australian Electoral Commission and equivalent state commissions, see Paul Kildea and Sarah Murray, 'Democratic Constitutions, Electoral Commissions and Legitimacy: The Example of Australia' (2021) 16(S1) *Asian Journal of Comparative Law* S117. For the role of human rights and equality commissions in comparative perspective, see Rosalind Dixon and Mark Tushnet, 'Democratic Constitutions, Poverty and Economic Inequality: Redress Through the Fourth Branch Institutions?' (2023) 51(3) *Federal Law Review* 285.
25. David Landau, 'Abusive Constitutionalism' (2013) 47(1) *University of California, Davis Law Review* 189; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018). See also David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts against Democracy' (2020) 53(3) *University of California, Davis Law Review* 1313.
26. Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 606; Dixon and Landau, *Abusive Constitutional Borrowing* (n 12), 81, citing Bojan Bugarič, 'Can Law Protect Democracy? Legal Institutions as Speed Bumps' (2019) 11 (2–3) *Hague Journal on the Rule of Law* 447; Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017).
27. Teresa PR Caldeira and James Holston, 'Democracy and Violence in Brazil' (1999) 41(4) *Comparative Studies in Society and History* 691; Dixon, *Responsive Judicial Review* (n 5).

However, a distinctive feature of courts, especially in the common law, Anglo-American tradition is the degree to which they are positioned to consider the effects of legislation in particular concrete contexts, and provide individuals adversely affected by the law with access to timely and effective *legal* remedies — that is, remedies that are binding on governments and citizens and affect the existing as well as future rights and liabilities of individual parties.[28] Concrete, case-by-case decision-making of this kind makes common law courts ideally equipped to identify and counter blind spots of application and accommodation. And access to timely, coercive relief can give courts broad-ranging tools for countering a variety of sources of democratic dysfunction.

One of the key principles behind the idea of RC, therefore, is the idea that democratic ideals are best protected through a mix of 'legal' and 'political' constitutionalism — or the *sharing* of authority and responsibility for constitutional implementation between courts, fourth branch institutions and legislative and executive actors.[29] Legal models of constitutionalism start with the idea of there being at least some set of written, entrenched constitutional norms, and then allocate responsibility to courts for the interpretation and enforcement of those norms, whereas political models of constitutionalism assume that constitutions may consist in a mix of written and unwritten, entrenched and flexible norms, but suggest that in each case legislators rather than judges should have prime responsibility for the interpretation and enforcement of these norms.

RC, in turn, seeks to *combine* aspects of both judicial and legislative responsibility for democratic constitutional implementation. Moreover, RC envisages a quite specific sharing of responsibility, or mix of legal and political constitutionalism in this context. RC, as I have noted previously, is closely related to other 'third way' models of constitutionalism such as the 'new Commonwealth constitutional model'.[30] But unlike these models, it contemplates that courts should exercise a mix of strong and weak — not simply weak — forms of review.[31]

28. This does not mean that civilian courts cannot engage in responsive forms of judicial review. Indeed, they can. It simply means that the scope and extent to which they can do so may be more limited than for some common law courts, or at least require some degree of institutional adaptation. For a very useful and thoughtful exploration of these questions, see Rosalind Dixon, 'Responsive Judicial Review in Central & Eastern Europe' (2023) 48(3–4) *Review of Central and East European Law* 375 ('RJR in Europe'); Samo Bardutzky, 'What Kind of Judicial Review for a Small, Post-Communist European Constitutional Democracy? Thoughts on the Proposal for the Slovenian Constitutional Court to Adopt a Responsive Approach to Judicial Review' (2023) 48 (3–4) *Review of Central and East European Law* 403; Ivo Gruev, 'Responsive Judicial Review in Kelsenian Constitutional Courts: The Impeding Effects of Limited Standing and Formalism' (2023) 48 (3–4) *Review of Central and East European Law* 426; David Kosař and Sarah Ouředníčková, 'Responsive Judicial Review 'Light' in Central and Eastern Europe – A New Sheriff in Town?' (2023) 48 (3–4) *Review of Central and East European Law* 445; Kriszta Kovács and Gábor Attila Tóth, 'Constitutional Review as a Democratic Instrument' (2023) 48 (3–4) *Review of Central and East European Law* 473; Ivana Krstic, 'Serbian Constitutional Court – (In)dependent Protector of the Rule of Law and Human Rights?' (2023) 48 (3–4) *Review of Central and East European Law* 490; Silvia Suteu, 'Between Dialogue, Conflict, and Competition: The Limits of Responsive Judicial Review in the Case of the Romanian Constitutional Court' (2023) 48 (3–4) *Review of Central and East European Law* 519.
29. Other scholars have argued for the sharing of constitutional authority in the Australian context, including by drawing attention to the important role played by legislative and executive actors in processes of constitutional construction. See, eg, Gabrielle Appleby, Vanessa MacDonnell and Eddie Synot, 'The Pervasive Constitution: The Constitution outside the Courts' (2020) 48(4) *Federal Law Review* 437.
30. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) ('*New Commonwealth Model*').
31. On political constitutionalism, see Richard Bellamy, 'Political Constitutionalism and Populism' (2023) 50(1) *Journal of Law and Society* S7; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60(1) *University of Toronto Law Journal* 1.

How is this the same, or different, to Ely-style understanding of courts' role in reinforcing commitments to representative government? In *Democracy and Distrust*, John Hart Ely focused on two distinct sources of democratic dysfunction: measures that 'clog' or undermine 'the channels of political change', and those that affect 'discrete and insular minorities'. These ideas also spanned the divide between thin and thick democracy. Maintaining the channels of political change is an essential part of thin notions of democracy, whereas protecting the rights of discrete and insular minorities is important to realizing thicker democratic commitments to rights and deliberation.

The difficulty for Ely, however, was three-fold: first, Ely claimed that this account was largely procedural in character and avoided difficult forms of substantive judgment about what democracy is, or entails. This claim, however, clearly does not hold up. There is too much scope for disagreement about the degree to which various channels of change are essential to democracy, and especially, what counts as a 'discrete and insular minority'.[32]

Second, many scholars have highlighted the difficulties with this formulation of equality rights. Commitments to equality, or non-discrimination, aim to advance three broad constitutional or political values: a commitment to freedom and equality of opportunity for all individuals, regardless of background; a commitment to equal dignity for all; and a commitment to eradicating past forms of group-based subordination, or historical disadvantage.[33] The difficulty with a focus on 'discrete and insular minorities' is also that it fails fully to capture these various understandings. Women, for instance, have suffered a long history of legal, economic and social discrimination, but are a statistical majority, with meaningful political power, and close (indeed intimate) connections to men. Gays and lesbians, young and old people and those with physical disabilities have likewise all experienced historical discrimination, yet often live, work and form political coalitions with heterosexual, able-bodied and working age family and allies. And commitments to ending subordination do not exhaust the scope of commitments to equal freedom and dignity.

Third, Ely developed his account of judicial review with a focus entirely on the US Constitution and Supreme Court. As such, he failed to consider the full range of ways in which democracy, and commitments to democratic responsiveness, may be threatened or undermined.

