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A Constitution of Values? Principles and Values in the Commonwealth Constitution

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Abstract

Recent Australian public law scholarship has demonstrated an increasing interest in the theme of constitutional values. In the current paper, I seek to clarify the terms of the debate by defending a distinction between (i) constitutional principles, understood as relatively flexible legal norms which rest on text, structure and history and (ii) extra-legal values. My argument is framed initially through a critical discussion of Rosalind Dixon's proposal for a 'functionalist' approach to constitutional interpretation, which ascribes a central place to values in judicial reasoning. The functionalist position, I contend, lacks a sufficiently clear distinction between, on the one hand, constitutional principles as legal norms and, on the other, extra-legal values of political morality. As a consequence, the functionalist appeal to 'constitutional values' tends to shift between a relatively modest supplement to purposive approaches to judicial interpretation and a more ambitious proposal for judges to promote 'normatively attractive' values. These claims are elaborated and refined through a comparative analysis of German constitutional jurisprudence and a recent example of an appeal to values by the High Court.

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I Introduction

An increasing enthusiasm for constitutional values is noticeable in recent Australian public law scholarship. It has been argued, for example, that the *Commonwealth Constitution*, despite its procedural and legalistic character, inevitably reflects certain value commitments.[1] If one accepts, as a corollary, that values are an inescapable feature of judicial reasoning, then it would seem preferable to thematise, rather than downplay, the associated methodological implications. Rosalind Dixon's proposal for a 'functionalist' approach to constitutional interpretation, which investigates

1. Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60.

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the methodological implications of appeals to values in judicial reasoning, argues in this context that the High Court of Australia should be more transparent regarding judicial values.[2]

This paper seeks to clarify the terms of the current debate on Australian constitutional values. Drawing on theoretical, comparative and doctrinal resources, it argues for a distinction between (i) constitutional principles, understood as relatively flexible legal norms which rest on text, structure and history and (ii) extra-legal values of broader political morality. I motivate this distinction initially through a critical examination of the 'functionalist' thesis that the Constitution should be interpreted through the lens of values. The functionalist position, I contend, lacks a sufficiently clear distinction between constitutional principles as legal norms and extra-legal values of political morality. As a consequence, the functionalist appeal to 'constitutional values' tends to shift between a relatively modest supplement to purposive approaches to judicial interpretation and a considerably more ambitious proposal for judges to promote 'normatively attractive' values.

The paper has three main sections. Section II sets the scene with a discussion of Elisa Arcioni and Adrienne Stone's recent examination of the role of values in the *Commonwealth Constitution* (and Australia's wider constitutional culture). I then turn to a critical analysis of Dixon's advocacy of a 'functionalist' approach to judicial interpretation, which, I argue, tends to vacillate between a modest variant of existing purposive approaches and a much more robust values jurisprudence.

Section III deepens the analysis of functionalism by moving to a comparative register, considering historical, conceptual and doctrinal dimensions of constitutional values, primarily by reference to the German Basic Law (*Grundgesetz*), the accompanying jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*) and the theoretical insights of Ernst-Wolfgang Böckenförde and Robert Alexy.[3] There are, of course, fundamental differences between the values jurisprudence of the German Constitutional Court and recent academic and judicial appeals to constitutional values in Australia (these are explored further below), which at first sight may seem to undermine the rationale for this comparison. The relevant systemic and jurisprudential contrasts are, however, in themselves highly instructive for two reasons. In the first instance, the post-WWII German constitutional settlement, precisely because of its entrenchment of basic rights and development of a systematic values jurisprudence, allows for a clear identification of difficulties associated with an 'expansive' construal of constitutional values. In the second instance, German doctrine reveals the importance, even for judges and scholars (like Alexy) who are favourably disposed to constitutional values, of distinguishing between values as objective *legal norms* that are structurally equivalent to constitutional principles and extra-legal values of political morality.

Finally, section IV extends and refines the arguments of the earlier sections by examining the recent theories of constitutional principles proposed by Marcelo Neves and Mitchell N Berman.[4] I demonstrate that both theories, despite their significant points of divergence in other respects, conceptualise constitutional principles as legal norms that are distinguishable from extra-legal values, viewed either as subjective preferences or ideals of political morality. In closing, I elaborate on my claims with examples from Australian public law scholarship and High Court jurisprudence, arguing that the Court's appeal to the value of dignity in *Clubb v Edwards*[5] departs from

2. Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455; Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury, 2018) 3.
3. Robert Alexy, *Theorie der Grundrechte* (Suhrkamp, 1994); Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, ed Mirjam Künkler and Tine Stein, tr Thomas Dunlap (Oxford University Press, 2017) 217.
4. Marcelo Neves, *Constitutionalism and the Paradox of Principles and Rules: Between the Hydra and Hercules* (Oxford University Press, 29 April 2021); Mitchell N Berman, 'Our Principled Constitution' (2018) 166(6) *University of Pennsylvania Law Review* 1325.
5. (2019) 267 CLR 171 ('*Clubb*').

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constitutional principles grounded in text, structure and history to uphold a value that is sourced from broader considerations of widely held political morality. Taken as a whole, these different dimensions of my argument all support the central proposition that constitutional interpretation should distinguish clearly between principles and values in a more expansive sense.

II Australian Constitutional Values

Values appear to be on the ascendant in Australian public law. Scholars have begun to place in question conventional assumptions about the implications of the procedural and legalistic surface form of the *Commonwealth Constitution* ('the *Constitution*'), arguing that it both can and should be read as a constitution of values. This trend is evident in (i) descriptive and normative analyses of the role of values in the *Constitution* and in Australian constitutional culture, (ii) theories of constitutional interpretation which ascribe a central place to values and (iii) the introduction of the terminology of values into the jurisprudence of the High Court itself. The current section focuses on (i) and (ii), by reference to two treatments of Australian constitutional values: Elisa Arcioni and Adrienne Stone's examination of the status of the Constitution as a repository of shared values and Rosalind Dixon's endorsement of a 'functionalist' approach to constitutional interpretation.[6] After setting the scene by reference to Arcioni and Stone's account, I argue that Dixon's 'functionalism' tends to equivocate between more modest and expansive ideas of constitutional values, which makes it difficult to assess its real significance as a model of judicial interpretation. An analysis of this equivocation motivates the development of a distinction between constitutional principles sourced in text, structure and history, and a broader conception of extra-legal values.

Discussions of Australian constitutional values often begin with an acknowledgement of the 'uninspiring' or 'technical' characteristics of the *Constitution* and the 'formalist' or 'legalistic' constitutional jurisprudence of the High Court. With respect to the *Constitution* itself, the Hon Patrick Keanes memorable 'small brown bird' metaphor (in comparison with the 'eagle' of the *US Constitution*) reflects the absence of a bill of rights or a grand rhetorical declaration of popular sovereignty, the 'lawyerly' prose in which the *Constitution* was drafted, and a more general 'constitutional modesty' associated with a classical liberal commitment to 'limited' government.[7] The *Constitution* is a structural constitution: it establishes a framework for a federal government 'within which substantive disputes about matters of fundamental value are to be resolved, leaving more fundamental values to the ordinary democratic process'.[8] On a compatible but alternative formulation, the *Constitution* is a 'basic law' providing a structural foundation for government, not a 'higher' law that seeks to articulate fundamental values.[9] A useful point of comparison (despite its

6. Arcioni and Stone (n 1); Dixon, 'The Functional Constitution' (n 2) 455–92; Dixon, 'Functionalism and Australian Constitutional Values' (n 2) 3–26. Further important recent contributions to debates on Australian constitutional values, symbols, and normative ideals include Dylan Lino, 'The Australian Constitution as Symbol' (2020) 48(4) *Federal Law Review* 543; Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143. High Court jurisprudence pertaining to constitutional values is discussed in section IV.
7. Patrick Keane, 'In Celebration of the Constitution' (Speech, Brisbane Banco Court, 12 June 2008) https://www.austlii.edu.au/au/journals/QldJSchol/2008/64.pdf. On this point, see also Arcioni and Stone (n 1) 63. Cheryl Saunders, *The Constitution of Australia* (Hart, 2011), 39–40 adopts Joseph Raz's terminology, in describing the Constitution as 'thin' in 'substance although not in form': see Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009) 323. The phrase 'constitutional modesty' derives from Arcioni and Stone (n 1) 63.
8. Arcioni and Stone (n 1) 65.
9. Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy and Unwritten Principles' [2012] 3 *University of Illinois Law Review* 683.

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customary translation as 'Basic Law') is the 1949 German *Grundgesetz*, which is regarded as 'substantive' because it enacts a framework of basic rights oriented to a 'master value' of dignity.[10]

The technical and procedural attributes of the *Constitution* have historically, at least, been seen as mirrored by Australian constitutional culture. The 'orthodox' tradition of old constitutionalism in Australia, Greg Craven once argued, is 'deeply suspicious of abstract constitutional values … [and] relatively uninterested in the magic of constitutional symbols or the *Constitution* as symbol'.[11] Rather than a symbolic *Constitution*, it has also been claimed, Australia has an 'inaccessible' Constitution, which is left largely to 'the province of specialists.'[12] Arcioni and Stone note, in an instructive example, that even following the High Court's development of the freedom of political communication as an implication of ss 7, 24 and 128 of the *Constitution*, discussions of free expression in Australia tend to appeal more broadly to 'the liberal political tradition', rather than to a specifically 'constitutional value of freedom of expression', of the kind perhaps most obviously associated with American public discourse on the significance of First Amendment jurisprudence.[13]

The jurisprudence of the High Court has also traditionally reflected the 'altogether more prosaic' character of the *Constitution* relative to the codified constitutional texts of nations like the United States and Germany.[14] At least until relatively recently, the High Court has favoured 'legalistic' methods of reasoning and interpretation and a 'literal and formalist rather than purposive and creative' approach.[15] The paradigmatic expression of this 'textualism' is, of course, the majority decision in the *Engineers* case, which characterised the duty of the High Court as 'faithfully to expound and give effect to [the *Constitution*] according to its own terms, finding the intention from the words of the compact and upholding it throughout precisely as framed'.[16] This 'textual formalism' had a long half-life, despite a greater preparedness by the High Court over the last 35 years to entertain implications of the *Constitution* that seem to depart from the intentions of the original framers.[17] By the 1990s, as James Stellios and Leslie Zines have noted, it is nonetheless the case that 'the Court, while not

