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LEGALIST REASONING AND ITS LIMITS: LEGAL PROFESSIONAL CULTURE AND CONSTITUTIONAL DEVELOPMENT IN AUSTRALIA AND GERMANY

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ABSTRACT

In this thesis I demonstrate the value of 'legal professional culture' as a contextual 'layer' that can assist in understanding constitutional development and disagreements about constitutional method. I describe legal professional culture as an infrastructure for socialising legal actors in an experience of 'constraint of choice': the experience that some forms of reasoning, but not others, are open to a legal decision-maker. I explore legal professional culture as a bundle of institutionalised practices that work to produce that experience of constraint of choice. These institutionalised practices can include legal education and training, scholarship and knowledge production, and the organisation of courts. I argue that culturally embedded beliefs, narratives and values are reproduced through those institutionalised practices and ensure the workability and stability of method when applied at scale.

To explore my description of legal professional culture I compare Australian and German constitutional histories. I explore how German and Australian legal professional cultures have influenced practices of constitutional development and disagreements regarding method. Both jurisdictions share a high degree of professional cultural cohesion, despite differences in constitutional text, methodological tradition and court organisation. I explore the relationship between that cohesion and 'legalist' approaches to reasoning, which I both employ as a device to explore the significance of legal professional culture and explore as a constitutional problem in its own right. 'Legalist' reasoning — an umbrella term that I use to encompass 'formalist' and 'positivist' reasoning — tends to assume the determinacy of legal materials, deny the role of judicial choice between multiple plausible interpretations, and insist on a hard distinction between legal and extra-legal considerations in constitutional reasoning. I argue that legalist, formalist and positivist styles of reasoning tend to emerge in professional cultures when there is a high degree of stability in cultural beliefs and narratives regarding method. Exploring how legalist arguments first emerge and then lose credibility over time sheds light on the interplay between professional culture and an experience of constraint of choice in legal actors.

I rely on analysis of what I describe as 'stability seeking' decisions to demonstrate my arguments regarding legal professional culture and legalist reasoning. In case studies drawn from the German Federal Constitutional Court (FCC) and Australian High Court (HCA), I demonstrate how the stability of professional beliefs and narratives, and the emergence of legalist or positivist reasoning, flowed from key decisions made by each court during a period of instability in their early history. During those periods the HCA and FCC attempted to introduce ideas or narratives that could reintroduce an experience of constraint of choice. I demonstrate how 'stability seeking' decisions introduced later in each court's history were less successful at establishing new, or shoring up existing, beliefs and narratives that could be accepted by the professional community and produce an experience of constraint in legal actors. In comparing how 'stability seeking' decisions emerged and were received, I demonstrate the relevance of professional cultural conditions to constitutional development and its stability over time.

DECLARATION

This thesis comprises only my original work toward the degree of Doctor of Philosophy. Due acknowledgement has been made in the text to all other material used. The thesis is fewer than 100 000 words in length, exclusive of appendices and bibliography.

All translations are my own except where indicated.

Signed

Elizabeth Hicks
October 2023

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CHAPTER ONE: INTRODUCTION

I LEGAL PROFESSIONAL CULTURE

A parable popularised by David Foster Wallace recounts a tale of two fish swimming. A third fish asks, 'How's the water?" It is revealed that the fish have no concept of water.[1] The point of Wallace's parable is that "the most obvious, important realities are often the ones that are hardest to see and talk about".[2] Wallace's parable can explain the value of comparison in legal scholarship and thought. Comparison can make "obvious, important realities"[3] visible by exposing the scholar to systems where that reality differs. Once those differences become remarkable, they prompt self-reflection on aspects of the scholar's system that the scholar has assumed as a universal, or not noticed at all.

One of the most important contextual factors in comparative law — culture — is also one of the hardest to see and define. Globalisation and the associated growth of comparative constitutional studies over recent decades has attracted attention to the influence of legal culture on legal practice.[4] Literature on legal culture[5] and constitutional culture[6] often focus on its societal dimension.[7] A distinct account of culture focusses on the 'internal' world of legal professional communities.[8] While scholarship has addressed this within legal cultural studies[9] and to a

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[1] David Foster Wallace, *This is Water: Some Thoughts, Delivered on a Significant Occasion, about Living a Compassionate Life* (Little, Brown and Company, 2009).

[2] Ibid.

[3] Ibid.

[4] Lawrence M Friedman, 'Legal Culture and Social Development' (1969) 4(1) *Law & Society Review* 29. While introduced by Lawrence Friedman in 1969, Friedman later claimed to regret using the term because of its slipperiness. See David Nelken, 'Thinking About Legal Culture' (2014) 1 *Asian Journal of Law and Society* 255, 255.

[5] See, eg, David Nelken, 'Disclosing/Invoking Legal Culture: An Introduction' (1995) 4(4) *Social & Legal Studies* 435 ('Disclosing/Invoking Legal Culture'); David Nelken, 'Comparing Legal Cultures' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing Ltd, 2004) 113; David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy* 1; Lawrence Friedman, 'Is There a Modern Legal Culture?' (1994) 7 *Ratio Juris* 117. For a comprehensive summary of the way in which legal culture has been used in literature, see Tanja Herklotz, 'Legal Cultures' in *Max Planck Encyclopaedia of Comparative Constitutional Law* (online at 1 October 2023).

[6] See, eg, Bernhard Schlink, 'German Constitutional Culture in Transition' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy* (Duke University Press, 1994) 197; Moshe Cohen-Eliya and Iddo Porat, Proportionality and Constitutional Culture (Cambridge University Press, 1st ed, 2013). I explore the distinction between 'legal culture', 'constitutional culture' and 'professional culture' in the next chapter.

[7] I explain how I distinguish between 'legal culture', 'constitutional culture' and 'legal professional culture' more fully in the next chapter.

[8] Lawrence Friedman referred to this dimension as 'internal legal culture': Lawrence Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975) 223–268. His description remains, however, focussed on how that 'internal culture' metabolises societal expectations in the United States.

[9] See, eg, John Bell, 'Legal Education' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (2005) 901; John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press, 2006).

certain extent in comparative law[10], comparative constitutional scholarship can at times neglect professional culture as a contextual 'layer' within its analysis.[11]

Legal professional culture remains the 'water' in which comparative constitutional scholarship 'swims'. Its invisibility, on one view, can be explained by professional cultural patterns that themselves influence constitutional comparison. Anglophone scholarship — and particularly US-American law schools and publications — has historically dominated global comparative constitutional studies. This can result in a tendency for comparison to 'translate' legal problems into the framing of the dominant professional culture, reducing the significance of professional cultural differences.[12] Professional cultural differences are less remarkable between Anglophone jurisdictions as they share a common law legacy and professional structure. Professional cultural features nonetheless have explanatory value for how constitutional texts and structures work in context. Rights catalogues in Germany, for instance, have not produced the divisiveness and controversy involved in rights adjudication in the United States.[13] Texts can produce different doctrinal developments in different cultural contexts.

If texts can produce divergent results in different contexts, this raises questions about the relationship between professional culture and constitutional method. Constitutions prescribe norms but they do not prescribe methods for how to interpret those norms and apply them to concrete cases. The method used to interpret constitutional norms can be as important to concrete outcomes as constitutional norms themselves. Dieter Grimm for instance notes that method "does not constitute a neutral instrument for finding a predetermined meaning of the normative text. Rather, interpretive methods have their own selectivity and thereby prejudice results."[14] Professional culture and its components — including education, training, the organisation of its institutions and allocation of authority, scholarship practices and transnational connections — are vehicles for developing and maintaining interpretive

[10] See, eg, Mirjan Damaška, 'A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment' (1968) 116(8) *University of Pennsylvania Law Review* 1363.

[11] Karl Klare's prominent essay on transformative constitutionalism is an example of constitutional scholarship that incorporates legal professional context into its analysis: Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146. It tends to be cited more frequently for its definition of transformative constitutionalism.

[12] A more recent turn in scholarship explores the effect of language and Anglophone dominance in the translation of concepts. See, eg, Vivian Grosswald Curran, 'Comparative Law and Language' in Mathias Reinmann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019).

[13] See argument of Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart* (Houghton Mifflin Harcourt Publishing Company, 2021).

[14] Dieter Grimm, 'The Role of Fundamental Rights after Sixty-Five Years of Constitutional Jurisprudence in Germany' 13(1) *International Journal of Constitutional Law* 9, 15; Dieter Grimm, 'Methode als Machtfaktor' in Norbert Horn, Klaus Luig and Alfred Söllner (eds), *Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag, Vol I.* (Beck, 1982).

methods. Gertrude Lübbe-Wolff's recent work on deliberative cultures for instance highlights how internal German Federal Constitutional Court processes of reaching decisions can influence outcomes.[15]

Because professional culture plays a role in developing and maintaining constitutional method, it can also provide a lens through which to understand conflicts about method and doctrinal development. Protracted professional conflict about the 'correctness' or appropriateness of a particular constitutional development can tend to point to underlying conflicts in cultural beliefs, narratives and values. 'Legalist' reasoning — an approach to constitutional interpretation that downplays the involvement of judicial choice and value judgments — usefully illustrates this tendency. Because they overplay the determinacy of legal materials and deny the involvement of judicial choice, legalist arguments tend to bury underlying value judgments and beliefs that restrict the range of meanings that can attach to legal materials.[16] The success or failure of a legalist argument will therefore depend on the self-evident quality of those beliefs or values. Exploring how legalist arguments work reveals the power of professional culture. It socialises legal actors into their understanding of choice. Where a particular belief or narratives is sufficiently embedded in a culture, a particular interpretation may not be experienced as a choice at all.

II ARGUMENT

A *Legal Professional Culture*

I make three related arguments in this thesis. Firstly, I argue that legal professional culture is comprised of a bundle of institutionalised processes. These processes interact to produce certain beliefs and narratives, set the limits of choice, and produce the experience of constraint in exercise of that choice, in members of the legal profession when they engage in legal reasoning and argument.

As well as providing mechanisms for choice and constraint, professional cultural processes allow the legal community to resolve disagreement about how reasoning should adapt. That resolution of disagreement does not occur solely in courts. Other professional cultural institutions play a role. How lawyers are trained to think about method and taught to think about institutional roles, how scholarship casts certain aspects of reasoning as 'problems' warranting critical reflection, but not others, and how institutions are organised, is also relevant to disagreements about method. Legal professional cultural processes influence how 'stable' practices of reasoning are. By 'stable', I mean that there is a basic agreement within a legal professional community about the core beliefs and assumptions that inform legal method.

B *Legalist Reasoning*

[15] Gertrude Lübbe-Wolff, *Beratungskulturen: Wie Verfassungsgerichte arbeiten, und wovon es abhängt, ob sie integrieren oder polarisieren* (Konrad-Adenauer-Stiftung e.V., 2022); Gertrude Lübbe-Wolff, 'Die Beratungskultur des Bundesverfassungsgerichts. Rede zur Verabschiedung aus dem Amt der Richterin des Bundesverfassungsgerichts' (2014) 41 (17-19) *Europäische Grundrechte-Zeitschrift* 509; Gertrude Lübbe-Wolff, 'Cultures of Deliberation in Constitutional Courts' in Patricio Maraniello (ed), *La Justicia Constitucional en los Differentes Ámbitos del Derecho y sus Nuevas Tendencias* (Chaco (Contexto), 2016) 37.