Because of this, comparative constitutional scholars have begun to develop a new vision of judicial representation-reinforcement — that acknowledges the porousness of the procedure-substantive distinction, takes a more fluid approach to promoting commitments to equality and accounts for the full range of ways in which democracy around the world may be threatened by real-world political dynamics. This vision is also at the centre of 'comparative political process theory' (CPPT) or 'comparative representation reinforcing theory' ('CRRT'), of which RC is just one example.[34]

III Responsive Constitutionalism and Two-Track (Strong and Weak) Judicial Review

Another key difference between Ely and modern CRRT is an embrace of the idea of 'weak' judicial review as a means of protecting thicker conceptions of democracy. The idea of 'weak' judicial review was a concept developed by Mark Tushnet to describe constitutional systems in which court

32. Laurence H Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89(6) *Yale Law Journal* 1063.
33. Dixon, *Responsive Judicial Review* (n 5).
34. Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) International Journal of Constitutional Law 1429.

decisions in respect of rights enjoyed limited legal finality. The Supreme Court of the United States has broad power to issue a range of remedies, including remedies striking down legislation and depriving of it legal effect.[35] Decisions of the Supreme Court under Art III of the *Constitution* can only formally be modified or overridden in a limited number of ways — namely through formal constitutional amendment under Art V of the *Constitution*, or the making of exceptions to the jurisdiction of the Court under Art III. The procedures for amendment under Art V are also extremely onerous, and it is not clear how far such exceptions can go under Art III. Therefore, whatever the scope for informal constitutional change or dialogue with the Court, there is limited scope for formal override of Court decisions. Hence, decisions of the Court under the *US Constitution* enjoy a 'strong' degree of formal legality finality.

The same could be said in Australia under the *Commonwealth Constitution*. Amendment to the *Constitution* under s 128 is a demanding process, which rarely succeeds in practice.[36] As in the US, there is also uncertainty as to bounds of Parliament's power to make 'exceptions' to the High Court's jurisdiction under s 73 of the Constitution; and there are clear limits to the effectiveness of any such power, given the entrenchment of the Court's jurisdiction to hear challenges to the validity of Commonwealth legislation under ss 75(iii) and (v) of the *Constitution*.

In many other national and sub-national constitutional systems, however, it will be much easier for legislatures formally to override or modify the effects of a court decision. Formal procedures for amendment are almost always less demanding under Art V of the *US Constitution*.[37] There may be broader powers to make exceptions to court jurisdiction than under Art III (as for example in India) or express power to legislate 'notwithstanding' certain provisions of a constitution (as for example in Canada). In some countries, constitutional protections for rights may also be enacted by way of an ordinary statute. This also means there is broad power both to amend *and* expressly or impliedly repeal the operation of constitutional norms as they are interpreted by courts.[38] Indeed, except in Canada, this is arguably *the* defining feature of the constitutional rights instruments that comprise the 'new Commonwealth constitutional model', including Australian statutory rights charters such as the *Human Rights Act 2004* (ACT), *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) and Queensland *Human Rights Act 2019* (Qld).[39] This is also why Tushnet labels judicial review under these constitutional instruments 'weak' rather than strong in nature.

In the new Commonwealth constitutional model, a further source of judicial non-finality is also found in the express limits on courts' remedial powers — for instance, under s 4 of the UK *Human Rights Act 1998* (UK) ('*HRA*'), and like provisions in Australia and New Zealand. Under s 4 of the HRA, UK courts are empowered to make a 'declaration of incompatibility' indicating inconsistency between legislation and those rights (ie, *European Convention on Human Rights* norms) protected by the *HRA*. But a declaration of this kind lacks immediate coercive effect — that is, it is expressly stated to have no effect

35. *Marbury v Madison* (1803) 5 US (1 Cranch) 137.
36. See discussion in George Williams and David Hume, *People Power: How Australian Referendums are Lost and Won* (University of New South Wales Press, 2nd ed, 2024).
37. Rosalind Dixon and Adrienne Stone, 'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016); Rosalind Dixon, 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32(3) *Oxford Journal of Legal Studies* 487; Rosalind Dixon, 'The Forms, Functions, and Varieties of Weak(ened) Judicial Review' (2019) 17(3) *International Journal of Constitutional Law* 904 ('Forms and Functions'). See also Scott D Lutz, 'Toward a Theory of Constitutional Amendment' (1994) 88(2) *American Political Science Review* 355.
38. Dixon, 'Forms and Functions' (n 36); Dixon, *Responsive Judicial Review* (n 5).
39. Gardbaum, *New Commonwealth Model* (n 28).

on 'the validity, continuing operation or enforcement of the provision in respect of which it is given' and to be 'not binding on the parties to the proceedings in which it is made'.[40] Similar provisions are found in s 32 of the *Human Rights Act 2004* (ACT), s 36 of the Victorian *Charter of Rights and Responsibilities* 2006 (Vic) and s 53 of the *Human Rights Act 2019* (Qld). Powers of statutory interpretation or 'reading down' aside, this means courts are limited to issuing non-immediate, non-coercive remedies that rely on the medium-term willingness of legislators to respond to such a declaration.

In a responsive approach, there are real risks to limiting courts' powers in this way: one of the core ideas behind RC is that courts and fourth branch institutions have an important role in countering these various sources of democratic dysfunction. Often, this requires them to enjoy a degree of capital 'C', entrenched Constitutional power, and s*trong* powers of judicial review.

But there are also advantages: weakened forms of review provide an important mechanism for reducing the risk that representation-reinforcing review by courts will misfire, so that rather than increasing overall democratic responsiveness, they end up creating new forms of democratic inertia, debilitation and backlash.

For instance, in seeking to counter democratic burdens of inertia, courts may view certain laws as reflecting outmoded purposes or attitudes, when in fact those laws continue to enjoy democratic majority support. Or in seeking to counter democratic blind spots, courts may misjudge the relative importance citizens place on the achievement of certain legislative objectives. In both cases, this result may be a form of 'reverse' democratic inertia, where a court changes the law in ways that do not enjoy democratic constitutional support, and yet are legally or practically hard for legislatures to reverse. Conversely, if courts seek consistently to counter inertia, and do so effectively, they may help overcome inertia in those cases, but actively undermine the incentive for legislatures and executive actors to build their willingness and capacity to do so in an even broader range of cases.[41]

Finally, in some cases, courts may deliver opinions or recommendations that are strongly opposed by the current government or legislative majority *and* by a majority of citizens. In such cases, their decisions are also likely to meet with a real risk of triggering damaging forms of attack on the institution itself. This form of institutionally focused backlash can also undermine the capacity of courts to enforce any and all constitutional requirements, including the most minimal commitments to the rule of law.[42]

The premise of RC, therefore, is that courts should enjoy broad and strong powers of review, but within the context of a commitment to shared legal and political constitutional enforcement, and hence, a commitment by courts themselves to engaging in a mix of weak and strong judicial review across different cases and contexts. This is also notably different from Ely's own conception of constitutional judicial review as consistently strong in form.[43]

Thus, in a responsive approach, there will be a powerful case for strong judicial review in cases involving the democratic minimum core; the risk to democratic functioning is high, and there is little scope for reasonable disagreement about the commitments a court is seeking to uphold. The key argument

40. *Human Rights Act 1998* (UK) s 4(6) ('*HRA*').
41. Mark Tushnet calls this the problem of 'democratic debilitation': Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94(2) *Michigan Law Review* 245. See also David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55(5) *Boston College Law Review* 1501; Dixon, *Responsive Judicial Review* (n 5).
42. Dixon, *Responsive Judicial Review* (n 5). See also Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53(2) *Columbia Journal of Transnational Law* 285.
43. Ely, *Democracy and Distrust* (n 6). Note that Ely does not oppose weaker forms of review, but simply does not seek to theorize them or put them at the centre of his theory. See also discussion in Dixon, *Responsive Judicial Review* (n 5) 56–8.