10. *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 1. Donald P Kommers, for example, states that the German Federal Constitutional Court's 'understanding of the Basic Law appears to be substantive rather than procedural' (in the sense that procedural dimensions of the Basic Law are interpreted by reference to substantive values): Donald P Kommers, 'German Constitutionalism: A Prolegomenon' (2019) 20(4) *German Law Journal* 534, 538 n 23.
11. Greg Craven, 'Australian Constitutional Battlegrounds of the Twenty-First Century' (1999) 20(2) *The University of Queensland Law Journal* 250, 251. On Australian constitutional culture more generally, see the informative discussion in Lulu Weis, 'Does Australia Need a Popular Constitutional Culture' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 377.
12. Ronald Sackville, 'Our Inaccessible Constitution' (2004) 27(1) *UNSW Law Journal* 66, 66.
13. Arcioni and Stone (n 1) 64.
14. Ibid 63.
15. Ibid 76. See also Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006); James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 2006) 638; Dixon (n 1) 457 (noting in particular the significant and abiding influence of Owen Dixon on Australian 'legalism' (closely associated with formalism) which 'suggests a strong, if not exclusive, emphasis on formal legal materials, such as the text of the Constitution, prior court decisions and formal sources relating to the aims and understanding of the framers of the Constitution or other aspects of our constitutional history'.
16. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 142 ('*The Engineers Case*').
17. James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30(2) *Sydney Law Review* 246. Jeffrey Goldsworthy dates the abandonment of the 'narrow textualism' of *Engineers* and associated shift from political to legal constitutionalism, to the 'last 30 years or so': Jeffrey Goldsworthy, 'Has Engineers Passed its Use-By Date?' (2020) 31(1) *Public Law Review* 18. See also Emerton (n 6) 143.

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rejecting the *Engineers* case, or even criticising it, was adopting an approach in which broad implications and constitutional purpose' are ascribed a much larger role.[18]

Arcioni and Stone's illuminating discussion of values in the *Constitution* sets out from these well-known facts.[19] It defends two closely related claims. The first is that, notwithstanding its legalistic and procedural character, the *Constitution* inevitably articulates a distinctive set of Australian values. The second is that there is a noticeable shift in constitutional culture, identifiable in the reasoning of the High Court, towards an acceptance of the view that the *Constitution* not only does, but should, seek to define core values that speak to the identity of the Australian people.

Arcioni and Stone's first argument begins with the claim that it is misleading to postulate a sharp line of distinction between 'rights' constitutions (eg, the United States and Germany) and 'structural' or 'procedural' constitutions (eg, Australia). The unsustainability of such a rigid distinction is evident in the fact that the First Amendment of the *US Constitution* — usually interpreted to entail a robust commitment to the value of freedom of political expression — may itself be seen as a procedural provision.[20] The establishment of a constitutional process, Arcioni and Stone suggest, necessarily involves decisions on questions of substantive value: 'the determination of the terms on which we engage in political discussion, the nature of representation and the membership of the political community are all substantive decisions of fundamental value that go to a constitutional community's deepest commitments.'[21] From this perspective, Arcioni and Stone continue, 'even a "procedural" constitution can, and perhaps must, define the deepest political commitments of the polity it governs'.[22] It is possible to identify in the federal and structural elements of the *Australian Constitution* 'some deep substantive commitments'.[23] These include — as discussed below — distinctive interpretations of democratic inclusion and the optimal conditions for civic discourse and debate on matters of common concern.[24] From this perspective, the Australian commitment to 'constitutional modesty' does not itself justify the claim that the *Constitution* is substantively thin.[25] It is, Arcioni and Stone conclude, thus plausible that the '*Constitution* does and should define the values of the Australian people'.[26]

This first argument of Arcioni and Stone assumes the 'inevitability' of values. Constitutional modesty is not, and cannot be, 'value-neutral'. 'Legalism', for example, may itself be characterised as 'reflective of a set of values'.[27] An obvious 'source' of legalistic values is the preference of the British tradition to 'constrain judges and correspondingly enlarge the role of Parliaments'.[28] More generally, and moving beyond Arcioni and Stone's own statements, it is hardly surprising that the late 19th century framing of a federal constitutional settlement informed by British and American influences would reflect a classical liberal view of liberty and a commitment to popular (albeit on the

18. Stellios (n 15) 18.
19. Arcioni and Stone (n 1).
20. Ibid 66.
21. Ibid 67.
22. Ibid 66.
23. Ibid 61.
24. Ibid 79.
25. Ibid 61.
26. Ibid 60.
27. Ibid 76.
28. Ibid.

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assumption of a limited franchise) election of representatives.[29] Arcioni and Stone's focus, however, is not the intentions and commitments of the framers, but, as is clear from their second argument, the amenability of the *Constitution* to interpretation as a repository of shared values.

Arcioni and Stone contend that relatively recent projects of constitutional reform — notably the republican movement and Indigenous recognition — and the jurisprudence of the High Court both indicate that the *Constitution* is increasingly perceived as an expression of shared Australian values.[30] The proposal for the constitutional recognition of Indigenous people is the most obvious example of this 'desire to align the *Constitution* with the identity and values of the Australian people'.[31] Yet the High Court's jurisprudence on the (constitutional) identity of the Australian people and implied freedom of political communication also seem to rest implicitly on constitutional value commitments. While the *Constitution* leaves the details of citizenship to Parliament, for instance, it does suggest the value of democratic political inclusion in its Preamble, s 128 (constitutional referenda) and ss 7 and 24 requirements for representatives of the Senate and House of Representatives respectively to be 'directly chosen by the people'.[32] These provisions have occupied centre stage in the High Court's jurisprudence on the implied freedom of political communication and the scope of the franchise.[33] With respect to the implied freedom, Arcioni and Stone submit that the High Court's jurisprudence reflects that public discourse in Australia is marked by a 'notably strong appreciation of the value of protecting robust and uncivil forms of communication'.[34] The political communication cases might thus 'potentially mark an important turning point in Australian constitutional law, offering a more substantive conception of Australian constitutional values that could provide a transformation in the social role of the Constitution'.[35]

Arcioni and Stone are careful not to overstate their conclusions on the status of constitutional values at the level of Australian public discourse and culture.[36] They also acknowledge that High Court jurisprudence on freedom of political expression ultimately rests on 'broader liberal democratic' commitments, rather than expressly declared value or values to be found in 'the written, entrenched Australian Constitution'.[37] In 'articulating the values underlying freedom of political communication', Arcioni and Stone admit, the High Court is 'defining rather than reflecting

29. A related 'inevitability of values' claim is found in Dylan Lino's thought-provoking discussion of Australian constitutional symbolism. According to Lino, the argument that the Constitution does not have symbolic force itself represents a 'form of constitutional symbolism'. '[R]epresentations of the Constitution as technical, practical and invisible … tend to reinforce the idea that the Constitution is a value-free, politically neutral instrument rather than a value-infused, politically contentious document that has served to privilege the ideas, interests and identities of some people while excluding and marginalising others.' On Lino's view, this approach allows for an identification of four symbolic constitutions associated with competing political projects: the practical, the liberal, the outdated and the exclusionary: Lino (n 6) 544, 549.
30. Arcioni and Stone (n 1) 77–8.
31. Ibid 78. This argument is indeed supported by subsequent events, most obviously the Uluru Statement from the Heart and subsequent proposal for the constitutional recognition of Indigenous peoples and entrenchment of a Voice to Parliament.
32. *Commonwealth Constitution of Australia*, Preamble, ss 7, 24 and 128.
33. Arcioni and Stone (n 1) 67-8, 71. Relevant High Court jurisprudence is considered in section IV.
34. Ibid 73.
35. Ibid 74.
36. Arcioni and Stone, while acknowledging doubts about the extent to which a robust 'constitutional patriotism' has much appeal outside of Germany (ibid 62), point to the Indian Constitution as another example of a 'transformative' constitutional settlement which embeds a commitment to shared values.
37. Ibid 75. In an interesting turn of phrase, Arcioni and Stone here note that 'these kinds of ideas [different views of political communication and its value] are creeping into our constitutional law and they offer a more substantive conception of Australian constitutional values'.

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Australia's true constitutional character'.[38] This raises well-known concerns about the scope and limits of judicial power.[39] The proposition that it is for the judiciary — aided by the insights of Australian public law academics — to determine the values of the people through the reconstruction of normative propositions taken to be implicit within the terse prose of the Constitution obviously leads to contentious questions of democratic legitimacy. Even absent a commitment to political constitutionalism or suspicion of judicial activism, moreover, the project of identifying values in a 'thin' and 'legalistic' constitution would seem apt to culminate in a clash of ideologies unless guided by sound interpretative methodology. This is a point that is best explored by looking at Dixon's advocacy of a functionalist model of constitutional interpretation.

Dixon introduces 'functionalism' as a theory of constitutional interpretation that is better able to explain 'judicial reasoning based on substantive values' than rival models.[40] Its core claim is that one should approach 'the interpretation of the Constitution by asking, first, what purposes or values various constitutional provisions or structures can be seen to protect or promote; and second, how specific provisions or guarantees can be interpreted in a way that best advances those purposes or values'.[41] In this respect, as Dixon acknowledges, functionalism is closely related to purposive interpretative approaches and represents a middle way between the extremes of 'realism' (or pure 'pragmatism') and 'formalism' (or 'legalism').[42] Realist and pragmatist approaches, for Dixon, rightly accept the inevitability of 'some form of evaluative judgement by judges', but (in their less sophisticated versions) do not provide a systematic or principled model for how judges should engage in values-reasoning.[43] Formalist approaches, by contrast, place a strong emphasis upon constitutional provisions, legal materials and constitutional history (hence providing clear guidelines for interpretation) but are inadequate primarily because they promote a lack of transparency regarding the inescapable role values perform in judicial interpretation.[44]

Recent High Court decisions, Dixon suggests, already evidence steps in the direction of functionalism. The *Kable* doctrine, for example, relies on broad rule of law considerations, inclusive of the value of limiting arbitrary administrative power, and of liberty more generally.[45] The High Court's use of proportionality analysis, notably in the implied freedom of political communication cases, also reflects a preparedness to consider substantive values. If proportionality prevails, then this will likely lead to even 'more open engagement by the High Court with constitutional values.'[46] Such statements suggest that Dixon's analysis is operating primarily on a descriptive rather than normative level and is intended to clarify the High Court's existing approach to judicial reasoning.