[16] I explore this idea in chapter two.

My second argument relates to 'legalist' reasoning, which I use as an umbrella term to capture methods involving certain core assumptions and characteristics. I analyse literature on US-American 'formalism', German 'positivism' and Australian 'legalism' and define 'legalist' reasoning as the following. It (1) treats legal materials (and constitutional meaning) as 'determinate'. This means that legal materials are susceptible to a 'correct' interpretation and choices between multiple plausible interpretations are not involved. Relatedly (2) it downplays — and in extreme cases denies — the role of 'value judgments' in judicial reasoning and constitutional interpretation. By 'value judgment' I refer to drawing a particular conclusion from a more general good, interest or commitment. Value judgments therefore connect with an acknowledgment of judicial choice. Where 'legalist' arguments acknowledge the involvement of a value judgment or experience of choice, they tends to downplay the complexity of that value judgment. Finally, (3) 'legalist' reasoning often invokes a hard distinction between 'legal' and 'extra-legal' considerations in constitutional argument. It presents these 'extra-legal' considerations — described variously as 'policy', 'political', 'social', or 'economic' — as both illegitimate and capable of separation from an 'internal' body of constitutional considerations.

I argue that the emergence and continued viability of legalist reasoning depends on professional cultural conditions. Three further features of legalist reasoning involve a clear legal professional cultural dimension. Legalist reasoning is often invoked to control the class of legal sources that a legal professional community perceives as authoritative. It also often relies on deeply culturally embedded beliefs and narratives to secure its assumptions, such as the determinacy of legal materials. Some of these beliefs and narratives may relate to the authority of certain institutions over others, the nature of institutional roles, or the nature of a constitutional order or 'founding' constitutional moment. Finally, 'legalist' arguments are often invoked defensively, during periods in a legal professional culture when the core beliefs and narratives sustaining legalist reasoning start to lose so complete a hold. I attempt to demonstrate in my case studies that legalist reasoning becomes less viable, and its position as orthodoxy is threatened, when core beliefs and narratives are challenged.

C *'Stability Seeking' Decisions*

Because of this relationship to legal professional cultural conditions, 'legalist' reasoning can highlight how legal professional culture shapes constitutional development more generally. I demonstrate my two arguments through case studies of what I call 'stability seeking decisions' delivered in Australian and German constitutional courts. These are decisions that have had profound consequences for core professional cultural beliefs and ideas regarding constitutional method. Stability seeking decisions (1) emerge in response to a perceived loss of stability in practices of reasoning and (2) seek to re-establish or introduce new principles or beliefs that can organise constitutional method.

In the case studies I explore, stability seeking decisions were ultimately responsible for establishing the beliefs and ideas around which subsequent legalist approaches stabilised. In Germany early fundamental rights decisions

— *Elfes* (1957),[17] *Lüth* (1958)[18] and the series of decisions establishing proportionality reasoning during the 1960s[19] — entrenched the FCC's jurisdiction over an almost universal range of potential societal conflicts, including conflicts with dimensions in private law. These decisions responded not only to the challenge of interpreting a new constitution, but also authoritatively settled intractable conflicts about method in the Weimar Republic that had compromised the stability of constitutional reasoning. Those early stability seeking decisions interacted with other features of German professional cultural features — the approach to public law scholarship, legal education and the composition of the FCC in particular — to ensure high professional cultural acceptance of that Court's authority. Over time this crystallised into a particular type of legalist reasoning — 'constitutional court positivism'[20] — underpinned by the deference of other professional cultural institutions to the Court on core questions of method and its approach to judicial review.

European integration destabilised this approach to legalist reasoning by disrupting the centrality and institutional authority of the FCC in German legal professional culture. This led to a series of 'stability seeking' decisions — *Solange I* (1974) and *Solange II* (1986),[21] *Maastricht* (1993)[22] and *Lisbon* (2009)[23] — that attempted to reconcile European integration and its consequences for core legal concepts with the centralised authority of the FCC. These decisions were limited in their ability to re-establish stability, however, as the core professional beliefs and values that enabled the success of the early fundamental rights decisions — deference to a superior court and a view of law as a complete system — struggled to adapt to a 'second' superior court and plural legal sources.

[17] *Elfes*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 253/56, 16 January 1957 reported in (1957) 6 BVerfGE 32.

[18] *Lüth*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198.

[19] See, eg, *Pharmacies*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in (1958) 7 BVerfGE 377; Bundesverfassungsgericht [German Constitutional Court], 1 BvR 665/66, 16 March 1971 reported in 30 BVerfGE 292; Peter Staubach, 'Das Verhältnismäßigkeitsprinzip' in *Vorbereiter - Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 131.

[20] Bernhard Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit' (1989) 28(2) *Der Staat* 161. Michaela Hailbronner describes this similarly as 'value formalism': Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press, 2015); Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (2014) 12(3) *International Journal of Constitutional Law* 626.

[21] *Solange I*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271; *Solange II*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvR 197/83, 22 October 1986 reported in 73 BVerfGE 339.

[22] *Maastricht*, Bundesverfassungsgericht [Germany Federal Constitutional Court], 2 BvR 2134, 2159/92, 12 October 1993 reported in 89 BVerfGE 155.

[23] *Lisbon*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvE 2/08 decision of 30 June 2009, reported in 123 BVerfGE 267.

In Australia the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘*Engineers’ case*’, 1920)[24] settled the core beliefs and narratives that would guide Australian legalist reasoning over subsequent decades. It drew upon beliefs regarding legal determinacy in the British tradition that were stable prior to the introduction of a new constitution. To sustain those beliefs in a new, written constitutional framework, Australian legalist reasoning relied on certain narratives about the founding moment — which I refer to as the ‘continuity’, ‘rights exceptionalist’ and ‘parliamentary sovereignty’ narratives — and strong control of a closed class of legal sources. A second set of ‘stability seeking’ decisions in the post-war era, including *Melbourne Corporation v Commonwealth* (‘*Melbourne Corporation*’, 1947)[25] and *R v Kirby; Ex parte Boilermakers’ Society of Australia* (‘*Boilermakers’ case*’, 1956),[26] rehabilitated ‘implications’ — derived principles ‘necessarily’ implied in the constitution by engaging with core ideas and concepts connected with federalism. In doing so they introduced a method that sat in potential tension with the core beliefs and narratives that the *Engineers’ case* had used to stabilise Australian legalist reasoning.

From the 1970s and 1980s a number of structural changes in the practice of organising elections, coupled with changes in Australian legal professional culture, placed pressure on the ‘continuity’ and ‘parliamentary sovereignty’ narratives.[27] This culminated in the implication of a freedom of political communication in 1992.[28] I argue that this development again reflected a form of ‘stability seeking’ as it attempted to establish new ideas and narratives — including ideas of ‘popular sovereignty’ — that could guide constitutional reasoning over the longer term. This responded to the declining credibility and perceived limitations of existing legalist narratives to respond to novel questions regarding representative democracy. This attempt at developing a ‘post-legalist’ method itself became a source of instability, particularly as the legalist ‘faithful’ attempted to explain the implied freedom in terms of older legalist assumptions.[29]

Taken together, these case studies reflect how legal professional cultural conditions — the organisation and operation of courts as well as less obvious processes such as legal education, scholarship, and identity — can shape how constitutional method develops. They can increase receptivity to some ideas and arguments over others, influence how broader societal and political problems are translated as constitutional problems, and colour how the legal profession understands institutional roles. Moreover, embedded beliefs and narratives create the conditions for legalist arguments to develop. They make possible legalist assumptions regarding the determinacy of legal materials and the ‘correctness’ of some legal sources over others. Professional cultural conditions and evolution, however, can also threaten the conditions and narratives that support legalist reasoning.

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[24] (1920) 28 CLR 129.

[25] (1947) 74 CLR 31.

[26] (1956) 94 CLR 254.

[27] I explain the content of these narratives in chapters eight and nine.

[28] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (‘*ACTV*’); *Nationwide News v Wills* (1992) 177 CLR 1 (‘*Nationwide News*’).

[29] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (‘*Lange*’).

III METHODOLOGY

A *Comparative Method*

The project combines ideas drawn from comparative and historical institutionalist approaches. It compares practices of constitutional reasoning in the Australian High Court and German Federal Constitutional Court, focussing in particular on key periods in the history of both courts that were decisive for the development of legalist reasoning.

Comparing Australian and German constitutional systems brings attention to the legal professional cultural conditions that support legalist reasoning. Both courts have histories of legalist approaches to constitutional reasoning but differ in the text and institutional structure around which legalist reasoning has developed.

Importantly, both Australian and German legal professional cultures tend to hold beliefs and narratives about the basis for legalist reasoning that are disproved by the experience of the other. A common refrain within the Australian legal professional community is that rights adjudication is 'political' in character. The legalist character of Australian constitutional reasoning is attributed to judicial non-involvement in 'political' or 'social' questions regarding fundamental rights.[30] German legal professional culture, in contrast, tends to view routine practices of judicial dissent[31] and executive driven appointment processes[32] with suspicion. In both instances a strong comparative orientation to the United States has no doubt influenced self-perception.[33] Prestigious educational institutions in the United States are attractive avenues for postgraduate study and career development in both Australian and German legal professional cultures. This has resulted in a tendency to define the 'success' of legalist methods in both systems through those features that distinguish it from the United States' system of judicial review, where the legal professional community is less cohesive. Placing Australian and German cultures of constitutional reasoning in dialogue disproves arguments that legalist approaches are incompatible with rights review, widespread practices of judicial dissent or executive driven appointment processes per se. The comparison reveals that the conditions that support practices of legalist reasoning are much more complex than text, judicial appointment or court design alone.

I rely on 'thick description' to identify features that I argue comprise legal professional culture in Australia and Germany. Introduced into ethnography by Clifford Geerzt, 'thick description' emphasises attention to the

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[30] See, eg, Harry Gibbs, 'A Constitutional Bill of Rights?' (1986) 45(2) *Australian Journal of Public Administration* 171.

[31] See, eg, Lübbe-Wolff, 'Cultures of Deliberation in Constitutional Courts' (n 15).

[32] See, eg,Konrad Duden, 'Richterwahl und Parteipolitische Einflussnahme: Vergleichende Anregungen zum Schutz der Unabhängigkeit des Bundesverfassungsgerichts und der Obersten Bundesgerichte' (2020) 84(3) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 637.

[33] See, eg, the use of the United States as a comparator for the German system in Lübbe-Wolff, *Beratungskulturen: Wie Verfassungsgerichte arbeiten, und wovon es abhängt, ob sie integrieren oder polarisieren* (n 15).