for judicial restraint or weakness is pragmatic or prudential rather than principled in nature — that is, the desire to avoid problems of democratic backlash, rather than reverse burdens of inertia or risks of democratic 'debilitation'. And hence, there is a powerful democratic case for courts to adopt robust or demanding forms of scrutiny, and grant strong judicial remedies — or delay the effect of those remedies only in cases where they judge the risk of backlash arising from more immediate relief to be too great.[44]

In cases involving blind spots and burdens of inertia, in contrast, the case for judicial intervention is real but less pressing: except for certain cases involving serious and irreversible harm to human dignity, the democratic harms at issue in these cases can be addressed by future legislative or executive policy change. There is also a greater risk of reverse inertia and democratic debilitation arising from judicial intervention, and therefore a clearer principled as well as pragmatic case for courts taking a more restrained approach to constitutional implications designed to counter these various forms of democratic dysfunction, or judicial remedies designed to counter them. In many cases, this will also translate into courts relying on a mix of weak and strong review — or a mix of strong remedies and narrow reasoning (weak rights-strong remedies); or coercive and delayed remedies (weak-strong remedies).[45]

IV Responsive Constitutionalism and the Australian Constitution

How do these ideas map on to the existing constitutional system in Australia? The democratic minimum core in Australia is protected largely through political cultural norms and two key features of Australia's electoral system: first, a system of 'preferential' or ranked choice voting, and second, a system of compulsory voting.[46] Ranked choice or preferential voting avoids the danger that election outcomes may be swayed by the entry of a third candidate and thereby fail to reflect majority preferences. Compulsory voting promotes competition among parties and candidates for the support of the median voter, as opposed to more extreme members of their own party base or coalition.[47]

In addition, the Australian welfare system helps maintain both the legitimacy and stability of the democratic minimum core. Processes of democratic self-government are only meaningful where there is universal access to a 'dignified social minimum'.[48] Otherwise, citizens lack the social bases for self-respect and meaningful political participation, and the time to devote to the exercise of political as opposed to economic freedoms. Universal access to a dignified social minimum is also important to the stability of the democratic minimum core: it guards against the risk of illiberal constitutional populist movements that seek to combine forms of economic populism with attacks on democracy and institutional pluralism.[49] In Australia, while the welfare state is authorized by the capital 'C' *Constitution*

44. Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) 2016(4) *Wisconsin Law Review* 683; Dixon, *Responsive Judicial Review* (n 5).
45. Dixon, *Responsive Judicial Review* (n 5).
46. See Rosalind Dixon and Anika Gauja, 'Australia's Non-Populist Democracy?: The Role of Structure and Policy' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 423. See also Richard Holden and Rosalind Dixon, *From Free to Fair Markets: Liberalism after Covid* (Oxford University Press, 2022).
47. For discussion, see Stone, More than a Rule Book (n 7).
48. Cf Holden and Dixon (n 45); Rosalind Dixon, 'Fair Market Constitutionalism: From Neo-liberal to Democratic Liberal Economic Governance' (2023) 43(2) *Oxford Journal of Legal Studies* 221. See also Martha C Nussbaum, 'Political Liberalism and Global Justice' (2015) 11(1) *Journal of Global Ethics* 68.
49. See, eg, Leonardo Baccini and Stephen Weymouth, 'Gone for Good: Deindustrialization, White Voter Backlash, and US Presidential Voting' (2021) 115(2) *American Political Science Review* 550; Jacqueline O'Reilly et al, 'Brexit: Understanding the Socio-economic Origins and Consequences' (2016) 14(4) *Socio-economic Review* 807.

(and especially the Benefits Power, inserted by way of constitutional referendum in 1944),[50] its scope and continuation largely depend on a range of Commonwealth statutes.[51]

A *Strong Protection for the Democratic Minimum Core*

The capital 'C' *Constitution*, however, also gives strong protection to a range of aspects of the democratic minimum core, in ways that conform to a responsive constitutional vision.[52] First, it provides for a robust system of institutional checks and balances, with the High Court and State courts at its centre, and a robust system of *horizontal* and *vertical* checks and balances.[53] This includes a range of 'fourth branch' or independent institutions, but also the parliamentary committee system, and accountability created by a federal system.

Second, the *Constitution* protects a range of political rights and freedoms, including universal access to the franchise and freedom of political communication. Sections 7 and 24 of the *Constitution* provide for a House of Representatives and Senate 'directly chosen by the people', and for Parliament to play a central role in defining the scope of this system of representative government. Section 128 of the *Constitution* sets out procedures for amendment to the *Constitution* involving proposed changes by Parliament and approval of proposals by 'a majority...of electors' in a majority of states. The High Court has held that these provisions — together with the broader structure of the *Constitution* — support implied constitutional principles protecting key aspects of the democratic minimum core, including the idea of universal access to the franchise and freedom of political communication.[54]

For instance, in *Roach v Electoral Commissioner*, a majority of the Court held that a Commonwealth law disenfranchising all prisoners from voting in federal elections was incompatible with the principle of 'choice by the people' enshrined in ss 7 and 4 of the Constitution, as well as the broader history and structure of representative government in Australia.[55] Gleeson CJ held that the law lacked any rational connection to relevant constitutional requirements, while Gummow, Kirby and Crennan JJ held that it was not appropriate and adapted to the preservation of the constitutionally prescribed system of representative and responsible government. And while Gleeson CJ was prepared to hold that this created a *de facto* right to vote on the part of adult citizens,[56] the plurality emphasized the nature of this 'constitutional bedrock' principle as a limitation on Commonwealth legislative power, rather than an independent source of rights.[57] In *Rowe v Electoral Commissioner*, the Court affirmed this understanding, holding that a law cutting off new electoral enrolments immediately after the calling of an election was not reasonably appropriate and adapted to promoting (the valid) objective of promoting 'smooth and efficient' electoral

50. See, eg, Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 445; *Australian Constitution* s 51(xxiiiA); *Williams v The Commonwealth (No 2)* (2014) 252 CLR 416.
51. See, eg, *National Health Act 1953* (Cth); *Human Services (Medicare) Act 1973* (Cth); *Social Security Act 1991* (Cth). For discussion, see also, William Partlett, 'Australian Popular Political Constitutionalism' (2024) *Federal Law Review* (forthcoming); Will Bateman, 'Federalising Socialism without Doctrine' (2024) 52(3) *Federal Law Review* (forthcoming); Lynsey Blayden, 'Active Citizens and an Active State: Uncovering the "Positive" Underpinnings of the Australian Constitution' (2024) *Federal Law Review* (forthcoming).
52. Cf Stephen Gageler, 'Judicial Legitimacy' (2023) 97(1) *Australian Law Journal* 28.
53. See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.
54. For discussion of these principles, see eg, Stone, *More than a Rule Book* (n 7). But for earlier criticism of the claim that these principles can be firmly and directly grounded in constitutional text and structure, see Adrienne Stone, n 14.
55. (2007) 233 CLR 162, 173–4 [6], 182 [24] (Gleeson CJ); 198–201 [82]–[91] (Gummow, Kirby and Crennan JJ).
56. Ibid 174–5 [8] (Gleeson CJ).
57. Ibid 198–9 [82]–[83], [85] (Gummow, Kirby and Crennan JJ).

administration.[58] In doing so, the Court again emphasized the idea of universal adult suffrage as an implied principle derived from the text, history and structure of the *Constitution*.[59]

Similarly, in *ACTV*, and *Lange v Australian Broadcasting Corporation*, the Court held that these provisions create an implied guarantee of freedom of political communication (IFPC).[60] This freedom of political communication is not absolute: in earlier cases, the Court held that it may be limited by laws that are reasonably adapted to advancing a legitimate government interest, in a manner compatible with the constitutionally prescribed system of representative and responsible government.[61] And in more recent cases, it has held that the freedom may be limited by laws that are proportionate to a legitimate government objective, again in a manner compatible with the constitutionally prescribed system of representative and responsible government.[62] But the principle clearly overlaps with a commitment to a system of regular, *free and fair*, multi-party elections, conducted on the basis of fair political competition and political freedom on the part of citizens.