The relationship of Dixon's functionalism with purposive approaches nevertheless warrants closer consideration.[47] According to Dixon, functionalism is a 'close relative' of purposive

38. Ibid 74.
39. I return to these concerns in section III.
40. Dixon, 'The Functional Constitution' (n 2) 462.
41. Ibid.
42. Ibid 457; Dixon, 'Functionalism and Australian Constitutional Values' (n 2) 9. In 'The Functional Constitution' (at 461), Dixon characterises 'pragmatism' as a response to the legal realist critique which, in its uncompromising or 'pure' form, is guided by consequentialist 'policy' considerations, without a necessary grounding in 'policy considerations … in some way internal to law'.
43. Dixon, 'The Functional Constitution' (n 2) 458-9.
44. Ibid 457, 462.
45. Ibid 472, 490; *Kable v The Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51. The *Kable* doctrine is glossed by Dixon as the principle that 'state Parliaments cannot confer functions on state courts which would undermine their institutional integrity as courts capable of exercising federal jurisdiction'.
46. Dixon, 'Functionalism and Australian Constitutional Values' (n 2) 7.
47. For closely related observations see Jeffrey Goldsworthy, 'Constitutional Functions, Purposes and Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury, 2018) 43, 45.

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methods, already well-accepted in Australia, which find 'support in common law approaches to statutory interpretation, and in provisions of Commonwealth and state *Interpretation Acts*.'[48] Dixon acknowledges that recent High Court decisions consonant with a functionalist approach have only allowed for 'policy considerations that can be considered in some way internal to law, or which in a constitutional setting find some support in the text and structure of the constitution as a whole'.[49] Such a departure from a robust 'pragmatism' appears to bring Dixon's position into close alignment with the High Court's rather constrained views on purposes in judicial interpretation. In *Lacey v Attorney General (Qld)*, most notably, a plurality of six Justices stated that '[t]he purpose of a statute is not something that exists outside the statute', but 'resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction'.[50]

Where functionalism seems to diverge is in the 'greater scope' it offers 'to identify the purposes or functions served by textual or structural provisions, either *ex ante* or *ex post*'.[51] The greater scope functionalism allows for identification of values suggests sympathy with more progressive 'living tree' interpretative approaches, which argue that the current 'socially accepted function of a law or provision is generally more salient than its intended function' in cases of conflict.[52] Dixon's account motivates such a view, at least, in proposing a constructional method that permits the judiciary to 'advance certain desired ends'.[53] In this 'normativist' emphasis on the promotion of 'desired ends', functionalism is more expansive than prevailing purposive models of interpretation.

On a normative level, Dixon places significant weight upon the capacity of a functionalist approach to promote a culture of enhanced judicial transparency.[54] Like pragmatism, functionalist jurisprudence entails that judicial 'choices' should 'be informed by direct and open engagement with substantive criteria that go beyond the scope of the text of the constitution, prior cases or the formal record of the aims and understandings of those who drafted the constitution'.[55] Dixon submits that 'Australian courts routinely consider a range of *political and moral values* in making constitutional decisions — the question is simply when and how openly they do so, and on what sources they rely on giving content to relevant values'.[56] In this claim, and in the further recourse to values that are 'normatively attractive', Dixon's conception of a constitutional value is more capacious, extending to 'substantive social values'.[57] As a prescriptive thesis regarding judicial interpretation, indeed, Dixon's functionalism does not simply depart from what, in the context of American debates on originalism, has been labelled the 'Constraint Principle'; that is, that public meaning at the time of enactment '*ought* to constrain constitutional practice, for reasons of

48. Dixon, 'The Functional Constitution' (n 2) 465. On common law 'values' in an Australian context see Peter Cane, 'Theory and Values in Public Law' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press, 2003) 3–22.
49. Dixon, 'The Functional Constitution' (n 2) 461.
50. *Lacey v Attorney General (Qld)* (2011) 242 CLR 573.
51. Dixon, 'The Functional Constitution' (n 2) 465.
52. Jonathan Crowe, 'Functions, Context and Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury, 2018) 61, 66.
53. Dixon, 'The Functional Constitution' (n 2) 474.
54. Ibid 456–7, 461-2.
55. Ibid 461.
56. Dixon, 'Functionalism and Australian Constitutional Values' (n 2) 7 (emphasis added).
57. Dixon, 'The Functional Constitution' (n 2) 462, citing Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 618.

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legitimacy and the rule of law.'[58] Dixon takes the additional step of allowing for substantive normative criteria that are derived from the broader political and the moral domains.

Dixon, to be sure, states that functionalism is not intended to offer a 'blank cheque' for the introduction of contentious political and moral values into constitutional interpretation. While partly inspired by realist approaches, Dixon also repeatedly emphasises the importance of legal form and suggests that 'any reliance by a court on "values"-based arguments should first depend on serious engagement with the text, history and structure of a constitution, as well as prior precedent'.[59] The expression 'first' in this passage is nonetheless significant. Dixon's claim is that, to '*the maximum extent possible*, members of the Court should … attempt to rely on values in some way sourced in the Constitution — and not simply their own values, or those of the community — in engaging in processes of constitutional interpretation or construction'.[60] Yet, in some cases, 'it may be impossible to avoid ultimate reliance on personal or community values'.[61] At this point, Dixon's argument strongly suggests, more 'realist' considerations will necessarily prevail.[62]

Dixon's characterisation of the values that are to inform functionalist constitutional interpretation is equivocal in its implications. One manifestation of this is the use of the inclusive disjunction 'purposes or values' to range over purposive interpretation in the sense endorsed by the High Court and a more substantive conception of values derived from political morality.[63] In what follows, I argue that this ambiguity reflects the lack of a clear distinction between, on the one hand, constitutional principles understood as relatively flexible legal norms which nevertheless rest on text, structure and history, and, on the other hand, extra-legal values.[64] Federalism and representative and responsible government — listed by Dixon as constitutional values — are examples of principles in the former sense.[65] Dixon also refers, however, to the 'accommodation of pluralism' as a constitutional value, which seems to require more interpretative imagination.[66] It is here that a more precise distinction between constitutional principles and values is necessary.

Dixon's functionalist approach ultimately admits of weaker and stronger interpretations.[67] On a weaker reading, it is a pluralist and ecumenical interpretative approach which combines an objective purposive emphasis on the 'ends' which give meaning to constitutional provisions with continued

58. See William Baude, 'Originalism as a Constraint on Judges' (2017) 84 *University of Chicago Law Review* 2217; Lawrence B Solum, 'The Constraint Principle: Original Meaning and Constitutional Practice' (unpublished manuscript) last accessed at SSRN: https://ssrn.com/abstract=2940215 1 November 2023.
59. Dixon, 'Functionalism and Australian Constitutional Values' (n 2) 9.
60. Ibid (emphasis added).
61. Ibid.
62. The jurisprudential implications of Dixon's functionalism arguably become clearer when one situates it within the Hart-Dworkin debate on 'hard cases'. Functionalism appears to suggest that in 'hard' cases one should adopt as a starting point a broadly Dworkinian perspective in the application of principles (i.e. legal norms less determinate than rules), but also that on occasion an ultimate recourse to judicial 'values-discretion' remains necessary. For Dworkin's influential account of the application of 'non-conclusive' principles in hard cases see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 81–130.
63. Dixon, 'The Functional Constitution' (n 2) 465.
64. Berman (n 4) 1385–6. The distinction between principles and values introduced here is developed in detail in sections III and IV.
65. Dixon, 'The Functional Constitution' (n 2) 464.
66. Ibid. The same ambiguity is apparent in Dixon's claim that attitudes towards 'federalism' and 'same-sex marriage' are both informed by 'broader values-based considerations.' See Dixon, 'Functionalism and Australian Constitutional Values' (n 2) 5.
67. Cf Dixon's own rendering of stronger and weaker versions of the functionalist thesis: ibid 10–11. Dixon leans towards the stronger reading which entails 'affirmative support for various values' rather than mere consistency with constitutional text and structure.

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adherence to formalist or legalist methods (consistent with High Court doctrine) but also acknowledges that in some exceptional cases it may be necessary for judges to take recourse to broader political and moral values. Dixon's functionalism, on this reading, is a fairly conventional purposive theory of constitutional principles with a dash of realism. On a stronger reading, Dixon's functionalism ascribes a role to extra-legal political and moral values — and substantive normative commitments generally — in judicial interpretation which exceeds what its frequent exhortations to incorporate formalist methods initially seems to suggest. The source of this ambiguity, it seems plausible, is the lack of clear definition of a 'constitutional value'.[68] This point is best elaborated by looking more closely at constitutional values from a jurisprudential and comparative perspective.

III Constitutional Values in Jurisprudential and Comparative Perspective

Functionalist approaches to constitutional values, at least on a stronger reading, invite obvious concerns regarding their bestowal of power upon the judiciary. From the broad perspective of political constitutionalism in its various manifestations, the proposition that constitutional apex courts are the privileged expositor of shared national values and normative commitments is indeed an uneasy fit with principles of parliamentary supremacy and popular sovereignty.[69] These concerns are not, however, my primary focus in the next two sections of the paper. The argument that follows, that is to say, does not presuppose a critical perspective on strong form judicial review or a robust theory of popular democratic legitimacy (although it may provide argumentative support for positions in this vicinity) but focuses specifically on the question of the role of values in constitutional interpretation. In the final section, I develop a distinction between constitutional principles and values that is explicated by reference to recent High Court jurisprudence. This third section prepares the ground for this distinction by engaging in a general jurisprudential examination of appeals to constitutional values, which I frame through a comparative analysis of the 'normativist' values jurisprudence developed by the German Federal Constitutional Court.[70]

My appeal to German constitutional jurisprudence in this section both to clarify the functionalist position and motivate a distinction between constitutional principles and extra-legal values requires a brief explanation. The doctrine of an 'objective order of values', as developed by the German Constitutional Court, is of course quite foreign to Australian constitutional jurisprudence, and there is no suggestion that Dixon's functionalism assumes otherwise. German values jurisprudence is nonetheless illuminating in relation to functionalism for two reasons. Firstly, consideration of German doctrine allows for a clear

68. As Goldsworthy, 'Constitutional Function, Purposes and Values' (n 47) 47 notes, in modern societies it 'is surely difficult to attribute purposes or values … other than at the most abstract level ("democracy," "equality," "justice" and so on), which provides little or no assistance in resolving concrete constitutional disputes'. From a sociological perspective, values hence tend to occupy a level of abstraction whereby they may often have a high chance of consensus in public discourse but barely admit of concrete implementation. See Niklas Luhmann, *Rechtssoziologie* (Westdeutscher Verlag, 1987) 88-9.