'internal' meanings that members of a culture ascribe to particular cultural practices.[34] Applying this to my argument, I focus not only on describing the 'features' of Australian professional culture such as education and scholarship, but also attempt to describe the beliefs and narratives that members of the legal profession attach to those practices.

By employing 'thick description' I avoid generalising features of those legal professional cultures and treating them as causal variables.[35] On the contrary, analysing legal professional culture in all its complexity reveals how context specific professional cultural processes are and how difficult it is to differentiate between those practices and legal materials. Legal professional culture is comprised of many features and institutions, an argument I explain below. Moreover, because I focus on legal professional culture and constitutional development — as opposed to how societal and political context interact with constitutional development — my analysis necessarily neglects the 'full picture'. Finally, comparing constitutional courts in two jurisdictions — especially courts that have developed in relatively stable and economically prosperous societal contexts[36] — provides insufficient data for drawing generalisable conclusions.

B *Historical Institutionalist Concepts*

I nonetheless develop concepts that may apply beyond the two jurisdictions I explore.[37] To better understand which features of legal professional culture can matter I model legal professional culture as a bundle of practices that influence a 'core' institutionalised practice — constitutional reasoning and practices of argument. By institution I mean a particular activity that is organised through formal or informal rules.[38] Practices of reasoning retain their structure and adapt to novel problems because of other professional cultural practices — legal education, legal scholarship and the production of knowledge, the training and professional structure of judicial careers, and the organisation and internal operations of constitutional courts. I therefore provide a description of 'professional cultural institutions' and their role in structuring and controlling institutionalised practices of reasoning.

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[34] Geertz, Clifford, *The Interpretation of Cultures* (Basic Books, 1973) 310.

[35] See, eg, Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar, 2016) 225–33. Cf Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) 224–5.

[36] For a discussion of what has been described as a 'global south critique' see Hirschl (n 35) 204–223; Philipp Dann, Michael Riegner and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020) 1.

[37] Ran Hirschl describes a "type" of comparison that he describes as "[c]oncept formation through multiple description." This is intended to "generate rich concepts and analytical frameworks for thinking critically about constitutional norms and practices." He critiques this practice however, for its failure to support causal inferences: Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53(1) *The American Journal of Comparative Law* 125, 129–31.

[38] See, eg, Douglass C North, 'Institutions, Ideology and Economic Performance' (1992) 11(3) *CATO Journal* 477.

Analysing the features of 'legalist' reasoning contributes to a broader understanding of how legal professional culture and constitutional development interact. In this way analysing the emergence and decline of legalist reasoning provides a 'method' for exploring legal professional culture as well as an inquiry in its own right. Legalist reasoning provides an extreme example of how legal professional culture can influence the structure and authority of constitutional argument. As I argue in the project, legalist arguments only become possible where there is sufficient agreement and cohesion within a legal professional community regarding method and the underlying beliefs and values that support it.[39] Legalist arguments are often invoked, however, to resist the further development of method and in circumstances where professional cultural beliefs are less stable. By modelling practices of reasoning as an institution, I can draw on ideas from historical institutionalist analysis. Historical institutionalist analysis is generally concerned with the way in which institutions change over time. It uses frameworks for studying periods of greater and lesser stability in institutions.[40] I draw on those frameworks to explore how legalist reasoning emerges from periods of professional cultural stability but tends to be used in normative arguments during periods of instability. Again, I do not deploy that analysis to make causal claims, but instead as a framework to organise close cultural description.

I also do not argue that legal professional culture is a causal variable or explanation for constitutional development to the exclusion of others. This thesis is not intended to 'disprove' doctrinal, cultural, behaviouralist or socio-political explanations of constitutional development and argue 'legal professional cultural analysis' as an alternative. It aims instead to present legal professional culture as an additional 'layer' of context that can support other interpretive approaches. An examination of how professional cultural mechanisms instil certain values and constrain choice can shed light on how doctrine develops in a certain way when multiple choices are available, how texts and legal sources acquire meaning within a professional interpretive community,[41] how certain professional beliefs and narratives can interact with the development of doctrine, and how those beliefs can evolve, decline or even fall into contradiction with one another. Similarly, a professional cultural analysis can complement critical legal[42] or law and political economy approaches. It can provide a framework to understand the mechanics of how certain values can be internalised as professional values and professional 'world views'.

IV SIGNIFICANCE

The comparative analysis in this thesis makes a significant and original contribution to scholarship in three ways. Its description of professional culture in terms of mechanisms for constraining choice differs from existing

[39] I develop this argument in the second chapter.

[40] See, eg, Elizabeth Sanders, 'Historical Institutionalism' in Sarah A Binder, R A W Rhodes and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2008) 39. I provide a more detailed account of historical institutionalist approaches and my framework for case studies in chapter five.

[41] See, eg, Michaela Hailbronner, 'We the Experts. Die Geschlossene Gesellschaft der Verfassungsinterpreten' (2014) 53(3) *Der Staat* 425; Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, 1982).

[42] See, eg, Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591.

definitions offered in literature on culture and law and society.[43] It builds on existing literature that employs historical institutionalist analysis to study courts and integrates this with cultural analysis.[44] It is distinct from that body of literature, however, in its focus on the professional cultural rather than societal cultural dimension of beliefs and narratives. It also contributes to a recent turn toward institutional analysis in German scholarship[45] and builds on accounts of the Federal Constitutional Court for foreign, Anglophone scholars.[46]

Secondly, the thesis contributes to the literature on legalism, formalism and positivism. While a significant body of literature has theorised and explored legalism, formalism and positivism in local contexts, comparative analytic accounts of legalism are uncommon.[47] This thesis synthesises accounts drawn from across legal professional cultures and historical periods and defends that synthesised definition through further case studies. My argument that the viability of legalist reasoning connects with professional cultural cohesion is novel. It is also significant for comparative scholarship at a time when the US-American experience of professional cultural division has had an outsized influence on global discussions about courts and judicial review.[48] The recognition that professional cultural cohesion — or lack of it — can affect methodological conflicts can place such events in context.

Finally, my argument that certain decisions are 'stability seeking' offers an alternative perspective on an established literature on 'landmark' decisions.[49] Popularised by Bruce Ackerman's account of 'constitutional

[43] For a summary of these definitions see Herklotz (n 5).

[44] See, eg, Theunis Roux's work combining historical institutionalist and cultural analysis in Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018). I analyse this literature more extensively in chapter five.

[45] See, eg, Lübbe-Wolff, 'Die Beratungskultur des Bundesverfassungsgerichts. Rede zur Verabschiedung aus dem Amt der Richterin des Bundesverfassungsgerichts' (n 15); Lübbe-Wolff, 'Cultures of Deliberation in Constitutional Courts' (n 15); Lübbe-Wolff, *Beratungskulturen: Wie Verfassungsgerichte arbeiten, und wovon es abhängt, ob sie integrieren der polarisieren* (n 15).

[46] See, eg, Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (n 20); Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951 - 2001* (Oxford University Press, 2015). See also Jacco Bomhoff, 'Making Legal Knowledge Work: Practising Proportionality in the German Repetitorium' (2023) 32 *Social & Legal Studies* 1, 28.

[47] For examples see Roux (n 44) 49–90. Michaela Hailbronner's work on 'value formalism', which I explore more fully in the next chapter, provides a comparative account synthesised from US-American and German examples. See eg, Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (n 20); Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (n 20).

[48] I refer here to comparative discussions in the aftermath of *Dobbs v Jackson Women's Health Organization* (Supreme Court of the United States, 19-1392, 24 June 2022) slip op.

[49] See, eg, JM Balkin and Sanford Levinson, 'The Canons of Constitutional Law' (1998) 111 Harvard Law Review 963; Ali Ighreiz et al, 'Karlsruher Kanones? Selbst- Und Fremdkanonisierung Der Rechtsprechung Des Bundesverfassungsgerichts' (2020) 245 Archiv des öffentlichen Rechts 537.

moments'[50], constitutional theory has long sought to account for decisions that represent 'revolutionary' change.[51] In this thesis I present an alternative argument that aligns ostensible 'radical' constitutional developments with the more conservative professional values of stability and coherence.

V OUTLINE OF THESIS

The body of the thesis is divided into two parts. The initial three chapters develop a framework for analysing a legal professional culture. They map legal professional culture as a bundle of institutions — formal and informal — that provide for mechanisms of constraint and controlled adaptation in practices of reasoning.

Chapter two develops my account of 'legal professional culture' and 'legalist' reasoning. I argue that the distinctive feature of legal professional culture is how component institutions provide for mechanisms of constraint and choice in constitutional reasoning. I build the idea of practices of reasoning as an informal institution. The second half of chapter two provides an account of 'legalist' reasoning. I canvas three accounts of 'legalist' reasoning drawn from different cultures — US-American 'formalism', Australian 'legalism' and German 'positivism' — and analyse the common features of these three terms. I then provide an account of components of 'legalist' reasoning and demonstrate their dependence on legal professional cultural institutions.

Chapter three provides an account of what I describe as 'legal professional cultural institutions'. Through comparison of Australian and German legal professional cultures, I identify legal education, training, scholarship and knowledge production, and transnational dialogue and exposure as professional cultural practices that influence the limits of choice and constraint in legal reasoning. I describe how these cultural practices have influenced the nature and development of constitutional argument in Australia and Germany.

Chapter four considers how court design interreacts with legal professional culture, and the extent to which this shapes the perspective professional actors bring to constitutional method. I identify at least three features of constitutional court design that can affect the stability of reasoning practices — a centralised or decentralised structure, specialised systems of appointment and decision-making processes.

In the second part of the thesis I explore case studies of decisions in German and Australian constitutional courts that were determinative for 'legalist' practices of reasoning. I describe these as 'stability seeking decisions' and explore the way in which these decisions interacted with legal professional cultural beliefs, institutions and conditions. For each jurisdiction I explore an 'establishment' period in which both legal professional conditions and key 'stability seeking' decisions contributed to a 'legalist' approach to constitutional method developing. I follow with an analysis of a second, 'destabilisation' period that threatened the conditions on which that legalist method rested and explore how the court responded.

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[50] Bruce Ackerman, *We The People: Volume I, Foundations* (Harvard University Press, 1991); Bruce Ackerman, *We The People: Volume 2, Transformations* (Harvard University Press, 1998).

[51] For a more recent example see, Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020). I distinguish my own account more fully in chapter five.

Chapters six and seven consider case studies from the German Federal Constitutional Court. Chapter six explores early decisions of the Court regarding fundamental rights. It begins by analysing key debates regarding constitutional method in the Weimar Republic that followed from a collapse in 'positivist' reasoning, and explaining how those methodological problems interacted with legal professional organisation. It then explores how early fundamental rights decisions settled not only methodological questions originating in the Weimar Republic, but also secured a 'cultural monopoly' for the FCC that minimised further disagreement. Over time this produced a form of legalist reasoning focussed on the interpretation and doctrinal refinement of 'standards' produced by the FCC, referred to in some literature as 'constitutional court positivism'.[52] I demonstrate how the development of this kind of legalist reasoning profited from certain features of German legal education and approaches to scholarship.