The High Court has also applied doctrines such as the IFPC in a differentiated manner, which shows sensitivity to the relevant democratic context,[63] including the degree to which relevant restrictions promote or undermine free and fair elections.[64] In prior work, I defended this approach as an appropriately 'calibrated' approach to proportionality analysis, which combines the benefits of a uniform doctrinal framework with the context-sensitivity of a more US-style (or Gageler and Gordon JJ-style) tiered approach to constitutional scrutiny.[65] It also fully accords with a responsive approach to judicial review.

One of the hallmarks of a responsive approach to judicial review — as opposed to constitutional design and construction generally — is a democratically sensitive approach to proportionality analysis. Specifically, it suggests that in applying a test of proportionality, in addition to considering other constitutional values, a court should consider the degree to which legislation (a) restricts electoral or institutional pluralism in ways that threaten the 'minimum core' democratic commitments and (b) is affected by democratic blind spots or burdens of inertia.[66] The closer the connection to electoral processes, or institutional checks and balances, the 'closer' or more searching the scrutiny courts should apply under a test of proportionality, whereas the more ordinary democratic expression or activity regulated, the less searching it should be.[67] Similarly, the more it reflects democratic blind spots or burdens of inertia, rather

58. (2010) 243 CLR 1, 34–7 [72]–[73] (French CJ); 61 [167] (Gummow and Bell JJ); 120–1 [384] (Crennan J).
59. Ibid 19–21 [22]–[25] (French CJ); 48 [121] (Gummow and Bell JJ); 107 [328]–[330] (Crennan J). Cf 77 [225] (Hayne J); 99–100 [301]–[304] (Heydon J).
60. *ACTV* (n 9); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').
61. Ibid; *Coleman v Power* (2004) 220 CLR 1.
62. *McCloy v New South Wales* (2015) 257 CLR 178 ('*McLoy*'). See discussion in Murray Wesson, 'The Reception of Structured Proportionality in Australian Constitutional Law' (2021) 49(3) *Federal Law Review* 352; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020); Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2022).
63. See, eg, Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551; Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92.
64. See *McCloy* (n 61); *Unions NSW v New South Wales* (2013) 252 CLR 530; *Unions NSW v New South Wales* (2019) 264 CLR 595 ('*Unions II*'). For a useful discussion of *Unions II*, see Murray Wesson, *'Unions NSW v New South Wales [No 2]'*: Unresolved Issues for the Implied Freedom of Political Communication' (2019) 23(1) *Media and Arts Law Review* 93.
65. Dixon, 'Calibrated Proportionality' (n 62).
66. Ibid.
67. Dixon, *Responsive Judicial Review* (n 5).

than recent, reasoned deliberation on an issue, the more appropriate heightened forms of scrutiny will be.[68]

Of course, the overlap between the Court's existing approach and RC ideas is not complete. Effective campaign finance regulations, for example, are arguably a necessary part of a system of free and *fair* elections. Otherwise, there is a real risk that elections will be influenced by a small number of corporations or high-net worth donors, rather than the views of the median voter. In developing the idea of an IFPC, the High Court in *ACTV* also clearly affirmed this understanding.

Yet the *effect* of its decision was arguably to undermine regulations of this kind: there has been no successful attempt to adopt comprehensive campaign finance reforms at the Commonwealth level since *ACTV*.[69] And the amount of money in federal politics has continued to grow, including through self-funding by wealthy individuals (such as Clive Palmer).[70] This may have been hard for the Court to foresee at the time. With the benefit of hindsight, one could view the substance of *ACTV* as strongly protective of the democratic minimum core in Australia, but the remedy the Court employed as in some tension with a commitment to judicial representation-reinforcement — because the Court set aside the relevant spending and free advertising regime without giving the Parliament a defined window in which to re-enact a replacement regime.

A window of this kind may not be sufficient to promote a legislative response to a court decision.[71] But it creates a focal point for legislators wanting to achieve such a response, and hence increases its likelihood.[72] And while this kind of 'suspended declaration of invalidity' remains a novel remedy in Australia, and would have been even more so in 1992, there was Canadian precedent for such a remedy even then[73]; and it is now a hallmark of a responsive approach to judicial review in a range of countries worldwide — including Canada, South Africa, Taiwan, Korea and Hong Kong.[74]

However, for the most part the Court's constitutional jurisprudence maps quite closely onto the protection of the democratic minimum core, in ways that conform to both an Elyian and responsive constitutional account.

B *Weak but Variable Protection for Human Rights*

The protection of human rights in Australia, in contrast, is both weaker and more variable in scope. The Constitution manifestly does not protect discrete and insular minorities.[75] And it provides only partial protection to rights affected by democratic blind spots and burdens of inertia.

68. Ibid.
69. *ACTV* (n 9).
70. See, eg, David Crowe and Paul Sakkal, 'Billionaires Pour Money into Political Parties, Donations Data Reveals', *The Sydney Morning Herald* (online, 1 February 2023) <https://www.smh.com.au/politics/federal/billionaires-pour-money-into-political-parties-donations-data-reveals-20230201-p5ch0j.html>.
71. This is one reason both I and other scholars have suggested that courts should combine remedies of this kind with a strong judicially defined default position, designed to encourage a legislative response: see Dixon, *Responsive Judicial Review* (n 5); David Landau, 'Aggressive Weak-Form Remedies' (2013) 5(1) *Constitutional Court Review* 244; Po Jen Yap, 'New Democracies and Novel Remedies' (2017) (January) *Public Law* 30. See also Rosalind Dixon and Po Jen Yap, 'Responsive Judicial Remedies' (2024) *Global Constitutionalism* (forthcoming).
72. Dixon, *Responsive Judicial Review* (n 5). See also Richard McAdam, *The Expressive Powers of Law: Theories and Limits* (Harvard University Press, 2017).
73. A remedy of this kind was issued three months earlier in Canada by the Supreme Court of Canada in *Schachter v Canada* [1992] 2 SCR 679 (decided 9 July 1992), compared to *ACTV* (n 9) (decided 30 September 1992).
74. Dixon and Yap, 'Responsive Judicial Remedies' (n 70).
75. Cf Loughland, 'Taking Process-based Theory Seriously' (n 8).