69. See, for example, Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022) 124–35; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard, University Press, 2007).

70. For the contrast between the interpretative methodologies of 'normativism' (involving a more 'holistic' conception of a constitution as irreducible to the sum of its written provisions) and 'legalism': Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 1st ed, 2012) 689–93.

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identification of potential problems with a more expansive jurisprudence of constitutional values. The current section explores these concerns by reference to Ernst-Wolfgang Böckenförde's critique of the values jurisprudence of the *Bundesverfassungsgericht*. Secondly, the German context helps to elucidate the distinction between constitutional principles and extra-legal values. As I demonstrate below, by reference to Alexy's justly influential work on basic rights, German jurisprudence in fact reveals a convergence between *constitutional values* and principles. Contrary perhaps to terminological first appearances, however, this convergence does not entail an identification of constitutional principles *with values in a broader extra-legal sense*. An examination of this convergence, indeed, motivates the framing of a more precise distinction between, on the one hand, constitutional principles as reflexive or determinative legal norms, and, on the other, values as extra-legal concepts of political morality.

As Arcioni, Stone and Dixon all note, many national constitutions refer to values and many constitutional courts likewise deploy values in judicial interpretation. The codified constitutions of Argentina, Brazil, Costa Rica, East Timor, Egypt, Rwanda, South Africa, Turkey, Uganda and Venezuela are relatively well-known examples.[71] The South African Supreme Court of Appeal and the Supreme Court of Israel are conspicuous instances of apex courts which ascribe a prominent place to values in judicial reasoning. It is the German Constitutional Court, however, in its interpretation of the 1949 *Grundgesetz* (henceforth Basic Law), that has developed the most systematic values jurisprudence. This is despite the fact that the Basic Law (unlike, for instance, the South African Constitution) does not expressly refer to values (*Werte*) as such. One should, in light of this fact, resist the hasty conclusion that ascribing a central role to values in the interpretation of the *Commonwealth Constitution* is incoherent in principle by reference to the text or intentions of the framers. While specific historical circumstances (the Holocaust and Apartheid) have a causal relation to the emphasis that the German and South African constitutional settlements place on human dignity and human rights, this is also insufficient in itself — given the rise of 'transnational constitutionalism' in the mid to late twentieth century — to reject granting a more central place to constitutional values in Australia.[72] A closer examination of German constitutional jurisprudence on values nevertheless does indeed motivate a more cautious stance.

Although drafted by a constitutional assembly, the 1949 German Basic Law was framed with significant input by the victorious Allied Forces and intended as a transitional document (pending national unification) that would guard against the political forces responsible for the failure of the Weimar Republic and subsequent rise to power of the Nazis.[73] The pride of place given to human

71. *Constitution of the Argentine Nation* (Argentina), ch IV s 75 [19]; *Constitution of the Federative Republic of Brazil* (Brazil), preamble; *Constitution of Costa Rica* (Costa Rica), tit II art 15; *Constitution of the Democratic Republic of East Timor* (East Timor), tit II s 41.5; *The Constitution of the Arab Republic of Egypt* (Egypt), pt II art 9; *Constitution of Rwanda* (Rwanda), tit II ch II art 51*; The Constitution of the Republic of South Africa* (South Africa) ch 1 s 1; *Constitution of the Republic of Turkey* (Turkey), preamble; *Constitution of the Republic of Uganda* (Uganda), s 24; *Constitution of the Bolivarian Republic of Venezuela* (Venezuela) ch VI art 101. For further discussion of these provisions, see Gary Jeffrey Jacobsohn, 'Constitutional Values and Principles' in Rosenfeld and Sajó (n 70) 777. The appeals to values in several of the national constitutions listed above are most plausibly read as rhetorical 'mission statements' which function on a primarily symbolic (rather than functional or operational) level. See, for idealistic and critical perspectives on this topic, respectively, Jeff King, 'Constitutions as Mission Statements' in Denis J Galligan and Mila Versteeg (eds) *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 73 and Marcelo Neves, *Symbolic Constitutionalisation,* tr Kevin Mundy (Oxford University Press, 2022) 38–86.

72. On transnational constitutionalism, or the global diffusion, exchange and imposition of common constitutional content (particularly constitutional basic rights), see Benedikt Goderis and Mila Versteeg, 'Transnational Constitutionalism: A Conceptual Framework' in Galligan and Versteeg (n 71) 103.

73. The decision to unify Germany within the framework of the Basic Law in 1990 'transposed the Basic Law from a temporary instrument of governance for one part of Germany into a document of force and permanence for the entire German nation': Kommers (n 10) 534. For useful broader historical context, see also, Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart, 1st ed, 2011).

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dignity and human rights in the Basic Law is readily comprehensible in this context.[74] As noted above, however, the Basic Law does not expressly refer to objective order of values, which is a conceptual scheme that was first explicated in the German Constitutional Court's jurisprudence on positive state obligations. In the (in)famous *Lüth* decision of 1958, the Court acknowledges — consistent with the 'limited government' tradition of liberal constitutionalism — that '[t]he primary purpose of basic rights is to safeguard the liberties of the individual against interferences by state authority'.[75] The Court nevertheless expands on this claim and asserts that it is equally true that the Basic Law is not 'a value-free document' on the grounds that its basic rights section establishes an objective order of values (*objective Wertordnung*) which reinforces the effective power of basic rights. A 'fundamental constitutional decision' for a value system (*Wertsystem*) which centres on 'the dignity of the human personality developing freely within the social community' is hence established by the Court as a framework for all spheres of law and even for society as a whole.[76]

The German Constitutional Court's subsequent jurisprudence conceptualised basic rights not merely as 'defensive' constraints on the state, but as the expression of an objective value order imposing an obligation on the state to respect the central values contained in the constitution. Basic rights are declared by the Court to have a 'radiating effect' on the entire legal order, inclusive of private law, and the basic principles or values of the constitution with respect to human dignity, democracy and the status of Germany as a social and a federal republic cannot — as reflected in the famous Article 79(3) eternity clause (*Ewigkeitsklausel*) — be altered by formal constitutional amendment. In addition to formal criteria guiding the conditions under which the state may limit basic rights, the Court has also developed a proportionality test and doctrine of concordance (*praktische Konkordanz*), which prescribes that the state should attempt to achieve a balance between basic rights which promotes the greatest possible effect of them all in cases of conflict.[77]

Despite its origins as an 'imposed' constitution, not to mention the unique historical and political circumstances of post-WWII Germany, the Basic Law and the accompanying jurisprudence of the German Constitutional Court has undoubtedly been influential.[78] There are nevertheless grounds — which have been articulated from a perspective internal to post-WWII German constitutional thought — to doubt the doctrinal cogency and normative desirability of a jurisprudence grounded in broad constitutional values. The first set of reasons reflects a fundamental suspicion of values as a jurisprudential concept. Associated most closely with Böckenförde (a justice on the German Constitutional Court between 1983 and 1996), this critique offers some important insights. Yet one

74. Article 1(1) states that human dignity (*Würde des Menschen*) is inviolable. The remaining 18 articles of the 'Bill of Rights' (which includes freedom of religion, speech, assembly, association, movement and rights to property, privacy and petition) are 'designed to actualise this crowning principle of human dignity': Kommers (n 10) 545. See also the illuminating critical analysis of the Court's jurisprudence in Maarten Stremler, 'The Constitution as an Objective Order of Values' (2017) 4(2) *Kutafin University Law Review* 498.

75. Bundesverfassungsgericht [Federal Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198 ('*Lüth*'). I follow Stremler's (n 74) translation.

76. *Lüth* case; Stremler (n 74) 4. Similar claims have been made with respect to the South African Constitution. According to Justice Arthur Chaskalson, the South African 'Constitution contains an objective value system, which must permeate all aspects of the law': Arthur Chaskalson, 'From Wickedness to Equality: The Moral Transformation of South African Law' (2003) 1(4) *International Journal of Constitutional Law* 590, 608.

77. Bundesverfassungsgericht [Federal Constitutional Court], 1 BvR 183/54, 3 June 1954 reported in (1954) 3 BVerfGE 383 ('*All-German Bloc*'); Bundesverfassungsgericht [Federal Constitutional Court], 1 BvR 402/87, 27 November 1990 reported (1990) 83 BVerfGE 130 ('*Mutzenbacher*'). On the third party effect of basic rights see Stremler (n 74) 506–8.

78. Although one should note arguments that the transnational influence of the German Constitution (like the United States Constitution) has in fact declined in the 21st century. See David S Law and Mila Versteeg, 'The Declining Influence of the American Constitution' (2012) 87(3) *New York Law Review* 762.

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does not need fully to subscribe to Böckenförde's rejection of a value-based conception of law in order to identify problems with the functionalist model examined in the previous section. For (and this is the second set of reasons) prominent *advocates* of the values jurisprudence of the German Constitutional Court — notably Alexy in his *Theorie* der Grundrechte (1985) — articulate a convergence between constitutional principles and *constitutional values* which allows the latter to be distinguished from values in the more diffuse sense as norms of extra-legal political morality.

Published in the early 1990's, Böckenförde's critique of a 'values-based grounding of law' combines historical and jurisprudential analysis with the practical insight and experience of a long-standing justice on Germany's constitutional court.[79] Some aspects of Böckenförde's analysis undoubtedly reflect idiosyncrasies of post-WWII German constitutional jurisprudence and not merely on a terminological level. It is also plausible, as discussed below, that Böckenförde's critique is more persuasive when its scope is restricted to values-subjectivism, as it does not engage in detail with meta-ethical accounts of objective value.[80] Böckenförde's jurisprudential critique of appeals to values in constitutional interpretation nonetheless has continued relevance across jurisdictions.