Chapter seven considers the effect of European integration on 'constitutional court positivism'. I describe FCC decisions that considered the validity of various integration agreements as 'stability seeking' and explore how these attempted to shore up the centralised structure of the FCC. These decisions sought to stabilise core concepts — fundamental rights, democracy and identity — in a way that would maintain the FCC's monopoly on 'setting standards' and controlling legal coherence. I explore why the FCC's decisions regarding European integration continue to be a major source of 'instability' in practices of constitutional reasoning.

Chapter eight and nine develop my Australian case studies. Chapter eight explores early federalism decisions and their establishment of Australian legalist reasoning. I argue that the limitations of Australian legalist reasoning were particularly highlighted by post-war economic programs. The post-war High Court — especially under the influence of Justice Owen Dixon — responded by developing legalist reasoning in a way that preserved core legalist narratives of 'continuity' and 'rights exceptionalism'. It did so, however by rehabilitating constitutional implication as a method.

Chapter nine argues that the consequences of rehabilitating implication as a constitutional method were felt in the 1992 implied freedom of political communication decisions. I argue that these responded to perceived limitations of legalist reasoning to respond to novel questions regarding the constitutions commitments of provisions establishing representative democracy. I explore how professional cultural evolution increased the receptivity of the High Court to arguments regarding the implied freedom amidst the gradual decline of the 'continuity' and 'parliamentary sovereignty' narratives.

In a conclusion I briefly draw together the observations regarding legal professional culture and 'stability seeking' reasoning that I explored in earlier case studies. I reflect more generally on the significance those observations may hold for comparative law generally, as well as for German and Australian 'post-legalist' approaches to constitutional reasoning.

[52] Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit' (n 20).

PART ONE: LEGAL PROFESSIONAL CULTURE

CHAPTER TWO: LEGAL PROFESSIONAL CULTURE AND LEGALIST REASONING

I INTRODUCTION

In this chapter I explain a relationship between legal professional culture and 'legalist' reasoning: an aggregate term that I use to describe approaches to reasoning variously described as 'formalist', 'legalist' and positivist' depending on culture and tradition.

I begin by explaining legal professional culture as the infrastructure for socialising professional actors in constraint of choice. Processes of education, training, the structure of legal careers, the nature of scholarship and court design interact to shape how legal professionals think about choice in legal reasoning. They also produce the beliefs, narratives and assumptions necessary to create experiences of constraint and choice in legal actors.

I model the legal professional mechanisms that perform this function of socialisation and reinforcement as institutions and describe legal and constitutional reasoning as institutionalised practices. I argue that institutionalised professional cultural processes determine the degree of stability within practices of reasoning and constitutional interpretation. Practices of reasoning and constitutional interpretation are relatively 'stable' when there is basic agreement about the core beliefs, narratives and assumptions that organise constitutional method.

In the second half of the chapter I provide a description of 'legalist' reasoning, also described in some cultures and historical periods as 'formalist' or 'positivist' reasoning. I survey three different accounts of reasoning that I describe as legalist — Frederick Schauer's account of US-American formalism, Paul Laband and Karl von Gerber's account of late nineteenth-century German positivist reasoning and Australian legalism. I distil three core characteristics from these literatures: legalist reasoning assumes that legal materials are determinate; it denies the need for value judgments and judicial choice, and where these are recognised, downplays their complexity; it invokes a hard distinction between 'internal' constitutional considerations and external, 'political', 'policy' or 'economic' considerations that can and should be separated from valid, 'legal' considerations.

I argue that legalist reasoning tends to seek a particular methodological outcome in argument, anticipating case studies that I explore more fully in later chapters. Legalist reasoning sometimes seeks to control and limit the 'class' of legal sources and considerations to maintain constraint of choice. Legalist reasoning tends to rely on certain beliefs, narratives and values produced through professional socialisation with a contingent relationship to constitutional text. Finally, legalist reasoning assumes a defensive posture, seeking to shore up professional beliefs, narratives and values during periods where they have become less stable.

II ONE EXPLANATION OF LEGAL PROFESSIONAL CULTURE

A *Socialisation in Constraint of Choice*

When contrasted with the structural features or doctrinal problems with which comparative legal scholarship is often concerned, legal culture appears as a "kind of residue; the contingent, even arbitrary, patterning produced

by many specific, diverse and possibly unrelated factors".[1] In comparative legal theory it can assume the quality of a 'black box', used to explain that which a comparison of structure and legal rules cannot.[2]

This project suggests one way of explaining the 'contents' of that box. I explain professional culture as the process — beyond formal rules alone — through which the experience of constraint and choice in legal reasoning is controlled. This explanation relates to the 'professional' quality of professional culture. A legal professional community is distinguished by specialist knowledge and skills that the community holds to the exclusion of other members of a society. In many accounts of separation of powers — and the separation of law and politics — specialised skills and knowledge provide the basis of the legal professional community's claims to interpretive authority.[3] Specialised skills and rules furnish the professional community with the authority to interpret legal materials authorised by other branches of government. This is because they prescribe a controlled process for reasoning and decision-making that distinguish it from political activity.[4] The controlled nature of that process connects with constraint of choice: legal actors must make decisions on facts according to legal materials and technical skills.

A premise of my argument is that the experience of constraint in legal reasoning is not produced in actors solely through the prescription of formal rules. As Karl Klare explains, legal constraint is a "particular kind of experience a legal actor has (or may have) in the course of doing legal-interpretive work with legal materials." The strength of that experience of constraint "in effect" with respect to a particularly legal problem is a matter of "feeling, belief or conviction in the context of work within the medium".[5] Klare observes that "[t]he process of dissolution and reconstitution of legal constraint has a cultural as well as an individual psychological dimension… legal constraint is 'culturally constructed'."[6] The process of legal education, training, scholarship, identity and dialogue between legal systems — in addition to broader societal and political culture — work in tandem to socialise members of a legal profession into beliefs, narratives, and values that instil the experience of constraint when interpreting a legal instrument.

Cultural beliefs, narratives and values are ideas and principles that tend to be shared by members of the legal profession that organise how they approach legal reasoning, method and argument. Legal professional cultural beliefs and narratives differ from legal reasoning or method in the sense that they must precede reasoning and

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[1] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing, 2006) 83.

[2] Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd ed, 2019) 710, 711.

[3] See, eg, Dieter Grimm, 'Was ist Politisch an der Verfassungsgerichtsbarkeit?' (2019) 66(1) *Zeitschrift für Politik* 86.

[4] Ibid 91.

[5] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146, 160.

[6] Ibid 160–161.

method. Sociological accounts of cultural beliefs emphasise the role of socialisation in homogenising and unifying beliefs.[7] Legal professional beliefs tend to emerge through socialisation. Mechanisms for socialisation proliferate the legal profession, including legal education, training, and the production of scholarship and knowledge institutions.

Legal actors experience constraint when they perceive that some choices in interpreting legal materials are not open to them. Professional cultural socialisation in turn shapes how and when those actors will perceive that a choice between multiple plausible interpretations is available when applying a legal norm, and when it is not. Karl Klare notes that all members of a legal professional culture regardless of their political leanings are to some extent influenced and constrained by that culture to produce ideas or outcomes that would differ were they members of a different legal professional culture. Legal professional culture and socialisation "constrain outcomes quite irrespective of the substantive mandates entrenched in constitutions and legislation".[8] Beliefs and narratives shape what is seen as a 'legal' or a 'political' interpretation[9] and the kind of reasoning that attracts censure as judicial activism.

Because I define professional culture in terms of socialisation and informal rules, I bring it into dialogue with existing literature on the behaviour of institutions. To define it as a bundle of institutionalised practises, I rely on the account of an institution provided by Douglass North.[10] North described institutions as collectively practised activities organised by rules.[11] Collectively practised activities can fit this description notwithstanding an absence of formal or written rules. Conventions, norms of behaviour and routines can also endow practises with an institutional quality. The benefit of describing professional culture in terms of a institutionalised processes is that it shifts a focus to how rules and conventions in a professional community — beyond just courts — create an experience of choice and constraint in legal reasoning. It also draws attention to shared cultural assumptions, beliefs and narratives that hold certain professional practices together. Those assumptions, beliefs and narratives may relate to the role and nature of law, the appropriate role of courts and judges and the nature of 'value judgments'. I explore this more fully below.

Existing literature has explored the relationship between legal professional practices and institutions. For example, John Bell's work on judicial culture notes that the "design and modes of operation" within institutions "establish routines, into which new members are inducted and which are often perpetuated out of convenience and inertia".[12]

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[7] See, eg, Avner Greif, 'Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies' (1994) 102(5) *Journal of Political Economy* 912, 915.

[8] Klare (n 5) 152.

[9] See, eg, ibid.

[10] I explore the body of new institutionalist and historical institutionalist literature describing legal development in more detail in chapter five.

[11] Douglass C North, 'Institutions, Ideology and Economic Performance' (1992) 11(3) *CATO Journal* 477.

[12] John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press, 2006) 355.

Bell's work emphasises the role of routine and repetition in the judiciary in giving rise to certain beliefs. This observation may be extrapolated to the institutions within a legal professional community more generally.[13] Those institutions provide structures, customs, and systems for producing knowledge regarding the law and for educating and training lawyers to apply the law in concrete cases.

Treating legal professional community regulating constitutional development also parallels what has been described as an "interpretive community".[14] Michaela Hailbronner, for instance, argues with respect to constitutional interpretation that whether an argument is defensible depends upon whether the members of an interpretive community accept is as such.[15] The premise of this account is that the production of knowledge and the endorsement and rejection of new methods takes place in the collective. What is accepted as an argument — including novel arguments, in circumstances where existing forms of argument cannot supply an answer — is defined by the collective professional community, through the 'habits of mind' and values produced and replicated through that community's institutions.

Authority and hierarchy within legal professional culture structure socialisation in constraint of choice. On the one hand, formal systems provide for hierarchy and allocate authority in the way law is produced. This includes the way that courts are organised, mechanisms for resolving disagreement between courts and justices, and doctrines of 'higher' and 'subordinate law'. These mechanisms are reinforced in court design and courts' internal operations, which I explore further in chapter four. Education and training also provide for less formal systems of hierarchy and authority that structure legal argument:[16] which institutional voices and actors within a legal professional community — including the academy or foreign courts — are persuasive and shape the approach taken to novel problems? How do hierarchy and authority influence the way that knowledge is produced within a legal professional community, including within its academic and professional institutions? How do institutions structure and authorise legal professional expertise? I explore how the 'professional cultural institutions' of legal education, training and scholarship socialise members of a legal profession in these questions in the next chapter.

B *Stability and Evolution*

The institutionalised quality of legal reasoning matters not only for claims to technical authority and expertise. Socialised experiences of constraint of choice also control the extent to which practices of reasoning are 'stable' and replicable across a legal profession. Throughout this project I describe practices of reasoning as 'stable' where there is basic agreement about the core beliefs and assumptions that underpin legal reasoning. Core beliefs and

[13] Ibid.