Rights to individual freedom are generally protected under Australian law, but only in weak form — as their effect and enforcement can be overridden by ordinary Commonwealth or state legislation. This includes rights to freedom of speech and movement, rights to privacy and freedom from surveillance or entry into private property,[76] and even rights to a fair trial such as those recognized by the High Court in *Dietrich v The Queen*,[77] which could effectively be modified by Commonwealth or state statute. They can also be protected only through traditional forms of reading down or interpretive remedies.

Rights to equality and non-discrimination are protected in a range of specific ways defined by statute, but not by the common law or any capital 'C' Constitutional norms.[78] In *Kartinyeri v Commonwealth*,[79] for example, the High Court held that even in its amended form, the plain language of the race power permitted the Commonwealth to pass laws creating both positive discrimination in favour of, and negative discrimination against, First Nation peoples. And in *Leeth v The Queen*, the Court rejected the contention that the Constitution contained an implied prohibition on discriminatory Commonwealth or state laws, or individual right to equal protection or protection from discriminatory federal legislation.[80]

But various Commonwealth and state anti-discrimination and anti-vilification laws provide clear statutory protection against certain forms of discrimination, and narrow but concrete legal relief for individuals affected by discrimination of this kind. It is just that these protections can be amended or repealed at any time, and they are not generally understood to provide the basis for broader interpretive or 'reading down' style remedies of the kind available for basic liberty rights, under the principle of legality. And the right to human dignity, and its various specific manifestations in international human rights norms, is protected in select ways by the common law,[81] through various administrative law doctrines, and by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and state rights charters.[82] At a constitutional level, dignity is recognized only as a constitutional value, rather than a common law right.[83] And as noted above, its protection via a range of specific human rights charters involves either weak or no judicial enforcement (Table 1).

This creates clear gaps in human rights protection, including in cases involving discrete and insular minorities (such as remote First Nation communities or potentially non-citizens in immigration detention), and where there is clear evidence of democratic dysfunction at play — that is, legislative blind spots and burdens of inertia.[84] That is, it creates gaps in the degree to which the

76. *Roberts v Bass* (2002) 212 CLR 1.
77. *Coco v The Queen* (1994) 179 CLR 427 ('*Coco*').
78. (1992) 177 CLR 292.
79. *Leeth v The Queen* (1992) 110 ALR 459 ('*Leeth*').
80. (1998) 195 CLR 337.
81. Leeth (n80). For further discussion, see Dixon, *Responsive Judicial Review* (n 5) 116.
82. See *Secretary of the Department of Health and Community Services v JWB* (1992) 175 CLR 218 ('*Marion's Case*'). In that case, the Mason Court seemed to suggest that the common law in Australia might go further than English law (at least prior to the *Human Rights Act*) and develop so as to recognize a broader common law right to *dignity*, but that suggestion has not been developed in subsequent cases, so that (for now at least) *Marion's Case* stands as a relatively isolated example of common law, judicial rights protection for the right to dignity in Australia. See, eg, *Australian Broadcasting Corporation v Lenah Meats Pty Ltd* (2001) 208 CLR 199.
83. On administrative law, see, eg, Janina Boughey, *Human Rights and Judicial Review in Australia and Canada The Newest Despotism?* (Bloomsbury, 2019).
84. See, eg, *Clubb v Edwards* (2019) 267 CLR 171, and discussion in Scott Stephenson, 'Dignity and the *Australian Constitution*' (2020) 42(4) Sydney Law Review 369 ('Dignity'). See also Ashleigh Barnes, 'Constitutional Dignity' (2023) 46(3) *Melbourne University Law Review* 683.

Table 1. Scope of statutory rights protections in Australian constitutional law.

Nature of right	Scope of protection	Strong/weak entrenchment	Narrow/broad judicial remedies
Autonomy/liberty/ fair process	Broad	Weak	Interpretive/weak remedies
Equality	Narrow/selective (Commonwealth and state anti-discrimination law)	Weak	Strong individual remedies No broader remedies
Dignity	Narrow (State rights charters only)	Weak	Interpretive/weak remedies or n/a

Australian Constitution can be seen to reflect a commitment to democratic representation-reinforcement, in either an Elyian or neo-Elyian sense.

Consider the recent decision of the High Court in *Garlett v Western Australia*.[85] The legislation under challenge in *Garlett* was Western Australian legislation providing for the preventative detention of high-risk offenders, including offenders at high risk of committing robbery. The key question about the legislation was, in effect, whether it imposed a disproportionate limitation on individual rights to liberty — bearing in mind the risk of re-offence, the protection of the community and relevant alternatives for the protection of the community. And while the legislation required a court to follow a reasoned and structured process, and consider the adequacy of community supervision orders as an alternative prior to the making of any such order, it did not contemplate the possibility of short-term, involuntary treatment for addiction or mental health conditions as a relevant alternative.[86] Nor was it passed after full consideration and engagement with the perspective of First Nations in Western Australia.[87]

For some, this first omission in particular might be considered a distinction without a difference; facilities for the involuntary treatment of mental health conditions have many similarities with minimum security correctional facilities.[88] But for others, there are still important differences in the staffing, ethos and purpose of such facilities, and their chances of supporting successful recovery and rehabilitation.[89] The failure by the Western Australian Parliament to consider this alternative, as a precondition to the making of a preventative detention order, could thus be considered a true blind spot of accommodation that operated

85. On the gaps in current human rights protection in Australia, see also Australian Human Rights Commission, 'Free & Equal' (n 2) 46. On how these principles play out in the context of the potential indefinite detention of non-citizens, see Dixon, 'The New Responsive Constitutionalism' (n 5), and also *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (relying on Chapter III principles rather than statutory interpretation as a means of limiting arbitrary detention in these circumstances).
86. (2022) 404 ALR 182 ('*Garlett*').
87. Section 26 of the *High Risk Serious Offenders Act 2020* (WA) provides for the making of an order for the 'control, care, or treatment' of an offender, but in the context of their 'continuing detention … in custody'.
88. Tamara Tulich and Sarah Murray, 'Confronting Race, Chapter III and Preventive (In)justice: G*arlett v Western Australia*', *Australian Public Law* (Blog Post, 4 November 2022) <https://www.auspublaw.org/blog/2022/11/confronting-race-chapter-iii-and-preventive-injustice-garlett-v-western-australia>. For the consideration of the issue, see discussion in *Garlett* (n 87) 950–1 [273]–[276] (Edelman J).
89. See DLA Piper, *Review of the Severe Substance Dependence Treatment Act 2014 (Vic)* (Report, vol 2, 2013) <https://www.health.vic.gov.au/sites/default/files/migrated/files/collections/research-and-reports/f/final-report-on-review-of-ssdta-vol-2-pdf.pdf>.

alongside relevant blind spots of perspective as to the impact of the law on young First Nation offenders.[90]

The constitutional challenge, however, was focused entirely on separation of powers questions, specifically the application of the *Kable* principle, and hence whether the *High Risk Serious Offenders Act* 2020 (WA) ('HRSO') conferred a function on Western Australian courts inconsistent with their necessary independence and integrity as 'a repository of the judicial power of the Commonwealth'.[91] It did not directly raise issues of individual freedom or security of the person, or the racially disparate impact of the law,[92] likely on the understanding that given the clarity and specificity of the HRSO, the relevant human rights arguments simply had insufficient prospects of success.