Böckenförde defines the 'values-based grounding of law' as the jurisprudential position that 'positive law finds its material basis in values that are to be realised through the law' and that 'the legal system itself is an order of values and must present itself as such'.[81] This position seems attractive, Böckenförde notes, because it allows the interpreter to reject a strict positivism, but lacks the conceptual baggage of the natural law tradition.[82] Yet, on closer examination, the grounding of law in values is beset by several difficulties. These difficulties can only properly be appreciated by reference to the conceptual history of values. Böckenförde locates the emergence of the use of value as a 'category of philosophical grounding' in the neo-Kantian attempt to compensate for the scientific objectification of nature and associated rejection of a teleological model of natural processes.[83] It became necessary to introduce 'new categories and forms of articulation for those spheres of reality which could not be grasped and expressed by the science of [natural] causality, including the grounding of ethico-moral conduct and law, lest they present themselves as nothing'.[84] Appeal to values was seen as a way of preserving the idea of human freedom (and associated personal responsibility) consistent with a rigid distinction between the 'is' and 'ought'.[85] Values nonetheless have a 'mode of being' which renders their legal application problematic. Values are inherently 'aggressive', because 'they possess their actuality only in their validity': they do not exist independently of the act of valuing and are not subject to the yardstick of reality.[86] The 'validity' of values is dependent upon their realisation and implementation. As a consequence, it is inherent to the logic of values that they seek to be fully realised.[87] The values of freedom and security, for

79. Ernst-Wolfgang Böckenförde, 'Zur Kritik der Wertbegründung des Rechts' in *Recht, Staat, Freiheit* (Suhrkamp, 1991) 67–91. Subsequent references are to the English translation (n 3).
80. I'm grateful to an anonymous reviewer for pressing me on this point.
81. Böckenförde (n 3) 217.
82. Ibid. Despite some important points of difference, 'positivism' in Böckenförde's sense has affinities with 'legalism' and 'formalism' in the Australian constitutional tradition.
83. Böckenförde (n 3) 219.
84. Ibid.
85. Ibid 219–20. Böckenförde distinguishes between three alternative (subjective, objective and lifeworld) philosophical conceptions of values. While significant, the details of these distinctions need not detain us here: there is sufficient commonality across the three conceptions of value from the perspective of Böckenförde's more fundamental critique of a value-based grounding of law.
86. Böckenförde (n 3) 223-4.
87. Ibid 224. This dimension of Böckenförde's analysis is influenced by Carl Schmitt, *Die Tyrannei der Werte* (Duncker & Humblot, 1967).

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example, conflict in concrete cases, but there is no objective criterion on a value-based conception of law for determining which value should be privileged in any context.

On the basis of these theoretical considerations, Böckenförde identifies three fundamental problems with a values-based grounding of the constitutional order. In the first instance, the 'ethics of value' is better suited to explain moral than legal conduct. The grounding of law in values leads to a 'moralisation' of the law, because 'the move to base the law on values and define it as a realisation of values provides the legitimation for — perhaps even demands — that one take everything that confronts the moral subject in values as demands on his ethical freedom and turn it into the content of what is rendered legal with an aim at unconditional adherence and enforceability'.[88] In the process, the distinctive methodology and rationality of law (for Böckenförde its 'character as a universal order guaranteeing the possibility of freedom') is undermined.[89] Secondly, a value-based grounding of law lacks a 'rational argumentative foundation', because it ultimately refers only to 'valuations'.[90] If values are seen as 'subjective', then they are 'mere' preferences which are not amenable to questions of right and wrong and true and false.[91] If values are asserted to be 'objective', however, Böckenförde argues, then this only exacerbates the problem of rational foundations on the practical level, insofar as modern legal systems are designed to resolve reasonable disagreement under conditions of pluralism.[92] Böckenförde notes presciently here that 'the raising of an absolute claim for content that exists only in the immediate subjective certainty' is a form of 'fanaticism'.[93] Thirdly, at the specific level of constitutional interpretation, values offer a mere legitimating 'semblance' of an objective or rational grounding.[94] This makes the legal system more vulnerable to capture by the subjective views of elites and/or prevailing or hegemonic conceptions of values in a society.[95] A values-based grounding of law promotes the entry of 'methodologically uncontrollable subjective opinions and views on the part of judges and law teachers, and of the prevailing values and valuations of the day within society, into the interpretation, application and the further development of law'.[96]

Böckenförde's critical discussion of values jurisprudence is motivated in large part by concerns regarding the indeterminacy and openness of judicial reasoning grounded in values.[97] The German Constitutional Court's proportionality reasoning has tended, from Böckenförde's perspective, to be 'devoid' of objective criteria, and hence to collapse into relatively unconstrained processes of practical reasoning which 'weigh' incommensurable values in line with prevailing popular or elite opinion.[98] It is certainly possible to respond in this context that Böckenförde's critique is too quick in assuming that

88. Böckenförde (n 3) 228-9.
89. Ibid 228.
90. Ibid 229.
91. Ibid.
92. I here connect Böckenförde's argument with Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) and the arguments of the next section (n 141).
93. Böckenförde (n 3) 231.
94. Values, Böckenförde contends, 'offer a grounding for something that is not thereby materially justified, but which is relieved of any further grounding': Böckenförde (n 3) 232. See also Gustavo Zagrebelsky, 'Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View' (2003) *1*(4) *International Journal of Constitutional Law* 628-9: 'he who parades values is often a cheat. The rule of values is: judge and act as seems congruous with regard to the goal that you wish to reach … values cannot be traceable to reasons subject to rational controls'. Zagrebelsky's critique also notes the tendency to conflate principles and values.
95. Böckenförde (n 3) 232.
96. Ibid 227.
97. Ernst-Wolfgang Böckenförde, 'Grundrechte als Grundsatznormen – Zur gegenwärtigen Lage der Grundrechtsdogmatik' in *Wissenschaft, Politik, Verfassungsgericht* (Suhrkamp, 2011) 189–229.
98. Böckenförde (n 3) 227.

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'objective values', on closer examination, are really 'subjective values' that have been dignified through widespread acceptance. There are a range of positions in contemporary jurisprudence which seek to uphold, based on meta-ethical premises, an account of objective values that falls short of a 'values-Platonism', while also resisting that conclusion that values are merely subjective preferences. Andrei Marmor, for example, has argued that while values are 'not qualities of objects, or aspects of the world', they are conclusions we draw from our interaction with the world, so that it is possible to subject our evaluations to judgements of truth and falsity.[99] It is also instructive that, despite significant divergences in other respects, Joseph Raz and Ronald Dworkin both accept the possibility of objectivity in value judgements and postulate the dependence of value on social practices.[100] Dworkin favours an integrative model of the relations among values (the 'unity of value'), which allows for objective assessment of value-claims.[101] For Raz, who accepts pluralism and the incommensurability of values, 'the primary way of identifying that something is of value' is that 'it has features or relations that make it valuable, features and relations that we can understand'.[102] This connects practical reasoning about values to experience, explanations of the point of social practices and the development of a network of moral propositions, rather than to mere subjective ideas or preferences absent any objective criteria.[103]

On balance, Dixon's functionalism might be most charitably understood as defending an account of constitutional values which assumes the dependence of value judgements on embedded social practices and forms of explanation that can be assessed by objective criteria, rather than as upholding a values relativism or subjectivism. The central question here, however, remains the role of values in constitutional interpretation. Böckenförde's critique of the tendency for appeals to values to promote indeterminacy and openness in judicial reasoning remains salient in relation to more expansive appeals to normative criteria beyond constitutional text, structure and history.

The continued cross-jurisdictional relevance of Böckenförde's critique is evident from the following example.[104] In a common law context, one finds adjacent concerns regarding judicial reliance on values expressed in relation to the UK Supreme Court's jurisprudence on the 'principle of legality'.[105] Jason N E Varuhas' discussion of the UK Supreme Court's recognition of values as 'trigger norms,' for instance, addresses noticeably similar themes to those in Böckenförde.[106] The UK Supreme Court's approach, Varuhas notes, entails that values 'are elevated from the substrata that underpins legal norms to the surface level of the law, themselves now having the status of legal norms and, where engaged, having direct legal consequences'.[107] Varuhas queries in this context the rational basis for the selection of values as triggers and the justification for their expansion. Although political constitutional principles and

99. Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001) 165.
100. For a recent analysis of this convergence, see Thomas Bustamante, 'Between Unity and Incommensurability: Dworkin and Raz on Moral and Ethical Values' (2022) 13 *Jurisprudence* 169–93.
101. Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 39. According to Raz, Dworkin's account offers textual support for both a more constructivist reading and a form of moral realism in which values are based on an 'object-dependent truth'. See Joseph Raz, 'A Hedgehog's Unity of Value' in Wil Waluchow and Stefan Sciaraffa (eds) *The Legacy of Ronald Dworkin* (Oxford University Press, 2016) 9.
102. Joseph Raz, 'Value: A Menu of Questions' in John Keown and Robert P George (eds) *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford University Press, 2013) 13, 19.
103. Joseph Raz, *Engaging Reason* (Oxford University Press, 1999) 174.
104. See, generally, the discussions of the rise of constitutional 'values' in Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014) 134–74; Martin Loughlin, *Against Constitutionalism* 163–5.
105. A 'trigger norm' is a norm which enlivens the principle of legality and delineates its scope of application (579). The UK Supreme's Court appeal to values as trigger norms is exemplified in the prorogation case *R (Cherry) v Advocate General for Scotland* [2020] AC 373.
106. Jason N E Varuhas, 'The Principle of Legality' (2020) 79 *Cambridge Law Journal* 582.
107. Ibid.