[14] Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, 1982).

[15] Michaela Hailbronner, 'We the Experts. Die Geschlossene Gesellschaft der Verfassungsinterpreten' (2014) 53(3) *Der Staat* 425, 429; Fish (n 14).

[16] See Klare (n 5).

assumptions may connect with how a professional community understands 'values' and 'value judgments', which I describe as drawing a particular conclusion from a more general, good or interest. By values I refer similarly to overarching considerations and commitments — not always embedded in a text — that legal actors take into account consciously or unconsciously when reasoning through legal materials and their application to a particular set of facts. But beliefs and assumptions regarding institutional roles, as well as the role of institutions within a legal professional community, may also influence the stability of practices of reasoning. I draw attention to how beliefs regarding the role of scholarship and the role of certain courts influenced the stability of practises of reasoning in Germany in chapters six and seven. The Australian case studies I explore in chapters nine and ten suggest that beliefs and narratives about the constitutional founding moment and the extent to which it 'continued' an existing legal order have also influenced the stability of Australian constitutional reasoning.

Shared narratives, beliefs and values provide a legal professional community with the infrastructure to navigate emerging problems and translate these as constitutional problems in a common language. But professional narratives and beliefs can also provide a 'brake' on constitutional evolution and distort constitutional development — an idea to which I return in later case studies. Karl Klare's account of legal professional culture in post-Apartheid South Africa provides a useful illustration to this end. Klare considered the obstacles to achieving "transformative constitutionalism" as entrenched in a newly introduced constitution — adjudication with a "commitment to social transformation"[17] — within an established professional understanding of the function of law and the nature of legal argument. He identified a "disconnect" between the new South African constitution's transformative aspirations and the "conservative character" of its established legal culture.[18] Klare described legal culture in terms of "professional sensibilities, habits of mind, and intellectual reflexes".[19]

Professional cultural beliefs and narratives can also evolve and become susceptible to challenge and replacement. Some of this may occur through exposure to new intellectual and academic currents, exposure to ideas in other legal systems, changes in how it perceives the relationship between its own legal system and other legal systems, and political and social change — whether gradual and tectonic, or sudden and rupturing. As a legal professional community and culture itself changes, new kinds of arguments become accepted and attitudes regarding the role of law, and of lawyers, change also. As Karl Klare also observed, "[e]ven within relatively homogenous legal cultures, changes occur over time in sensibilities about what types of arguments persuade, what kinds of authorities constrain an outcome or lend support to a proposition, and so on."[20]

[17] Ibid 151.

[18] Ibid.

[19] Ibid 166. See also Cheryl Saunders' description of the 'mentalité' of the principal actors within a legal system: Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) *National Taiwan University Law Review* 1, 7. See also Roger Cotterrell, 'Law and Culture—Inside and Beyond the Nation State' (2008) 31(4) *Retfærd : Nordisk Juridisk Tidsskrift* 23.

[20] Klare (n 10) 161.

But because shared beliefs and narratives tend to be entrenched through slow processes of socialisation, the pace at which they evolve must often proceed generationally.[21] In later case studies I explore how generational change within the legal profession interacted with beliefs and narratives and argue this plays a role in the stability of constitutional reasoning. I provide a more comprehensive account of that process in chapter five.

II LEGALIST REASONING AND PROFESSIONAL CULTURE

A *Legalism and Related Terms*

1 *US-American Formalism*

'Legalist' reasoning is an approach to argument that demonstrates how features of my account of professional culture can interact in extreme form. I distil the characteristics of legalist reasoning in more detail below. For present purposes, a crude definition of legalism is reasoning that overemphasises the constraining quality of legal materials. This brings other ideas in my above account of legal professional culture into play. In denying the availability of judicial choice, legalist reasoning buries what I have described earlier as value judgments and professional values.

Reasoning sometimes described as 'formalist' fits within this description. Frederick Schauer's 1988 account of formalist reasoning[22] provides a useful reference point for exploring this term, given the outsized influence of US-American constitutional discourse on Anglophone scholarship.[23] Schauer described formalism as "decisionmaking according to *rule*." This in turn involves "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account." [24] Schauer notes, however, that reasoning claiming to be formalist often involves the "denial of choice" where it may be available. The reasoning in the United States Supreme Court decision *Lochner v. New York*[25] is often described as formalist. Schauer argues that its formalistic quality arises through its "denial of the political, moral, social, and economic choices involved in the decision, and indeed in its denial that there was any choice at all." The judgment suggests that it is explaining "a precise statutory scheme rather than expounding on one word in the Constitution", which necessarily involves choice of meaning of a broad term.[26] Accordingly "choice is masked by the language of linguistic inexorability."[27]

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[21] I adopt the idea of generational change from Christoph Möllers' article, Christoph Möllers, 'Der Methodenstreit als politischer Generationenkonflikt: Ein Angebot zur Deutung der Weimarer Staatsrechtslehre' (2004) 43(3) *Der Staat* 399.

[22] Frederick Schauer, 'Formalism' (1988) 97(4) *Yale Law Journal* 509.

[23] Tanya Josev usefully illustrates how the US-American discourse on 'formalism' and 'realism' has influenced the Australian reception of the 'judicial activist' label: Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

[24] Schauer (n 22) 511.

[25] 198 US 45 (1905).

[26] Schauer (n 22) 511–12.

[27] Ibid 512.

Schauer traces this kind of formalism to the understanding of language entertained by earlier legal actors. Language can contain a clear, univocal meaning where words "track the natural kinds of the world." For those earlier actors, categories like liberty, property, and contract were not perceived as abstractions or "human artifacts" that involve contested meanings and choices. "When one believes that a general term reflects a deep reality beyond the power of human actors, the view that certain particulars are necessarily part of that reality follows with special ease."[28] Schauer continues with an account of other Anglophone theorists such as H.L.A. Hart who claim that certain concepts can be indeterminate in certain circumstances, and require judicial choice for interpretation.[29]

Schauer concludes that there are some circumstances where the language that formulates the rule does only provide for one interpretation. In these cases a norm is 'closed' and permits only one interpretation or application. He contrasts this with the idea of 'completeness', which refers to the capacity of a system of norms to provide an answer to a particular question. As Schauer describes it, "[c]losedness refers to the capacity of a system to decide cases within the confines of that system".[30] As an example of perfectly closed system of rules, Schauer provides the example of mathematical reasoning. Mathematical systems of reasoning possess all the tools they need already to deal with a problem that is framed in mathematical terms. Mathematical systems, however, are highly incomplete — they cannot answer normative questions about, for example, the position a state should take to eradicate poverty.[31]

Applying Schauer's account, constitutional systems must not be completely 'closed' so that they can provide comprehensive answers to new forms of argument. They must be open to new forms of argument for novel questions. For this reason, legal systems "often employ norms sufficiently indeterminate to accommodate much that is important in the world at large", and in doing so, sacrifice the predictability and constraints of a more closed system.[32] Formalist constitutional reasoning insists on a lack of choice in the meaning of those norms and identifies a 'rule-like' quality to them.

2 *German Positivism*

German legal and constitutional history furnishes further examples of reasoning practices that conform to the legalist description. Between 1880 and 1895 'positivism' dominated as a method in public law.[33] The German

[28] Ibid 513.

[29] Ibid 514-15.

[30] Ibid 535.

[31] Ibid 536.

[32] Ibid.

[33] Stefan Korioth, 'Erschütterungen des Staatsrechtlichen Positivismus im Ausgehenden Kaiserreich: Anmerkungen zu frühen Arbeiten von Carl Schmitt, Rudolf Smend und Erich Kaufmann' (1992) 117(2) *Archiv des öffentlichen Rechts* 212, 212. See also Michael Wrase, 'Methode der Grundrechtsinterpretation' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter. Zum*

meaning of 'positivist' as a description of legal reasoning differs from its meaning in the Anglophone analytic tradition, which focusses on what a legal actor perceives as a binding norm. But its meaning is also related. German positivist reasoning of the late nineteenth-century — sometimes called 'statutory positivism' — purported to analyse laws that applied as expressions of the will of the state.[34] The work of Karl von Gerber and Paul Laband, its proponents, emphasised the lack of choice and value judgment involved in interpreting those laws.[35] Laband's account emphasised the 'closedness' of the system of norms produced by the constitution and statutory law — both of which ranked equally — and advocated a form of reasoning that organised laws into "a coherent, logically closed system of norms, compiled in the form a handbook."[36] Laband described this approach to argument as a "purely logical, intellectual activity" — similar to that of the natural sciences — to which historical, political and philosophical considerations were irrelevant.[37] Treating the development of the law in this way neutralised potential political implications of public law conclusions.[38] Laband also championed 'Begriffsjurisprudenz' or a 'jurisprudence of concepts': a method that aimed to systematise legal concepts as a coherent, complete system, from which logical propositions regarding the law could be derived. [39]

German public law also demonstrates how generational change can influence the meaning of 'positivist' reasoning and expand its definition over time. A description of constitutional reasoning as 'positivist' reappeared a century after Laband, with Bernard Schlink describing the activity of public law scholarship as 'constitutional court positivism' in 1989.[40] By using this term Schlink referred to the tendency of contemporary public law scholarship to treat statements and features of the constitutional court as a priori principles and focus on their systematisation and interpretation. Just as Laband's positivism a century earlier focussed on interpreting acts of the will of the state, contemporary 'constitutional court positivism' focusses on interpreting the will of the constitutional court. The scope of this task is necessarily narrow. Like the positivism of the late nineteenth-century, contemporary

Verhältnis von Verfassungsrechtswissenschaft und Verfassungsrechtsprechung (Mohr Siebeck, 2019) 352–6; Rainer Schmidt, 'Der Staatsrechtspositivismus Gerbers und Labands' in Rainer Schmidt (ed), *Rechtspositivismus: Ursprung und Kritik* (Nomos, 2014) 63, 72.

[34] Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press, 1997) 3–4.

[35] Schmidt (n 33). See also Stefan Korioth, 'Erschütterungen des Staatsrechtlichen Positivismus im Ausgehenden Kaiserreich: Anmerkungen zu frühen Arbeiten von Carl Schmitt, Rudolf Smend und Erich Kaufmann' (1992) 117(2) *Archiv des öffentlichen Rechts* 212.

[36] Caldwell (n 34) 4.

[37] Schmidt (n 33) 66–67. For an English language extract, see Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press, 2015) 73 ('*Traditions and Transformations*').

[38] Schmidt (n 33) 85. See also Manfred Friedrich, 'Paul Laband und die Staatsrechtswissenschaft seiner Zeit' (1986) 111(2) *Archiv des öffentlichen Rechts* 197, 209: "Aber darum ist Labands Staatsrecht nicht im Sinne seines Anspruchs unpolitisch, sondern nur in seiner Argumentationsstruktur entpolitisiert." ["But this does not mean that Laband's law of the state is apolitical in the way that he claimed, but only depoliticised in the structure of his argument."]

[39] Hailbronner, *Traditions and Transformations* (n 37) 73.