And while Justices Gageler and Gordon would have found that the HRSO was not ultimately capable of being characterized as consistent with the *Kable* principle — that is, as having a protective rather than punitive purpose, or authorizing 'the involuntary detention of a citizen in custody' other than as an incident of the adjudication of criminal guilt only in 'exceptional cases'[93] — a majority found otherwise.[94] The decision also led to little willingness to revisit the legislation in the Western Australian Parliament.[95] Even after the High Court's decision, therefore, the relevant blind spots in the law simply went unchecked. The only limit on their operation, arising from the decision, was the insistence by Justice Edelman that the HRSO could not validly be construed as applying to all robberies, rather than robberies 'with a sufficiently high degree of seriousness' or 'sufficiently high magnitude of harm' to justify the making of a restriction order.[96]

IV Responsive Constitutionalism and the Principle of Legality

What would it mean for Australia to adopt a more fully responsive approach to the protection of human rights in this context? One possibility is for the Court itself to help close the current gap in weak-form human rights protection; another is for there to be legislative change creating an express statutory basis for a role of this kind. In either case, it is important to stress the kind of reform supported by a responsive approach: one that broadens the High Court's role in rights protection, including its powers to issue appropriate individual relief, but does not make it more difficult for the Commonwealth or state parliaments to contribute to the process of implementing small 'c' constitutional rights commitments.

This is distinct from an Elyian-style vision of expanded protection for the rights of discrete and insular minorities: while Ely was generally wary of strong-form judicial protection of rights, his vision of judicial minority rights protection was squarely based on the idea of entrenched, strong-form constitutional rights protection. A responsive approach, in contrast, envisages broadening courts' role in this context, but within the context of a commitment to constitutional 'dialogue' or weak-strong forms of judicial review.

90. See ibid. See also Magistrate Jennifer Bowles, 'Why Can I Lock Kids Up but I Can't Ensure They Receive Treatment?', *University of Queensland* (Blog Post, 12 February 2021) <https://stories.uq.edu.au/policy-futures/2021/the-case-for-effective-mandated-substance-abuse-treatment-for-young-people/index.html>.
91. Tulich and Murray (n 89).
92. *Garlett* (n 87) 196–8 [57]–[65] (Kiefel CJ, Keane and Steward JJ); 207 [107] (Gageler J).
93. For discussion of this issue, see, eg, ibid 250–1 [273]–[277] (Edelman J); Tulich and Murray (n 89).
94. *Garlett* (n 87) 217–8 [153]–[160], 221–32 (Gordon J).
95. Ibid 207 [107] (Kiefel CJ, Keane and Steward JJ), 252 [281] (Edelman J), 260–1 [314] (Gleeson J).
96. Alicia Bridges, 'High Court Decision on WA Law that Allows Indefinite Detention for 'Serious Offenders' Shocks Human Rights Lawyers', *ABC News* (online, 7 Sep 2022) <https://www.abc.net.au/news/2022-09-07/high-court-denies-challenge-to-serious-offenders-act/101416110>.

The dialogue metaphor has been criticized by the High Court, as reflecting an 'inappropriate', perhaps unduly *conversational,* account of the exercise of judicial power.[97] But at its best, it is entirely consistent with the idea that courts make decisions according to law, on the understanding that those decisions have coercive effects against individuals and the state. It simply conveys the understanding that small and large 'C' constitutional meaning is constructed through an iterative process, involving both legislative and judicial judgment, and this iterative process has advantages for the democratic legitimacy of judicial review.[98]

The principle of legality is an interpretive principle: wherever possible, it provides that statutes should not be construed as infringing 'fundamental rights' and freedoms.[99] And as the High Court noted in *Momcilovic v The Queen,* this allows courts to adopt a narrow or strained approach to the interpretation of the language of a statute.[100] The limit to the principle is that courts must maintain the distinction between legislation and interpretation, and hence must not engage in a process of legislation or statutory re-writing.[101]

What is less clear are the kinds of rights that can attract the operation of the principle or count as 'fundamental' for this purpose.[102] As Brendan Lim notes, this principle has two potential bases: firstly, the 'positive' version of the principle assumes that legislators are committed to the protection of rights, and hence are unlikely to infringe them absent express language indicating this intention.[103] This is the version of the principle set out by the High Court in *Potter v Minahan*[104] and affirmed in cases such as *Bropho v Western Australia*[105] and *Malika Holdings Pty Ltd v Stretton*.[106]

Secondly, the 'normative' version assumes that legislators may have varying intentions in relation to the protection of rights, but that there are normative reasons for courts to give heightened protection to rights, as opposed to other interests, in the interpretation of statutes.[107] This, for example, was how the Mason Court explained the principle in *Coco v The Queen.*[108]

97. *Garlett* (n 87) 252–3 [282] (Edelman J).
98. *Momcilovic v The Queen* (2011) 245 CLR 1, 93 [175] (Gummow J) (suggesting that references to dialogue are 'apt to mislead'), 207 [534] (Crennan and Kiefel JJ) (labelling the metaphor an 'inappropriate description of the relations between the Parliament and the courts').
99. See, eg, Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391 ('Creating Dialogue'); Kent Roach, 'Dialogic Remedies' (2019) 17(3) *International Journal of Constitutional Law* 860; Barry Friedman, 'Dialogue and Judicial Review' (1993) 91(4) *Michigan Law Review* 557; Po Jen Yap, 'Defending Dialogue' [2012] *Public Law* 527; Po Jen Yap, 'Dialogue and Subconstitutional Doctrines in Common Law Asia' [2013] *Public Law* 779.
100. For an illuminating exploration of the principle in Australia, see Dan Meagher, 'The Modern Approach to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?' (2018) 46(3) *Federal Law Review* 397; Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329.
101. Momcilovic (n 99).
102. Ibid. For an earlier discussion of where this line lies, see JJ Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79(12) *Australian Law Journal* 769.
103. Lim, 'Normativity' (n 3).
104. Ibid 386–8.
105. (1908) 7 CLR 277.
106. (1990) 171 CLR 1.
107. (2001) 204 CLR 290.
108. Lim (n 3) 389–94. For a powerful defence of this understanding, see Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Public Law Journal* 40.

The scope of the principle will also vary between these two understandings.[109] The positive version of the principle depends on there being some relatively well-defined set of rights that can be identified *in advance* by legislators and courts as worthy of protection.[110] This often equates to a fairly narrow set of common law rights — in the form of freedom of speech, assembly, association, movement, privacy and bodily integrity, and even there is a question about how predictable these rights are in their concrete application.[111]

The normative version of the principle, in contrast, allows for a more contextual, *ex post* judgment about the importance of certain rights to the broader constitutional system.[112] This could also *include* attention to the degree to which certain rights have historically been protected by the common law, or as the US Supreme Court requires in judging whether rights are fundamental under the Due Process Clause, are 'deeply rooted' in a country's constitutional traditions. Part of the value of a backward-looking approach of this kind is that it helps buttress the legal legitimacy of a decision to apply the principle of legality. Another benefit is that the common itself often reflects important political values, which are then indirectly captured by an attention to common law history and tradition.[113]

But history alone also need not be determinative: as Lim notes, statutory rights to non-discrimination, workplace protections or statutory forms of compensation, or certain welfare entitlements that support the enjoyment of basic human dignity could equally be considered fundamental in this context.[114] Here, the argument is that statutory norms help evidence the rights or values that society deems fundamental, or worthy of heightened legal protection — not that every past statutory entitlement should be treated as attracting the protection of the principle of legality.