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values may have existed within the UK constitution, they were not recognised as legal norms as such.[108] More generally, Varuhas argues that judicial review in the United Kingdom can increasingly be seen to rest on a process whereby judges identify a set of values, principles, interests or rights, 'which they consider important and relevant to the case at hand', and then assign these weight so that they can be subjected to an open ended-balancing method.[109] In its reliance on broader political values, this 'open-ended' approach to public law adjudication (influenced by the proportionality jurisprudence of the German Constitutional Court) undermines the 'maintenance of a rationally ordered system of law and [its] coherent development' through legal categorisation.[110] It also embodies a shift from courts exercising a 'secondary, supervisory jurisdiction' towards the possession of a 'primary or original power of decision'.[111] Similar concerns, as is explored in Section IV, apply to Dixon's functionalism.

Two counterarguments to these concerns regarding the role of values in constitutional reasoning and interpretation are as follows. The first objection is that, whether one laments the fact or not, values are an inevitable part of public law. Christian Starck, for example, has defended this necessity claim in relation to the jurisprudence of the German Constitutional Court, arguing that the more important issue is the selection of the values on which a legal order is based.[112] The second is that while the argument that broad *moral and political* values should be denied a central role in constitutional reasoning may be persuasive, the same does not apply to *constitutional values*, which are more or less synonymous with constitutional principles. In the remainder of this section, I consider the second counterargument by reference to Alexy's basic rights jurisprudence. I begin with the second objection, as my response to this also helps to address the first counterargument.

It is not uncommon, as a matter of terminology, for judges and public law scholars to treat 'constitutional principles' and 'constitutional values' as roughly equivalent or even synonymous.[113] A widespread lack uniformity and precision in the application of the concepts of constitutional principles and values is, however, a major source of confusion that should be avoided. The tendency, seen in Section II, for Dixon's functionalism to vacillate between a relatively uncontentious subtle variation of purposivism and a more radical position introducing substantive political values into the law is an instructive example.[114] The ambiguities in Dixon's functionalism point to the need for a more systematic distinction between constitutional principles and values.

108. Ibid 585.
109. Jason N E Varuhas, 'Taxonomy and Public Law' in Mark Elliott; Jason N E Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2020) 52.
110. Varuhas, 'Taxonomy and Public Law' (n 109) 40.
111. Ibid 74.
112. Christian Starck, 'Zur Notwendigkeit einer Wertbegründung des Rechts' in Ralf Dreier (ed) *Rechtspositivismus und Wertbezug des Rechts: Beiheft Archiv für Rechts- und Sozialphilosophie* (Franz Steiner, 1990) 33–7.
113. Gary Jeffrey Jacobsohn, 'Constitutional Values and Principles' in Rosenfeld and Sajó (n 70) 777. Jacobsohn distinguishes principles and values on the basis that 'constitutionally-inscribed mentions of principles are associated more often with matters that are less culture-bound than one usually finds with citation of values': at 778. While indicative of identifiable trends in written constitutional texts, Jacobsohn's discussion suffers from a lack of clear definition of the categories informing the comparative analysis.
114. One major source of confusion derives from the 'moralism' of Dworkin's influential jurisprudence, which asserts that a principle is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality': Dworkin (n 62) at 39. This conception rescues constitutional principles from the domain of utilitarian political or policy objectives, only to infuse them with moral considerations that, as Lawrence Tribe puts it in another (related) context, 'go beyond anything that could reasonably be said to follow simply from what the Constitution expressly says'. Lawrence H Tribe, *The Invisible Constitution* (Oxford University Press, 2008) 28. As Richard Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990) once also remarked, in practice a (Dworkinian) principle often seems to be little more than a policy with which we happen [morally] to agree: at 22.

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Robert Alexy's theory of basic constitutional rights is an instructive starting point in this context because it demonstrates that a clear distinction between principles and values need not derive from wholesale scepticism about the latter.[115] Alexy, in his theory of basic rights, defends (and seeks to 'rehabilitate') the proposition that the constitution expresses a value order.[116] All legal norms, according to Alexy, fall within the two categories of principles and rules.[117] A rule is a legal norm which requires its addressee to do exactly what it asks, neither more nor less.[118] A principle is a legal norm that requires that something be 'optimised' or realised to the greatest possible extent. Although principles are demands for optimisation, they are always *prima facie* reasons in contrast to the definitive reasons of rules.[119] This reflects the premise that principles do not determine their own 'extent' of application in relation to competing principles.[120] Principles, consistent with the proportionality test of the German Constitutional Court, are thus 'optimisation' requirements that are applied by balancing their 'weight' against other constitutional principles.

For Alexy, principles are not definitive like rules; they are 'flexible' and have the capacity to be 'optimised' or satisfied to various degrees. Principles are also, however, to be distinguished from values. Alexy distinguishes the two by characterising the former as 'deontological' concepts concerned with the 'ought', and the latter as 'axiological' concepts concerned with the good.[121] In elaborating the values jurisprudence of the German Court, Alexy does contend that statements about principles are 'structurally equivalent' to statements about values.[122] For Alexy, that is to say, what is 'axiologically the best is deontologically what ought to be'.[123] Yet, and this is the decisive point here, Alexy also argues that it is preferable to speak of constitutional principles instead of values in *legal contexts*, because principles are legal norms which express 'more clearly than values the obligatory nature of law'.[124] It is telling in this regard that the German Constitutional Court has increasingly appealed to 'principles', rather than 'values', in its recent Basic Law jurisprudence.[125]

My intention here is not to endorse wholesale Alexy's distinction between constitutional principles and values. The claim that statements about principle and value are 'structurally equivalent' is intelligible for a 'substantive' constitution like the Basic Law but less suitable for more 'procedural' constitutions. Alexy's analysis does, however, provide the foundation for a more general analytical distinction between (i) constitutional principles as legal norms that (while not definitive like rules) are firmly grounded in the text, structure and history of a constitution and (ii) values as extra-legal norms derived from broader societal political and moral attitudes, preferences and ideals. The advantage of this way of formulating the distinction is that it guards against the conflation of principles internal to a legal system and more indeterminate moral and societal values.

115. Alexy (n 3) 18.
116. Ibid.
117. Ibid 71–104.
118. Ibid 75–6.
119. Ibid 90.
120. Ibid 88.
121. Ibid 125–34.
122. Ibid 125–34. A similar view is suggested by Berman (n 4) 1386.
123. Stremler (n 74) 516.
124. Alexy (n 3) 125–34.
125. See Rainer Wahl, 'Lüth und die Folgen. Ein Urteil als Weichenstellung für die Rechtsentwicklung' in Thomas Henne and Arne Riedlinger (eds) *Das Lüth-Urteil aus (rechts-) historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts* (Berliner Wissenschafts-Verlag, 2005) 380-1. Stremler (n 74) argues, however, that this terminological shift has not changed the substantive and practical implications of the values-order jurisprudence of the German Constitutional Court: at 515.

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Constitutional principles, on this conception, are legal norms with an associated 'ought' character, which implies that their interpretation should be guided by distinctively legal norms of rationality.

Despite the frequent confusion of constitutional principles and values, a firm conceptual distinction is both possible and doctrinally cogent. Importantly, this still holds, my discussion of Alexy suggests, even if one is resistant to Böckenförde's strident critique of values jurisprudence and broadly accepts the constitutional methodology of the German Constitutional Court. The 'values' of the German Constitutional Court are, in Alexy's influential account, structurally equivalent with constitutional principles, understood as obligatory legal norms. Such 'values', that is to say, are not to be identified with extra-legal moral or political preferences or normative ideals.

IV Constitutional Principles and Values

In the previous section, I considered two quite contrasting approaches to constitutional values in the German jurisprudential tradition. The section began by examining Böckenförde's concerns regarding the tendency for appeals to values to promote undesirable levels of indeterminacy and openness in judicial interpretation and to introduce subjective opinions and currently prevailing conceptions of morality into the reasoning of constitutional courts. I then turned to Alexy's defence of the German Basic Law as an order of values. While Alexy ascribes a central place to values in his theory of constitutional basic rights, his account rests on the proposition that constitutional values are structurally equivalent to principles. Constitutional values in Alexy's sense are therefore not to be identified with extra-legal values derived from subjective opinions or broader commitments of political morality. Despite their significant divergences, in other words, Böckenförde and Alexy both accept, from a terminological and conceptual point of view, the need to distinguish between constitutional principles (or 'values') and a more expansive extra-legal conception of values. This final section begins by elaborating on the above distinction, which I develop in dialogue with two leading recent accounts of constitutional principles. The section concludes by returning to Dixon's functionalism in light of the distinction between principles and extra-legal values and by considering the distinction's application to Australian constitutional law.

Neves' important recent work helps to further sharpen the distinction between, on the one hand, constitutional principles, and on the other, values of political morality. Like Alexy, Neves categorises legal norms as either rules or principles, with the former providing 'definitive' reasons for the settling of legal disputes.[126] While principles are norms internal to a legal order, and hence connected to constitutional text, structure and history, they operate at the 'reflexive' level of justification.[127] Principles are legal norms enabling the 'construction or reconstruction of rules' and are 'dependent' on the latter.[128] This dependence does not reduce the necessity or importance of constitutional principles: a constitution comprised only of rules and lacking the flexibility of principles would be inadequate for a complex modern society.[129] Principles are nonetheless

126. Neves (n 4) 85.
127. Ibid 81. Constitutional principles hence arise with the modern 'positivisation' of law (88).
128. Ibid. Neves, following Claus-William Canaris, defines legal norms in terms of their 'if-then' or conditional propositional structure (above n 4, 37). Claude-William Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (Duncker und Humblot, 1983).
129. Neves (n 4) 92.

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ambivalent. They have a 'destabilising' character, because the flexibility they provide to the interpreter has the potential to promote uncertainty and — particularly where they are not firmly grounded in rules — to facilitate the intrusion of power, money and 'moralism' into the legal system.[130] The grounding of principles in rules (and constitutional text, structure and history) nevertheless alleviates the worst excesses of these tendencies. The same cannot be said for moral and political values which, as extra-legal norms drawn from wider societal attitudes and preferences, are less amenable to domestication by rational constraints of legal methodology.[131]

Constitutional principles, on Neves' model, are hence 'reflexive' legal norms which subserve the interpretation of definitive legal rules. In contrast to extra-legal moral and political values, constitutional principles can, and should, be firmly located in the text, structure and history of a constitution and its associated interpretative development. While constitutional principles serve justificatory aims, operating at a 'meta-level' in relation to textual provisions, they are legal norms resting on determinate legal content and are thus distinguishable from moral and political values.