[40] Bernhard Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit' (1989) 28(2) *Der Staat* 161. See also Dieter Grimm, 'Eine Unaufgeklärte Kontroverse' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien Zum Verhältnis von Verfassungsrechtsprechung Und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 3.

public law scholarship takes the legitimacy of that norm-setting power — the principles and standards articulated by the Federal Constitutional Court — as a given. They provide the totality of the public law world. I explore the conditions in which 'constitutional court positivism' developed more fully in chapter six.

Michaela Hailbronner similarly describes the contemporary German approach to constitutional reasoning as "value formalism", drawing from the terminology used in the United States. [41] Hailbronner describes values formalism in terms of a fusion between a "hierarchical" approach to "law as a science to be dealt with by professionally trained experts at a very *specific* task…"[42] and "activist constitutionalism".[43] This combination involves "the transformation and taming of activist constitutionalism through doctrinal formalization."[44] This means that the Federal Constitutional Court will employ "technical and neutral" language while remaining "concerned with a 'scientific' analysis of the moral and political concepts contained in the Basic Law." Hailbronner notes that this departs to a certain extent from the US-American description of formalism as it does not completely reject "judicial discretion in the construction of a moral universe as in the United States…" "Value formalism" does, however, treat the exercise of discretion as reflecting a "comprehensive expert understanding of the Basic Law and its central ideas."[45]

Features of German fundamental rights reasoning share similarities with the earlier approach to 'positivism' in Laband's time. The promotion of 'Dogmatik' and the disciplinary autonomy of legal reasoning that emerged in this era persists in the present. The premises underlying of Laband's approach to a 'jurisprudence of concepts' — a form of reasoning that is self-contained, and can produce outcomes through induction and deduction — also endured. I explore these further in the next chapter.

3 *Australian Legalism*

Commentary has offered various accounts of Australian legalist reasoning throughout Australian legal history. It is most commonly associated with Owen Dixon, who presided as Chief Justice of the Australian High Court between 1952 and 1964.[46] In his writing Dixon described his approach to judicial method as one of "strict and

[41] See Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (2014) 12(3) *International Journal of Constitutional Law* 626; Hailbronner, *Traditions and Transformations* (n 37) 97–123.

[42] 19/10/2023 13:38:00

[43] Ibid 111.

[44] Ibid.

[45] Hailbronner, *Traditions and Transformations* (n 37) 108–9.

[46] Helen Irving, 'The Dixon Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 179. I explore why Dixon's approach to reasoning 'stabilised' the terms of Australian legalism in a case study in chapter eight.

complete legalism".[47] Dixon's account of this approach emphasised adherence to an "external standard of legal correctness"[48] that judges should apply to reach decisions. This involves the exclusion of "subjective" or "personal" views in legal reasoning. The external standard consists in a received body of principles and knowledge that "excludes social, political and economic considerations" when developing the law.[49]

For Dixon, legalist reasoning entails certain methodological "assumptions": a decision will be "right" or "wrong", "correct" or "incorrect" according to a standard which is not personal to the judges themselves.[50] Dixon claimed this approach to legal method was necessary to ensure the separation between law and politics, which in turn maintains public confidence in judicial decision-making and protects the judiciary from the taint of partisanship.[51] Dixon nonetheless acknowledged a degree of indeterminacy within constitutional reasoning, as the nature of constitutional norms differ from those in private law: "The standards of what is correct cannot be so exact, they cannot be so external."[52] Dixon also acknowledged that judicial discretion may play a role in legal development. Considerations of "justice" may inform judicial reasoning but only where these proceed from "deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice", rather than from "political or sociological propensities".[53] He insisted that the judge could not discard precedent "in the name of justice or of social necessity or of social convenience".[54]

Anthony Mason, Australia's High Court Chief Justice between 1987 and 1995, offered a similar explanation of legalist reasoning but from a position of critique.[55] Mason argued that Dixon's "strict and complete legalism" was premised on a belief that "within a body of authoritative legal materials… there is to be found 'true' principle and

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[47] Justice Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21 April 1952' in Susan Crennan and William Gummow (eds), *Jesting Pilate: And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 287, 289.

[48] Justice Owen Dixon, 'Concerning Judicial Method' in Susan Crennan and William Gummow (eds), *Jesting Pilate: And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 112.

[49] Justice Anthony Mason, 'Legislative and Judicial Law-Making' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 59, 61.

[50] Dixon (n 48) 114.

[51] Justice Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21 April 1952' in Susan Crennan and William Gummow (eds), *Jesting Pilate: And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 287.

[52] Dixon (n 48) 116.

[53] Ibid 122.

[54] Ibid 117.

[55] I explore Justice Anthony Mason's significance in a case study in chapter nine.

doctrine".[56] Mason claimed that, within this approach, there is little scope for policy considerations or discussion of "values".[57] Mason argued that legalist reasoning does involve values, but merely ones that are not acknowledged as such. He argued that "it is impossible to interpret any instrument, let alone a constitution, divorced from values… The ever-present danger is that 'strict and complete' legalism will be a cloak for undisclosed and unidentified policy values." Legalist reasoning therefore "has subtle and formidable conservative influence."[58] Mason explicitly claimed to depart from legalist reasoning in his own approach to method and advocated discussion of the "underlying values influencing a judgment" — the reasons for which judicial choice is exercised — so that the "appropriateness of those values" could be openly debated.[59]

Legal historian Tanya Josev distinguishes Australian legalist reasoning and US-American formalist reasoning. Josev describes legalism as a "richer, more nuanced technique than formalism" but that one of its hallmarks "like the formalist approach" is to "disregard the policy issues underlying, or the social consequences flowing from, its decisions. Legalism instead require[s] an engagement with the 'high technique' of law." She argues that while Australian legalism is "born of the same tradition as formalism" it is a "more complex creature" that has allowed the "High Court members more room to move than their Supreme Court counterparts."[60] Josev describes legalist reasoning as "adherence to accepted rules of legal reasoning." Josev, like legal theorist Jeffrey Goldsworthy, argues this approach to legalism was possible because the Australian Constitution lacks the "broad, vague[ly]" expressed norms such as 'due process' and 'equal protection' seen in the US-American Constitution.[61] Josev nonetheless acknowledges that legalism was "at best, an aspiration" with avowed legalists such as Owen Dixon departing from precedent and relying on value judgments.[62] Goldsworthy explains the apparent departure of legalist judges from legalist technique by arguing legalism allowed judges to "take into account considerations of history, purpose, and policy" albeit "within a relatively narrow compass, severely restricting the admissibility of

[56] Anthony Mason, 'Legislative and Judicial Law-Making' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 59, 61–62.

[57] Ibid 62.

[58] Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 110, 114.

[59] Ibid.

[60] Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017) 92.

[61] Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions : A Comparative Study* (Oxford University Press, 2006) 106, 155.

[62] Josev (n 60) 94; James Stellios, *Zines and Stellios's The High Court and the Constitution* (The Federation Press, 7th ed, 2020) 643.

historical evidence of original meaning and purpose…"[63] Josev in turn argues that "legalism can be shown to be a broad (and accommodating church, a possible reason that it survived longer than American formalism."[64]

Current High Court Justice Stephen Gageler describes legalist reasoning as the "dominant theme of the judicial style of the [Australian High] Court for much of the twentieth century…" Tautologically, Gageler describes legalist reasoning as reliance on "the strict analytical and conceptual techniques of formal legal argument to form an interpretive judgment as to the meaning of a constitutional or statutory text or the scope of a judicial precedent." Gageler connects legalism with the declaratory theory of the law: for legalists "[t]he law existed independently of its exposition… 'judgments and other legal writings' were merely 'evidence of its contents'" and "[w]ithin that system of knowledge or thought, there was no room for policy considerations and no scope for choice in judicial decision making." Gageler argues that legalist reasoning began to decline under the stewardship of Chief Justice Gibbs, further giving way in some of the Mason Court decisions that "more openly acknowledged the policy choices being made." In Gageler's view, the legal profession now accepts the Court's role as the "evaluation and development of legal principle in the light of contemporary needs and values".[65] This suggests legalist premises no longer hold.

B *A Professional Cultural Account of Legalism*

1 *Organising Assumptions of Legalist Reasoning*

(a) Determinacy of Legal Materials and Denial of Choice

The above accounts of 'formalist', 'positivist' and 'legalist' reasoning are heterodox. It may be that reasoning described variously as 'legalist', 'formalist' or 'positivist' does not reflect a consistent or coherent content as a method. Legalist reasoning may acquire its description as such within a particular professional cultural context.[66] Claiming to be legalist or formalist can itself amount to a form of argument, as I argue further below. Some common features nonetheless recur across the above accounts and connect with the description of legal professional culture — socialisation in constraint of choice — that I supplied above.

Firstly, the above accounts tend to describe legal materials as holding a determinate content. This means that the legal materials can be interpreted, through technique, in a way that a single, 'correct' meaning emerges. Owen

[63] Goldsworthy (n 61) 153–4.

[64] Josev (n 60) 94. Josev also notes the view, expressed by political scientist Brian Galligan, that legalism was a "pronouncement" and a "powerful legitimating device to be employed to shield the Court from criticism… [as a] public 'face'…": 95.

[65] Justice Gageler, Stephen, 'Legalism' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court* (online at 1 January 2023).

[66] See, eg, Brian Galligan's claim that "strict and complete legalism is as much a rhetorical device as an interpretive method": Brian Galligan, 'The Barwick Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 201, 211.

Dixon's reference to an 'external standard of correctness' reveals how the assumption of determinacy can work to organise legal argument. Dixon identifies that external standard in a body of accepted interpretive rules — not subjective to the person or personal values of the judge. If there is a 'standard of correctness' against which reasoning can be measured, then arguments are rejected not because they are less persuasive, but because they are 'wrong'. To succeed as a legalist argument, constitutional arguments must do more than persuade — they must prove the implausibility and incorrectness of alternative points of view. This also has consequences for the kind of reasoning provided for legalist conclusions. The judge lacks 'choice' between multiple plausible interpretations and arguments and is compelled by the 'correctness' of an argument. This shifts the focus of reasons to the 'incorrectness' of alternative arguments rather than principled explanations for choosing one interpretation over another.

Laband's account of positivist reasoning provides a more extreme example of the treatment of determinacy and judicial choice. Laband described positivist reasoning as a 'logical' exercise similar to that of studying the natural sciences. This implies that law exists as an apriori, objectively existing system — like naturally existing phenomenon — whose exposition does not involve choice or evaluative reasoning. Schauer similarly describes formalist reasoning in terms of 'constraint of choice' and 'adherence to rule', though notes that it is often claimed where choices are objectively available. Schauer's account of formalist reasoning is therefore also centred around claims of legal determinacy, albeit with the acknowledgement that such claims are not always accurate.