The two understandings thus differ in their understanding of the relationship between the principle of legality and the related principle that, where possible, Commonwealth and state statutes are to be interpreted consistent with international law, including international human rights law.[115] The positive basis for this principle is doubtful, given the complexity of modern human rights law, and the varying attitudes towards international law on the part of legislators. Justice McHugh made this point with some force in *Al-Kateb*, as a reason not to endorse an interpretive principle of this kind.[116] But the normative basis for this principle is much more compelling: the principle of *pacta sunt servanda* means that Australia should seek to uphold its international human rights obligations

109. (1994) 179 CLR 427.
110. For the suggestion that the Court adopts a varied approach in practice, see, eg, Francis Cardell-Oliver, 'Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality' (2017) 41(1) *Melbourne University Law Review* 30.
111. See, eg, Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413.
112. Ibid.
113. See Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality Lending Exceptions' (2022) 45(2) *Melbourne University Law Review* 511 ('Institutional Justification').
114. See Lisa Burton Crawford, 'The Institutional Justification for the Principle of Legality, Revisited' (2024) *Melbourne University Law Review* (forthcoming).
115. Lim (n 3) 409–12. For a useful exploration of this same issue, albeit one that ultimately argues against the application of the principle to statutory rights, see Bruce Chen, 'The Principle of Legality: Protecting Statutory Rights from Statutory Infringement?' (2019) 41(1) *Sydney Law Review* 73.
116. For a helpful exploration of this intersection, see Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2013) 38(4) *Alternative Law Journal* 209. See also, Alison Coecke, 'The Principle of Legality as Protection for Human Rights' (2014) 39(4) *Alternative Law Journal* 249; *Murphy* (n 6).

wherever possible,[117] and protecting human rights enhances the moral and political legitimacy of our constitutional democratic system.

What a responsive approach adds to this understanding is that the *breadth* and *intensity* of both the principle of legality — and principles of interpretation consistent with international law — should vary, depending on the degree to which legislation is affected by various sources of democratic dysfunction.[118] Lim suggests this can be understood as a principle of rights 'vulnerability', or the idea that:

> Some rights may not be adequately protected by ordinary political processes, in the sense that there is a real risk they might be abrogated by Parliament without effective opportunity for electoral discipline. Where the rights-holders are a politically weak minority (perhaps because they are 'discrete and insular'); where the rights themselves concern the substance of representative government and the political process; or where the circumstances are otherwise such that only an especially clear statement of legislative intent will ensure sufficient political scrutiny.[119]

Hence, Lim suggests that 'courts may legitimately insist upon a clearer statement of legislative intention in service of protecting "vulnerable" rights'.[120]

The same principle would apply if the Commonwealth Parliament were expressly to authorize Australian courts to rely on international human rights norms in the application of the principle of legality. The Australian Human Rights Commission ('AHRC'), for instance, recently issued a position paper calling for the adoption of a Commonwealth Human Rights Act providing that all primary and secondary Commonwealth is to be 'interpreted, so far as is reasonably possible, in a manner that is consistent with human rights'.[121] The AHRC further proposed the inclusion in a Commonwealth Human Rights Act of a wide range of rights, including a range of civil and political and economic, social and cultural rights.

This is effectively a call for Parliament to invite Australian courts to expand the scope of the weak-form rights protection offered by the principle of legality. What a responsive approach adds, in this context, is also the idea that the precise scope or intensity of that protection should be linked to the degree to which statutory limitations on rights are the product of recent, reasoned legislative deliberation, or else, the product of democratic blind spots or burdens of inertia.

It is important to note that this *not* how the Court currently understands or applies the principle of legality.[122] This is one reason scholars such as Lisa Burton Crawford reject this approach, and instead propose understanding the principle as a relevant part of the context for legislation. This approach is sceptical of the extent to which the background statutory norms can enhance the democratic process, but insists that courts can legitimately make interpretive choices so as to protect

117. *Al-Kateb v Godwin* (2004) 219 CLR 562, 581–94 [33]–[73] (McHugh J). For the recent reconsideration of reversal of the *Al Kateb* decision, see Transcript of Proceedings, *NZYQ v Minister of Immigration Citizenship and Multicultural Affairs & Anor* [2023] HCATrans, 154.
118. See Australian Human Rights Commission, 'Free & Equal' (n 2) 107–8.
119. This is one answer to the argument that democracy-enhancing accounts of the principle are not sufficiently context-sensitive: see Burton Crawford, 'Institutional Justification' (n 114) 519–20.
120. Lim (n 3) 403.
121. Ibid. Cf also Loughland, 'Taking Process-based Theory Seriously' (n 8) (making a similar argument drawing even more explicitly on Elyian ideas about the democratic argument for the judicial protection of 'discrete and insular' minorities, but in the context of construing capital C constitutional guarantees).
122. Australian Human Rights Commission, 'Free & Equal' (n 2) 22.

common law rights and principles.[123] Burton Crawford also rightly points out that the Court has never explicitly endorsed the idea it is appropriate in applying the principle of legality to consider democratic *procedural* considerations — or when or how laws were debated or enacted.[124]

But a democracy-enhancing approach is largely consistent with the general *pattern* of the Court's jurisprudence in this area. A responsive approach also provides a distinctive version of the democracy-sensitive approach to the scope of the principle, but gives the idea of 'vulnerability' a somewhat different, more *neo-Elyian* gloss. Specifically, it suggests that in applying the principle of legality, courts should consider the degree to which relevant legislation is the product of the product of recent, reasoned deliberation by the legislature on a question, or rather influenced by democratic blind spots or burdens of inertia, or has the potential to create forms of electoral or institutional monopoly power. The greater the evidence of democratic dysfunction, the greater the argument will be for courts to apply the principle of legality, whereas the greater the evidence of recent, reasoned deliberation, the greater the argument for close adherence to the language of the statute.

This builds on, but is distinctive from, an Elyian process-based approach to vulnerability in two ways. First, it gives more precise content to the notion of rights that 'concern the substance of representative government and the political process': it suggests that these are political rights and freedoms necessary to the maintenance of the *minimum core* of any truly democratic constitutional system worldwide. This is also similar to but distinct from Ely's idea of constitutional guarantees necessary to maintain the 'channels of political change'. Second, a responsive approach avoids the difficult line-drawing exercise that can arise in any attempt to define what constitutes a 'discrete and insular' minority worthy of judicial protection, and instead focuses on laws that affect individual rights and are subject to arguable blind spots or burdens of inertia.