Mitchell N. Berman offers a different model of constitutional principles. According to Berman, 'rules are sufficiently determinate to adequately serve the [legal] system's core conduct-guidance function, whereas principles do not purport to determine action but rather have … a dimension of weight'.[132] Whereas Neves regards principles as 'reflexive' legal norms grounded in rules, however, Berman argues that '[c]onstitutional rules are determined by the interactions of our constitutional principles', which are in turn grounded in social and psychological facts.[133] Principles are ascribed a determinative or constitutive role; individually and in combination they provide the normative framework within which legal norms that determine action are established and interpreted. In an American context, for example, the principles of democracy and popular sovereignty, reflected in the text of the US Constitution, but also constitutional history and judicial precedent, speak to the need to enact laws that do not 'unreasonably entrench and augment the influence of powerful factions'.[134] Principles of liberty and autonomy similarly motivate, for Berman, enactment of legal norms that respect the bodily integrity of persons and also their pursuit of individual happiness.[135]

Berman is nonetheless clear — and here his position mirrors that of Neves — in upholding a demarcation between constitutional principles and political morality.[136] While acknowledging that commitments of political morality may influence the constitutional principles we discern or select, Berman also seeks to avoid 'Dworkinianism'.[137] Constitutional principles for Berman, that is to say, are internal to law as an artificial normative system.[138] Even though Berman rejects originalism and the proposition that all constitutional principles are derivative from text, his analyses of specific

130. Neves (n 4) 102. See also Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 841 on the 'vagueness' and associated uncertainty of principles. Larry Alexander and Ken Kress, 'Against Legal Principles' (1996) 82 *Iowa Law Review* 739, go so far as to argue in this context that (even) 'invocation of legal principles is misguided.' In its own way, due to its critical focus on the jurisprudence of Dworkin, this assessment also rests on a confusion between constitutional principles and values.

131. Broader social values can, for Neves, be incorporated within an analysis of principles and rules in constitutional reasoning and interpretation. They nonetheless have a more 'unstructured' character, which has implications with respect to their inevitable 'collision' in normative assessments. Neves (n 4)71.

132. Berman (n 4) 1330.

133. Ibid 1331.

134. Ibid 1388-9.

135. Ibid.

136. Ibid 1386.

137. Ibid 1385-6.

138. Ibid 1365-6.

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principles refer to the codified US Constitution, Supreme Court rulings and the US legal tradition.[139]

The otherwise diverse accounts of constitutional principles in Alexy, Neves and Berman converge on one fundamental proposition. Constitutional principles are legal norms distinct from broader moral and political values. Regardless whether constitutional principles are seen as optimisation requirements, higher-order reflexive norms, or determinants of legal rules, that is to say, they are legal norms internal to a constitutional system and subject to its distinct interpretative constraints.

Where does this leave, however, realist appeals to the inevitability of the intrusion of extra-legal values into the law? From the perspective of a normative theory of adjudication, it would seem beside the point that judges are in fact sometimes influenced by broader moral or political considerations. As William Baude suggests in his discussion of originalist commitments, it is implausible to think that appeals to text, structure and history can offer a watertight 'external' constraint on judicial practice.[140] From a normative viewpoint, if one accepts that a primary function of modern legal systems is to offer rational guides to conduct under circumstances of pluralism and widespread disagreement on comprehensive doctrines, then legal officials, particularly the judges of apex courts, both can and should orient their interpretative methodology to principles internal to a constitutional system of legal norms rather than political values.[141] This is ground zero, in the sense that the rejection of this normative claim would also undermine the rationale for the establishment of a liberal democratic constitutional order in the first instance.

Even if one disagrees with these high-level normative claims regarding constitutional legitimacy, moreover, the realist objection has limited force on a more analytical level. The reason for this is that constitutional principles, in the sense outlined here, are flexible enough to accommodate considerable interpretative debate and disagreement, which leaves 'realist' claims regarding the unavoidability of recourse to substantive political morality both unnecessary and unmotivated.

In order to make good on these claims, it is instructive to apply Neves' model of principles to Australian constitutional circumstances.[142] Consider Section 116 of the *Commonwealth Constitution*. Section 116 states a definitive rule (or series of rules), namely, that the 'Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.[143] This provision has the surface character of a definitive legal rule insofar as it expressly forbids the Commonwealth from specific courses of action in relation to religion.[144] In the interpretation of this provision, it is nonetheless cogent and intuitive to derive a constitutional principle of 'religious freedom' which *justifies* at the meta-level the content and application of the rule. Such a principle seems a clear implication of the semantic

139. Ibid 1385 and 1391-2.

140. Baude (n 58) 2213–2230.

141. This assumption informs the broad spectrum of positions on the normative foundations of modern constitutional liberal-democracies. See, for example, Waldron (n 92) 1–18; Jürgen Habermas, *Between Facts and Norms* trans W Rehg (Polity, 1996) 82–193; John Rawls, *Political Liberalism* (Columbia University Press, 2005) 3–46; Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1995) 496–549.

142. As should become clear in the analysis which follows, Neves' model better reflects the Australian constitutional tradition than the models of Alexy and Berman, which are more parochial in reflecting historical particularities of the German and United States constitutional settlements.

143. *Commonwealth Constitution of Australia* s 116.

144. This is not to deny, of course, the potential for contention regarding the meaning and intended range of application of expressions such as 'prohibition' and 'free exercise' of religion. It is rather merely to identify the definitive and categorical rule-character of the legal obligation(s) which the provision establishes.

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content of the provision, because it is grounded in concepts explicitly referred to in its clauses and is also consistent with Australian constitutional history and the structure of the constitutional text as a whole. One could, in addition, seek to provide a more expansive justification for the provision which relies on broader normative, political or moral value concepts such as human dignity, autonomy or pluralism. Yet this would be to move beyond a construction of a principle on the basis of the content of the provision (understood as stating a definitive rule) to the importation of value concepts which could, in different contexts or from alternative points of view, just as readily support the restriction of religious freedom on the grounds of, for example, intolerance or bigotry.

This explanatory model can also be applied to slightly more complex cases. It is plausible that the rule of law — particularly if taken in a broad Diceyean sense — is an Australian constitutional principle, despite the fact that there is no specific provision of the Constitution which stipulates in so many words that the 'rule of law' is a legal norm.[145] In the case of the rule of law, it is necessary to derive a constitutional principle from broader textual, structural, historical and purposive considerations. On closer consideration, such a derivation is clearly viable. Section 51 prefaces its various legislative heads of power with the statement that the provision is 'subject' to the Constitution. This can be reasonably (and is usually) taken to imply, as Nicholas Aroney argues, that 'the power of the Parliament to make laws is not only conferred by the Constitution but also limited (subject) to it'.[146] Lisa Burton Crawford identifies other evidence for regarding the rule of law as a constitutional principle.[147] Covering Clause 5 of the Constitution states expressly that laws made by the Parliament are binding upon 'courts, judges and people of every State and of every part of the Commonwealth'.[148] Burton Crawford also explicates the rule of law implications of Chapter III provisions on judicial power: of particular relevance here are section 71 (empowering the High Court to exercise the judicial power of the Commonwealth) and section 75(v) (granting the High Court power to hear matters in which remedies are sought against 'officers of the Commonwealth').[149] Furthermore, and turning to judicial construction, Burton Crawford notes that the High Court's invalidation of the *Communist Party Dissolution Act 1950* in in the *Communist Party Case* was premised on the arguments that (i) Parliament could not enact 'laws that fell outside the enumerated powers conferred on it by the Constitution' and (ii) it was 'for the High Court to decide whether a law was within power'.[150] If one applies the explanatory model above, then Burton Crawford's analysis identifies the rule of law as a constitutional principle that is justified on the basis of textual provisions in the Constitution and supporting structural and historical evidence.

What are the implications of these observations on constitutional principles for Dixon's functionalism? On the one hand, many of Dixon's statements on interpretative method conform with this account. It is uncontentious, for example, that Aroney's and Burton Crawford's analyses of the

145. The broad Diceyean sense of the rule of law referred to is the proposition that all persons and institutions are bound by the law. See AV Dicey, *Introduction to the Study of the Law of the Constitution* 10th edition (Macmillan, 1959) 183–205 and the discussion of the rule of law as a structural constitutional principle in Nicholas Aroney, 'The Justification of Judicial Review' in Dixon (ed), (n 2) 35-6. In the same passage, Aroney notes the appeal of Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002* (2003) 211 CLR 476, 513–14 to the rule of law as a constitutional principle that supports the practice of judicial review.

146. Aroney (n 145) 36.

147. Lisa Burton Crawford, 'The Rule of Law' in Dixon (ed)(n 2) 77–98.

148. Burton Crawford (n 147) 82.

149. Ibid 84-6. Burton Crawford adopts Dixon's terminology of 'values,' but her account of the rule of law is consistent with the theory of constitutional principles developed here.

150. *Communist Party Case* (1951) 83 CLR 1 and Burton Crawford (n 147) 82. Burton Crawford notes (83) that Dixon J [at 193] was the only member of the court to expressly use the phrase 'rule of law'.

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rule of law are consistent with Dixon's prescription to engage seriously with 'the text, history and structure of a constitution'.[151] As Aroney notes, such engagement has a salutary 'disciplining' effect; it helps 'to ensure that 'meanings are not attributed to the Constitution as a result of the interpreter's personal preferences and predilections'.[152] On the other hand, Dixon's appeal to 'normatively attractive' political and moral values is difficult to interpret as anything other than an exhortation to import broader values external to the legal order into constitutional interpretation.

In sum, the analysis in this section confirms that Dixon's tendency to run together (under the rubric of 'constitutional values') well-attested doctrine and substantive moral and political considerations flows from the lack of a clear distinction between principles and values. Gabrielle Appleby and Brendan Lim allude to this point in their discussion of Dixon's interpretative methodology. According to Appleby and Lim, it is useful to differentiate between 'mandatory … rules standards or principles with more determinate legal contours' and 'the indeterminacy and choice' distinctive of constitutional values.[153] Yet Dixon rejects this classification, perhaps on the basis that '[c]onstitutional values could equally be regarded as constitutional "principles," or purposes in the objective sense'.[154] Dixon's response is puzzling, however, because elsewhere she insists, as noted in section II, that recourse to substantive values is inevitable and normatively desirable when judicial interpretation grounded in text, history and structure runs out of resources. A clear distinction between (i) constitutional principles as legal norms grounded in constitutional text, structure and history and (ii) extra-legal moral and political values can remove this ambiguity.