To a certain extent 'constitutional court positivism' and 'value formalism' are outliers in the above accounts of legalist and formalist reasoning. Hailbronner's description of value formalism notes that it recognises judicial discretion. Schlink's description of constitutional court positivism similarly does not deny the role of judicial choice. Its charge is directed at the tendency of broader professional cultural institutions to treat FCC reasoning *as though* choice has not be involved because those institutions are focussed on doctrinal exposition. But when viewed through a legal professional cultural lens, 'constitutional court positivism' and 'value formalism' perform a similar function to assuming legal materials are inherently determinate. In the other accounts of legalism I have explored, the determinacy of legal materials is a *methodological* assumption embedded in individual argument. In supporting an argument, the legal actor — advocate or judge — assumes that other interpretations are not possible and that a single correct answer is compelled by the very nature of the legal materials. 'Constitutional court positivism' and 'value formalism' assume the determinacy of legal materials because of the *capacity of professional institutions* to interpret them authoritatively. Indeterminate constitutional provisions become determinate because the FCC provides an authoritative source for their interpretation. In this way, both 'classical' legalist reasoning and 'constitutional court positivism' incorporate assumptions and beliefs about method that close off the plausibility of multiple, or alternative, interpretations of constitutional meaning. Legalist reasoning tends to do so through its methodological assumptions. 'Constitutional court positivism' and 'value formalism' achieve this through the organisation of institutional authority within German professional culture — an argument which I develop further in subsequent chapters and case studies.

(b) Understanding of Value Judgments

‘Legalist’ modes of reasoning also tend to minimise the necessity for ‘value judgments’ and the role ‘values’ in constitutional reasoning. As explained above, I define a value judgment as one that draws a particular conclusion from a more general good or interest. And yet constitutions often employ broadly phrased or framed provisions to be able to apply to many particular instances — an acknowledgement evident in both Frederick Schauer’s and Owen Dixon’s account of legalist reasoning above. In this way constitutional reasoning is replete with value judgements. ‘Values’ are overarching considerations or commitments that can shape the outcome of a value judgment. As I argued earlier, these are not necessarily explicitly embedded in constitutional texts. Professional cultures can also be sites for carrying and reproducing values that colour how constitutional provisions are applied to concrete factual settings. This connects with the idea of judicial choice, and the experience of constraint of choice, that I explored earlier. Professionally socialised values — those connected with stability, traditions, or beliefs around institutional roles — contribute to an experience of constraint of choice in legal actors, as I explore in subsequent case studies.

Legalist constitutional reasoning tends to deny its reliance on value judgments for much the same reason as it denies the involvement of judicial choice. As explored above, Anthony Mason criticised legalist reasoning on the basis that it ‘buries’ the values and value judgments on which it relies. As I explore in Australian case studies in chapters eight and nine, embedded ‘values’ connected with British tradition and narratives regarding the founding constitutional moment supported the experience of the post-federation legal profession that constitutional meaning was ‘determinate’. Where accounts of legalist reasoning do acknowledge a reliance on value judgments and values, they tend to present those judgments as uncomplex. Owen Dixon, for instance, stated that considerations of “justice” could inform judicial reasoning judgment but only where these proceeded from “deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice” than those contained in “political or sociological propensities.”[67] In such reasoning, the ability of the judge to distinguish ‘deeper’ conceptions of justice from ‘political and sociological propensities’ is assumed as straightforward.

The way that ‘constitutional court positivism’ and ‘value formalism’ treat values and value judgments make them appear an odd fit for my description of legalism. Early German fundamental rights reasoning, after all, proceeds from the declaration of fundamental rights as ‘objective values’. As I explore in a case study in chapter six, that treatment of rights as values receded over time as German constitutional reasoning acquired a legalist quality. To the extent that fundamental rights reasoning continues to acknowledge a reliance on values reasoning and value judgments, it does not present these as contestable choices. As with the above discussion of the determinacy of legal materials, there is professional belief in the capacity — appropriateness — of professional institutions to settle the meaning of those values authoritatively. These are not presented as contestable choices. Value judgments involved in applying fundamental rights principles to facts — proportionality reasoning — are similarly presented as straightforward and uncomplex.[68]

[67] Dixon (n 48) 122.

[68] Jacco Bomhoff, ‘Making Legal Knowledge Work: Practising Proportionality in the German Repetitorium’ (2023) 32 *Social & Legal Studies* 1, 28. I explore this further in chapter six.

(c) Hard Distinction between Legal and Extra-Legal Considerations

A third feature of the above accounts of legalist reasoning is a tendency to invoke a hard distinction between 'legal' or 'internal', and 'external' or 'extrinsic' considerations. Legalist reasoning supposes a clear distinction between considerations that are *of* the constitution and can inform predictable, determinate outcomes, and those that are not. This can connect in part with the idealised opposition between legal and political forms of argument that legalist reasoning supposes. Legalist reasoning's rejection of considerations that are 'political' or relevant to 'policy' choices is an example of an 'external' class. Dixon's reference to "political or sociological propensities",[69] which I explored above, is an example of how legalist reasoning tends to invoke a 'hard' distinction between classes of considerations. In its account "political or sociological propensities" can be demarcated from "deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice."[70] Laband's proposed form of positivist reasoning similarly sought to strictly separate 'political and legal' questions.[71]

Schauer's account of formalist reasoning involves a similar demarcation. Formalist reasoning involves "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account."[72] The formalist quality of *Lochner v. New York* "inheres in its denial of the political, moral, social and economic choices involved in the decision, and indeed in its denial that there was any choice at all."[73] Schauer's explanation here is a useful way of linking the distinction between classes of considerations that legalist reasoning invokes, and the denial of judicial choice. By excluding a class of considerations as 'political' or unable to give rise to determinate outcomes, legalist reasoning affirms the determinacy and reliability of 'internal', legal considerations.

2 *Control of Legal Sources*

In addition to the reinforcement of the assumptions I've described above, legalist reasoning sometimes seeks to compel a particular methodological outcome. One of the outcomes that follows from legalist reasoning's a reliance on a hard distinction between 'internal' and 'external' constitutional considerations is its control of classes of legal sources. Legalist reasoning often seeks to confine the range of sources and considerations that can lend authority to constitutional argument. This in turn attempts to render constitutional meaning more determinate by discrediting alternative interpretations. In the Australian *Engineers' case*[74] the Australian High Court overturned

[69] Dixon (n 48) 122.

[70] Ibid.

[71] Schmidt (n 33) 67.

[72] Schauer (n 22) 510.

[73] Ibid 511.

[74] (1920) 28 CLR 129.

previous doctrines and rejected arguments because they were based on "vague external" considerations,[75] including reference to US-American materials. The Court confined its consideration to British traditions and values — 'internal' considerations — that were consistent with the "statutory character" of the Australian Constitution.[76] I explore this in more detail in a case study in chapter eight.

Where legalist reasoning seeks to control or confine the class of sources to which constitutional reasoning can refer, it also reveals connections between legalist reasoning and legal professional culture. As I explore in the next chapter, professional socialisation involves instilling in lawyers a deference to certain legal sources over others. This may connect with knowledge produced certain institutions and professional practices — such as constitutional scholars — or with certain international or foreign sources. Where legalist reasoning engages with this allocation of authority, it is often to assert longer established or traditional sources.

3 *The Defensive Character of Legalist Reasoning*

The appeal of legalist reasoning to longer established sources, narratives and values — while denying their quality as such — points to the defensive posture that legalist reasoning sometimes assumes. As I demonstrate through this project's case studies, legalist reasoning is often employed to resist slippages in professional beliefs and narratives that potentially threaten the experience of constraint of choice. While I develop this argument more fully in chapter five onward, it also bears out in the intellectual and professional climate in which some of the above accounts of legalist reasoning emerged.

Dixon's most well-known commentary on legalist reasoning, 'On Judicial Method', had a profound impact on Australian professional culture. Successor justices have appealed to it for support when developing legal principles and it has been cited in numerous judgments in the High Court since 1987[77] — a period associated with a 'change' in Australian constitutional reasoning, which I explore more fully in chapter nine. Despite being cited subsequently to justify legal development, the bulk of the 1955 address at Yale Law School engages in an indirect dialogue with the US-American post-war legal realist movement. Dixon perceived that it was "not an age in which men would respond to a system of fixed concepts, logical categories and prescribed principles of reasoning."[78] He noted the tendency in the physical sciences to hold certain hypotheses as provision. Dixon attributes to this intellectual trend an "intellectual climate" that is "unfavourable to the high technique of the common law, to say nothing of strict logic." He laments that the "principles" of law "are held to be provisional; its categories, however convenient or comforting in forensic or judicial life, are viewed as unreal."[79] That Dixon overstated the influence

[75] Ibid 145.

[76] Ibid 132.

[77] Josev (n 60) 104.

[78] Dixon (n 48) 113.

[79] Ibid 113–114.

of legal realism is perhaps explained by his proximity to US-American legal discourse and correspondence with US Supreme Court Justice Felix Frankfurter.[80] Elsewhere Dixon complained about the 'Americanisation' of Australian law schools such as Melbourne Law School, preferring the "British, black-letter 'casebook' approach…"[81] While Dixon acknowledged that aspects of the realist critique of judicial behaviour rang true, his address emphasised the necessity of judges and members of the legal profession believing in the certainty of judicial method.[82] He noted that "courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case" and "the court would feel that the function it performed had lost Its meaning and purpose, if there were no external standard of legal correctness."[83] In this light, Dixon's account of legalist reasoning is an attempt to resist, and salvage, slippages in methodological assumptions that he perceived to be occurring elsewhere.

IV SUMMARY

In this chapter I have offered an explanation of legal professional culture centred around socialisation in constraint of choice. In doing so, I have introduced an idea that I explore and defend with respect to constitutional reasoning and development in subsequent chapters and case studies. A focus on constraint of choice may not be the only way to explain legal professional culture, especially in systems with different societal and historical contexts to Australia and Germany. Constraint of choice connects, however, with the claims through which the legal profession justifies its technical authority to interpret provisions whose meaning can bear on political outcomes.

Exploring how an experience of constraint of choice is produced for legal actors brings my study of legal professional culture into dialogue with legalist forms of reasoning. I have distilled certain characteristics of legalist reasoning from various literatures, where similar approaches to reasoning and argument have different labels. The particular form that 'legalist', 'formalist' and 'positivist' reasoning takes may differ even within constitutional systems. Similarities between different forms of legalist reasoning appear, however, at the level of professional culture. Legalist reasoning often asserts the determinacy of legal materials and denies the availability of choice; it also tends to minimise the role of value judgments and invoke a hard distinction between considerations that can correctly inform constitutional reasoning, and others that cannot. These three tendencies share similarities in turn between themselves, as rhetorical or methodological appeals to interpretive communities. By insisting on determinacy, the plausibility of other interpretations is entirely excluded and the role of an interpretive community in regulating and controlling choice is hidden. Value judgments become less contestable and challengeable when removed from discussion within interpretive communities. Control of which considerations can inform interpretation and rejection of others in turn supports the claim that legal materials are determinate and limits an experience of choice.

[80] Josev (n 60) 96.

[81] Ibid 97.

[82] See, eg, ibid 99.

[83] Dixon (n 48) 114.