In addition, as a neo-Elyian theory, RC invites attention to the relationship between these forms of democratic dysfunction and overlapping structural constitutional principles and values — including commitments to individual freedom, dignity and equality.[125] A key premise of RC is that it provides a partial account of democratic constitutionalism, which must be complemented by attention to overlapping constitutional values or commitments.[126] It is, in this sense, a species of — rather than substitute for — a functionalist approach to constitutional construction.[127] Because of this, it invites attention to the degree to which certain rights or principles are democratically vulnerable *and* fundamental from a values-based perspective. As Julian Murphy notes, this is also important to ensuring concordance between the scope of the principle and existing case law in this area.[128]

Finally, a responsive approach understands the normative, democratic case for the principle of legality in a quite specific way: one way of understanding the Court's reasoning in *Coco* was that the principle of legality aims to be democracy-forcing — that is, to force legislators openly to debate the limitation of rights, or to 'enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.[129] And as Crawford notes,

123. On the importance of this kind of consideration of 'fit', see Murphy (n 6) 26.
124. Burton Crawford, 'Institutional Justification' (n 114) 513.
125. Ibid 522.
126. For the idea that the principle should focus on 'structural principles and systemic values', see *Murphy* (n 6) 27. On the scope and content of Australian constitutional values in this context, see, eg, Rosalind Dixon, *Australian Constitutional Values* (Hart Publishing, 2018). On dignity, see also *Stephenson* (85); Barnes (n 85).
127. Dixon, *Responsive Judicial Review* (n 5).
128. See Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455; Dixon, *Australian Constitutional Values* (n 127). Cf Dixon, 'RJR in Europe' (n 28).
129. *Murphy* (n 6).

this has not proved to be an accurate description of what has occurred in consequence of courts' applying the principle in Australia.[130]

But another understanding, endorsed by Lord Hoffman in *Simms,* is that it is meant to create a form of *de facto* weak rights-based review, whereby the legislature is free to override court decisions protecting rights, but only if it 'squarely confront[s] what it is doing and accept[s] the political cost' of limiting rights.[131] As Lim notes, this understanding was endorsed by Kirby J on numerous occasions, Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* and *Al-Kateb*, French CJ in *K-Generation Pty Ltd v Liquor Licensing Court*, Heydon J in *AG v Corporation of the City of Adelaide*, and Gageler and Keane in *Lee v New South Wales Crime Commission*.[132]

A responsive approach also points to a third, related understanding, namely: the idea that courts can themselves enhance the functioning of our democracy, even without remanding questions to parliament for debate, but that their judgments about rights and values in this context are necessarily contestable, or subject to reasonable disagreement, and this makes it desirable that those judgments should be subject to override by the considered judgments of a majority of legislators.

V Conclusion

Constitutional theory and real-world practice cannot always speak usefully to each other. Constitutional practice may be too complex, dynamic or context-specific to allow for meaningful constitutional theorizing: hence, the call by some constitutional theorists for a 'boiled down' account of constitutional practices as the starting point for theoretical debates.[133] Conversely, for lawyers and judges, constitutional theory may ultimately be too abstract, or divorced from the specific constitutional context, to be useful.

But there are also advantages to attempting to place constitutional practice in conversation with a variety of different theoretical accounts: doing so allows us to reflect on the ways in which existing constitutional practice may, or may not, be democratically desirable and could therefore usefully be improved. With this aim in mind, the article explores the idea of RC as a distinctive model of democratic constitutionalism, which starts with an attempt to reconcile both 'thin' and 'thick' commitments to democracy, and in light of this posits three broad principles of constitutional design and construction: shared and overlapping responsibility for constitutional implementation among courts, legislature and 'fourth branch' institutions; strong *and* weak remedial powers on the part of courts; and a differential approach to the exercise of those power by courts, based on the specific context and risks of democratic dysfunction, especially the degree to which a case involves risks to the 'democratic minimum core' (strong relief) versus democratic blind spots and burdens of inertia (weak-strong relief), and counter-vailing risks of judicial over-enforcement — that is, reverse burdens of inertia, democratic backlash and debilitation.

130. *Coco* (n 78).
131. Burton Crawford, 'Institutional Justification' (n 114) 521–2.
132. *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, 131 (Lord Steyn).
133. Lim, 'Normativity' (n 3) 392–3, citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ).

On this account, the Australian constitutional system is operating relatively well: it gives strong constitutional protection to core political freedoms and the institutional checks and balances necessary for the maintenance of a system of free and fair multi-party elections, but narrower and weaker forms of protection to human rights generally. In giving effect to the IFPC, the Court has also taken a differential or 'calibrated' approach to proportionality analysis, which substantially aligns with a responsive judicial approach.[134]

At the same time, attention to the idea of RC can also help draw our attention to current gaps in human rights protections in Australia — including gaps in the breadth and strength of that protection. That is, a responsive constitutional theory lends additional theoretical support for aspects of the current constitutional order in Australia *and* suggests the benefits of reforms aimed at expanding the scope and strength of human rights protections — albeit within the context of a commitment to 'dialogic' or weak-strong rather than purely capital 'C' strong-form constitutional protection, and hence a commitment to weak judicial remedies such as that provided by 'reading down' or the principle of legality.

The High Court itself could drive this shift, towards an expanded, more normatively theorized principle of legality, either driven by the High Court alone, or else it could be encouraged by a Commonwealth Human Rights Act. The latter approach would clearly enhance the perceived legal and political legitimacy of the Court adopting this approach. But it is also not legally necessary.

For some, this fit with existing constitutional norms and structures may make a responsive approach, and its prescriptions for change, too modest. For others, it may point to too radical a departure from existing political constitutional approaches to rights protection or common law approaches to the principle of legality. A responsive approach certainly requires Australian lawyers and courts to step outside their current approach and rethink it through a more explicitly theoretical, democracy-sensitive lens, and for some, this may be a (theoretical) bridge too far. An approach of this kind would also raise distinctive evidentiary and procedural complexities, which merit further consideration as part of any debate on the merits of this kind of approach.[135]

But some Australian constitutional lawyers have already taken important steps in this direction: following the lead of (now Chief Justice) Stephen Gageler, they have shown a clear willingness to engage with the theoretical ideas of John Hart Ely about the relationship between democracy and judicial review.[136,137] RC offers both a continuation and adaption of Ely-style ideas: like Ely it offers an account of democratic constitutionalism and judicial review that is explicitly representation-reinforcing. But it also does so in a way that answers

134. Waldron, 'Core of the Case' (n 14). But for criticism, see Rosalind Dixon and Adrienne Stone, 'The Invisible Constitution in Comparative Perspective' in Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 3; Theunis Roux, 'In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case against Judicial Review' in Ron Levy et al (eds), *Defensive Constitutionalism* (Cambridge University Press, 2018) 203; Samuel Issacharoff, 'Judicial Review in Troubled Times: Stabilizing Democracy as a Second-Best World' (2019) 98(1) *North Carolina Law Review* 1.

135. See Dixon, *Responsive Judicial Review* (n 5).

136. I am indebted to Brendan Lim for pressing me on this point. He and Gabrielle Appleby make a similar point about a functionalist approach to constitutional construction: see, eg, Brendan Lim, 'The Convergence of Form and Function: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 505; Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges' (2015) 43(3) *Federal Law Review* 493; Rosalind Dixon, 'Response to Commentators' (2015) 43(3) *Federal Law Review* 517.

137. See ibid. Stephen Gageler, 'Judicial Legitimacy' (2023) 97(1) *Australian Law Journal* 28; Dixon and Loughland (n 8); Loughland, 'Taking Process-based Theory Seriously' (n 8).

many of the modern critiques of Ely, and that is arguably even more fit for purpose in Australia in 2024. It does not depend on a wholly entrenched vision of constitutional rights protection and hence on any express guarantee of constitutional equality. Instead, it offers a vision of a flexible, statutory model of human rights dialogue under Australia's existing Washminster system, which is arguably much less radical than an Ely-style commitment to protecting discrete and insular minorities.

Some lawyers and scholars will nonetheless reject it as too radical or unlikely to persuade the current High Court. But whether that is true, or not, remains to be seen and can only be tested by putting these ideas before judges and legislators — in the hope that at least some may see it as coherent and normatively attractive account of how Australia's constitutional system could evolve in a more fully democratically responsive direction.

ORCID iD

Rosalind Dixon https://orcid.org/0000-0002-6613-8032