Once constitutional principles are understood as reflexive or determinative legal norms, then it is doubtful whether recourse to substantive values is in fact necessary in 'difficult' cases. Constitutional principles can themselves, on the model above, accommodate flexible and diverging interpretations of constitutional content by reference to text, history and structure. An obvious example of this in an Australian context is the derivation of the implied freedom of political communication from ss 7, 24 and 128 of the Constitution, where these provisions have been read as supporting more fundamental principles of representative and responsible government and popular sovereignty. While the implied freedom, considered as a putative constitutional principle, is more 'reconstructive' than 'religious freedom' or the 'rule of law', its initial development by the High Court was nonetheless informed by an *attempt*, successful or otherwise, to derive it from text, history and structure.[155] In this sense, the implied freedom may be regarded as a (still contested) constitutional principle.[156] If one accepts the distinction between principles and values above, then the rationale and need for a category of 'constitutional value' starts to look dubious.

151. Dixon, 'Functionalism and Australian Constitutional Values' (n 2) 9.
152. Aroney (n 145) 41.
153. Gabrielle Appleby and Brendan Lim, 'Democratic Experientialism' in Dixon (ed) (n 2) 241.
154. Ibid 9-10. Dixon cites Allsop J's opinion that values lie on a continuum with other norms, principles and rules and 'are not clearly identifiable separate vehicles, but expressions along a gradation of particularity.' James Allsop, 'Values in Public Law' (2017) 91 *Australian Law Journal* 118, 121. It is difficult to see how Allsop's comments are very helpful in clarifying the relationship between rules, principles and values.
155. See, eg, *Nationwide News Pty Ltd v Willis* (1992) 177 CLR1, 70 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 172-3 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140, 236 (McHugh J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557. Cf. *Coleman v Power, Carnes and Attorney General (Queensland)* (2004) 220 CLR 1 (Callinan J).
156. This argument is consistent with the view that the High Court's reasoning in *Lange* reflected an attempt to reconcile previous divergences in the interpretation of the implied freedom ie that constitutional principle can develop in part through forms of retrospective justification or reconstruction directed towards satisfying demands of consistency or precedent. I'm grateful to an anonymous referee for raising this point.

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This claim can be elaborated by reference to a recent implied freedom case decided by the High Court. In the 2019 *Clubb*[157] decision, the High Court does gesture towards the recognition of constitutional *values* in a broader sense in its deployment of the concept of dignity. Revealingly, the plurality judgement in *Clubb* is beset by similar ambiguities to those found in functionalism. If *Clubb* is an instance of functionalist interpretation, then it speaks strongly against its adoption.

Clubb concerned whether an anti-abortion activist had breached s 185D of the *Public Health and Wellbeing Act 2008* (Vic) by approaching a couple outside an abortion clinic and attempting to dissuade them from proceeding with an abortion.[158] Following conviction by a magistrate, Ms Clubb appealed to the Supreme Court, and the case was then removed to the High Court.[159] Ms Clubb argued for the invalidity of s 185D on the grounds that it breached the constitutional freedom of political communication. The High Court unanimously dismissed the appeal (and associated Preston appeal) that s 185D was invalid. In dismissing the appeal, the plurality (Kiefel CJ, Bell and Keane JJ) applied the three stage 'proportionality' test developed by the High Court in *Lange*[160] and refined in *McCloy v New South Wales*.[161] While the plurality found that s 185D did burden the implied freedom in its terms, operation and effect, they also ruled that the law's purpose was legitimate.[162]

According to the plurality in *Clubb*, the communication prohibition in s 185 not only had a 'rational connection to the statutory purpose of protecting the privacy and dignity of women accessing abortion services', but the rational connection accorded with 'the constitutional values that underpin the implied freedom'.[163] This reference to 'constitutional values' at first appears to denote, consistent with previous freedom of political communication cases, the constitutional principles (properly understood) of representative and responsible government and popular sovereignty, interpreted as implications from ss 7, 24 and 128 of the Constitution. Yet the plurality judgement introduces further arguments which suggest a considerably more expansive conception of constitutional values. In an opaque chain of reasoning, the plurality draw on the extra-judicial statements of the former President of the Supreme Court of Israel, Aharon Barak, to uphold the status of human dignity as the most central of all human rights.[164] On this basis, the plurality assert that 'the balance of the challenged law can, in significant part, be assessed in terms of the same values as those that underpin the implied freedom itself in relation to the protection of the dignity of

157. *Clubb* (n 5).

158. Following the High Court, I focus on the facts of the *Clubb* case within the combined appeal. The *Public Health and Wellbeing Act 2008* (Vic) s 185D states that a 'person must not engage in a prohibited behaviour within a safe access zone' where 'prohibited behaviour' is defined as 'communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety'.

159. For background see Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication: Clubb v Edwards; Preston v Avery' (2018) 40 *Sydney Law Review* 395–409.

160. (1997) 189 CLR 520.

161. (2015) 257 CLR 178. The High Court applies proportionality analysis to the third step ('is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?') of the *McCloy* test. This corresponds to the second limb of the *Lange* test for assessing the invalidity of a law on the basis that it impugns the implied freedom of political communication. *Clubb* (n 5) 6.

162. Ibid 5 and 44–60.

163. Ibid 85.

164. Ibid 50. See Aharon Barak, *The Judge in a Democracy* (Princeton, 2006) 86.

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the people of the Commonwealth'.[165] This reference to the 'dignity of the people of the Commonwealth', while certainly consistent with post-WWII international law, and reflective of the normative commitments of many post-WWII constitutional settlements, is difficult to ground in the text, history and structure of the Constitution, and hence seems to appeal to a 'constitutional value' in a broader sense. On a strong reading, indeed, the plurality here might be taken to imply, without any clear textual basis in the Constitution, that human dignity is a 'core' value of the Australian legal system. Even if one resists this interpretation as implausible, however, it is hard to deny that the plurality's recourse to 'dignity' moves beyond the domain of constitutional principles grounded in text, structure and existing doctrine, to broader normative and value considerations.

The ambiguous appeal to constitutional values in *Clubb* appears to be in large part a product of the plurality's construal of the implications of proportionality analysis. The plurality notes the 'abstract and indeterminate language' of the second limb in *Lange* but suggests that a 'structured proportionality analysis' provides the basis on which a 'rational justification for the legislative burden on the implied freedom may be analysed'.[166] While 'the test recognises that to an extent a value judgement is required', it also 'serves to reduce the extent of it' while encouraging 'transparency' in judicial reasoning.[167] The plurality's reference to the inevitability of value judgements echoes Dixon's functionalist approach and is similarly equivocal. The suggestion, in particular, that proportionality analysis 'does not attempt to conceal what would otherwise be an impressionistic or intuitive judgement' of what is 'reasonably appropriate and adapted' could be taken to mean that the plurality refers to broad values of political morality, rather than constitutional principles in the strict sense.[168] In short, one finds a regrettable tendency in the plurality's judgement to not distinguish clearly between a conception of constitutional 'values' (ie, principles) disciplined by legal text, structure and doctrine and broader substantive moral values.

V Conclusion

The overarching intention of this paper has been to clarify the terms of the debate on Australian constitutional values by developing a distinction between constitutional principles firmly grounded in text, structure and history, and a more expansive conception of values derived from political morality. I began by considering Dixon's recent proposal for a functionalist approach to judicial reasoning, which tends to equivocate between a variant of purposivism, and a more expansive advocacy of the need for judges to be transparent about broader normative commitments. I then moved to a comparative register, examining two contrasting accounts of constitutional values in the German tradition, which both converge on the requirement for a distinction between constitutional principles (or 'values' in an objective sense) and a more expansive extra-legal sense of values. In the final section, I then elaborated on the distinction between constitutional principles and extra-legal values and examined *Clubb* as a recent High Court case in which one can observe some troubling implications of a neglect of this distinction in judicial reasoning and interpretation.

It is at least questionable whether the High Court's appeal to 'constitutional values' in *Clubb* is conducive to greater transparency and clarity in judicial reasoning. The conflation of constitutional principles and values seems apt to promote 'impressionistic' or intuitive judgements derived from

165. *Clubb* (n 5) 101. The plurality's judgement is also ambiguous insofar as it seems to elevate 'dignity' from its express inclusion in the wording of the Victorian legislative provision to the constitutional level.
166. *Clubb* (n 5) 74.
167. Ibid 75.
168. Ibid.

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political morality, which are legitimated by their elision with well-accepted legal doctrine. Of course, where this political morality conforms with international human rights norms, then it will tend to reflect normative commitments readily acceptable to most public law scholars and the judiciary. The 'normative attractiveness' of the consequences of adopting a functionalist approach, however, is contingent upon the political morality that is predominant, whether among the judiciary, public law academics or the community as a whole.[169] It is noteworthy in this context that the functionalist approach has (surely unintended) affinities with attempts to resuscitate a 'common good constitutionalism', which encourages greater transparency in the deployment of substantive moral and ethical values in judicial reasoning and interpretation, but from a more 'conservative' traditional natural law viewpoint.[170] In advocating a functionalist approach, one would do well to keep in mind not only the 'strategic' dimension of constitution-making and interpretation, but also the fact that trends in political morality can shift in unpredictable ways.[171]

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169. On 'normative attractiveness,' see Dixon, 'Functionalism and Australian Constitutional Values'(n 2) 22–3.
170. Adrian Vermeule, *Common Good Constitutionalism* (Polity, 2022). In an Australian context, see also George Winterton's analysis of the role of 'extra-constitutional notions' in the justification of emergency powers in 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223–39. Consider also the German Constitutional Court's decision in 1975 to strike down a liberal abortion statute by reference to the value of life understood within the meaning of Art 2(2) of the Basic Law. For details, see Kommers (n 10) 554-5.
171. Ran Hirschl, 'The Strategic Foundation of Constitutions' in Galligan and Versteeg (n 71) 157–181.

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