I have also introduced the idea that legal professional culture and constraint of choice is produced through institutionalised practices of education, training, scholarship and knowledge building. These reproduce a set of practices and rules that structure argumentation in terms of past practice. A legal professional culture, however, is a site in which challenges to practices of reasoning can emerge through conflict and debate within and between legal professional practices as they assimilate changes from broader contexts, at different speeds and in response to different pressures. Through this I make the case for why legal professional culture matters. It influences the production of knowledge, the structure of legal argument and the development of legal method. Because it is the 'shock absorber' for broader contextual — such as societal — change, legal professional culture determines how the production of knowledge and the development of legal method evolves and adapts to those changes. In the next chapter I explore how professional cultural practices instil socialisation in constraint of choice while also creating the conditions for constraint to be challenged.

CHAPTER THREE: LEGAL PROFESSIONAL CULTURAL INSTITUTIONS

I INTRODUCTION

In this chapter I provide an account of what I term 'professional cultural institutions'. I describe how these socialise lawyers into an experience of constraint of choice in constitutional reasoning. I argue that these cultural practices reproduce the beliefs and narratives necessary for method to be stable and replicable across the legal profession. Cultural practices work to set the limits of choice, the experience of constraint in exercise of that choice, and whether aspects of constitutional reasoning and development are perceived as 'problems' or are unremarkable.

I begin by briefly exploring the institutional quality of certain professional cultural practices, connecting this with literature on 'informal institutions'. Noting that this thesis focusses specifically on professional culture, I briefly discuss the relevance of broader societal cultural context to professional cultural processes and institutions. I then focus on key professional cultural practices that are particularly relevant to understanding constitutional method and socialisation in constraint of choice in Australia and Germany. I begin by exploring how legal education and practical training work in tandem to furnish lawyers with the conceptual framework to present and justify method, as well as less visible beliefs and narratives that make that method workable in practice. The structure of the legal profession and career progression also matter to these processes of education and socialisation — they shape how practical exposure to method reinforces certain beliefs and an experience of constraint. I demonstrate this through a comparison of Australian and German legal education and professional training, noting a convergence between the two notwithstanding differences in the presentation of method. I compare how doctrine (Australia) and Dogmatik (Germany) present different 'anchors' for constraint in method, even as they share commonalities in their approach to authority and the beliefs that make method 'workable'.

In a final section I consider the role of public law scholarship and the production of knowledge in producing an experience of constraint of choice and 'correctness' in members of the legal profession. The role of public law professors and the academy is particularly relevant to understanding differences between Australian and German legal professional cultures. I also consider how the experience of legal professional cultural identity and tradition shape practices of constitutional 'borrowing' and trans- and supranational legal 'dialogue'.

II PROFESSIONAL CULTURAL INSTITUTIONS

A *Informal Institutions*

In the previous chapter I introduced Douglass North's description of an institution as collectively practised activities organised by rules.[1] Literature on institutional analysist, which I explore more fully in a later chapter,[2]

[1] Douglass C North, 'Institutions, Ideology and Economic Performance' (1992) 11(3) *CATO Journal* 477.

[2] I explore this more fully in chapter five, where I set out my framework for exploring 'stability seeking' decisions and their significance for constitutional reasoning.

defines informal institutions as "socially shared rules, usually unwritten, that are created, communicated and enforced outside of officially sanctioned channels."[3] These contrast with formal institutions, which are "rules and procedures that are created, communicated and enforced through channels widely accepted as official."[4] Informal institutions can include behaviour where a failure to behave in a particular way "generates some kind of external sanction."[5] While informal institutions may be rooted in beliefs and values, they extend further to shared expectations about how actors within the institution will behave.[6]

Forms of legal education and training, and the practice of public law scholarship, can fit a description of informal institutions. Like the reasoning that is presented in Court by legal actors, scholarship and education also involve routines and behaviours organised by informal rules and expectations. Some of these rules are formal. To progress in legal education and professional qualification, examination requirements impose certain prescribed standards that must be met. But other rules — such as those that govern 'good' scholarship and progression within certain career paths — are less formal. I explore these in detail below. The boundaries between these professional cultural institutions are porous. The beliefs and values that inform practices in education and training may in turn affect practices of reasoning and practices of scholarship.

Unlike formal institutions, informal institutions are often considered "highly resistant to change."[7] Whereas formal institutions can be changed by recourse to the formal code that prescribes its rules, informal institutions "do not possess a [centre] which directs and coordinates their actions…"[8] Informal institutions can change, and I explore how this can occur in more detail with respect to institutionalised practices of reasoning in chapter five. But because informal institutions are organised by beliefs, narratives and expectations embedded at a deeper cultural level than formal codes, the processes that govern their change is complex.

B *Comment on Societal Cultural Context*

Different considerations would necessarily emerge when studying legal professional culture in countries sometimes described as the Global South,[9] in the former Soviet World, or those emerging from an experience of colonialism. Factors such as language, broader cultural and societal contexts, and the understanding and

[3] Gretchen Helmke and Steven Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda' in Thomas Christiansen and Christine Neuhold (eds), *International Handbook on Informal Governance* (Edward Elgar, 2012) 85, 88–9.

[4] Ibid 89.

[5] Ibid.

[6] Ibid 90.

[7] Ibid 99.

[8] Ibid.

[9] See, eg, Philipp Dann, Michael Riegner and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative* Constitutional Law (Oxford University Press, 2020) 1.

invocation of history will alter how a legal professional culture structures and orders authority and hierarchy and its perception of the role of law in society more generally. The nature of a constitutional text — including the ease with which it is amended, the age of a new constitution and the nature of its birth — will similarly impact upon a legal professional culture and its relationship with constitutionalism.

As I explained in the introduction, this project focusses on how professional features — education, training, knowledge building and approaches to professional authority and hierarchy — influence constitutional interpretation and the experience of constraint of choice. While I focus on these features rather than the relationship between societal culture more generally and constitutional development, that analysis must acknowledge the role of context in shaping and influencing professional cultural norms. Professional cultures emerge within broader societal contexts and beliefs about the technical quality of law and expertise.[10]

Broader societal context can shape how a particular legal professional culture develops. As members of a legal professional community are also members of a broader society, their initial impressions of the law will be shaped by broader community experiences and expectations, and shifts in society and culture more generally. In Australia, for instance, an increased legal professional interest in the relationship between the Constitution and Australia's First Nations peoples has followed from broader community and political shifts regarding Australia's experience of its history and expectations regarding the function that constitutions should perform.[11] Germany's experience of its history has similarly altered during the course of the post-war years. While the reaction to National Socialism does not fully explain Germany's embrace of a strong judiciary, particularly during the early years of the Federal Constitutional Court,[12] Germany's evolving cultural relationship with its history has exerted an influence upon Constitutional Court decisions.[13] Karl Klare's work on South Africa, which I discussed in the previous chapter, considered how an established legal professional culture and professional socialisation acted as a brake against changes sought to be effected through a new constitution.[14] An inverse process can take place, with broader societal change prompting legal professional culture to develop. As a culture's experience of its history changes, this seeds expectations and perceptions that may shape how subsequent generations of lawyers construct the nature of legal problems.

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[10] See, eg, Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative* Law (2nd ed, 2019) 710; Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) *National Taiwan University Law Review* 1.

[11] See, eg, Dylan Lino, 'The Australian Constitution as Symbol' (2020) 48(4) *Federal Law Review* 543.

[12] See, eg, Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (2014) 12(3) *International Journal of Constitutional Law* 626.

[13] See, eg, *Wunsiedel*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 2150/08, 4 November 2009 reported in (2009) 124 BVerfGE 300. See also Maximilian Steinbeis, 'Epochales Urteil: Das Grundgesetz als Anti-Nazi-Verfassung', *Verfassungsblog* (Blog Post, 17 November 2009) https://verfassungsblog.de/wo_die_toleranz_endet/. For a critical discussion of the use of historical argument in constitutional reasoning see William Partlett, 'Historiography and Constitutional Adjudication' (2022) 86(3) *Modern Law Review* 629.

[14] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146

That relationship will be distinctive to local circumstances. However, I retain that broader societal cultural context in view while exploring the professional landscape of German and Australian legal cultures. As I explore in this project's case studies, broader context supplements, shapes and explains resistance and change within legal professional culture, how that culture perceives its relationship with legal systems elsewhere, and the sources to which it turns to justify new approaches in method.

III LEGAL EDUCATION AS SOCIALISATION

A *Educational and Professional Structure*

John Bell defined legal training as "the knowledge and skills required to undertake a specific and immediate task. It is focussed and utilitarian". Legal education, in contrast, is concerned with knowledge in the abstract sense: it enables an individual "to understand and reflect upon knowledge and processes and to be able to act in a critical and responsible manner. It is concerned with critical self-awareness".[15] The education and training of lawyers provides central mechanisms for instilling the experience of constraint of choice as well as core narratives, beliefs, and values that stabilise practices of reasoning. They operate according to their own institutional rules, with examination in education, and career development and progression within practical training, acting as mechanisms to control and filter those members of the legal profession who have internalised professional norms, beliefs and narratives from those who have not. The nature of education and training shapes the way that method is presented, but also exposes lawyers to how that method is applied in practice. This latter practical exposure socialises lawyers in beliefs of a method's workability, viability and 'technical' quality.[16] It can colour the extent to which a lawyer perceives that application as involving choice or value judgments.

The structure of the profession — how members progress through their careers, particularly judges — informs that process of formal education and socialisation. Professional structure also informs the treatment of specialisation and expertise. To what extent do members of a legal professional community acquire generalist training, and how does the profession channel and structure those practitioners through further training and specialisation — particularly in constitutional reasoning? This question — particularly as it relates to the judiciary — affects the perspectives that justices bring to constitutional problems. This also interacts with the organisation and specialisation of courts, which I explore in the next chapter.

In Germany compulsory practical preparatory training (the "Rechtsreferendariat") supplements formal legal education oriented toward abstract principles and systematisation rather than facts, cases and precedent. The Rechtreferendariat functions as a traineeship to provide the skills necessary to deal with concrete cases —

[15] John Bell, 'Legal Education' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (2005) 901, 902.

[16] See, eg, Jacco Bomhoff, 'Making Legal Knowledge Work: Practising Proportionality in the German Repetitorium' (2023) 32 *Social & Legal Studies* 1, 28.

including placements with a court that provide experience writing judgments.[17] In this way the divide between common law education and training — driven through the case method — and the civil law focus on codes, norms, deduction and abstract principles, converges in practice. German lawyers acquire practical training and undergo a process of socialisation that instructs how abstract method is to be applied in concrete cases.

The Australian legal profession inherited much of its professional structure from the British tradition.[18] Evolving over centuries, education initially required presence at court, participation in moots, attendance at lectures and 'readings', after which students were called to the Bar. A barrister of at least ten years experience provided lectures, with a shift to education in universities in the mid-eighteenth century.[19] From its origins, value was placed on practical experience — a view of law and legal reasoning as a practical craft, acquired through time in practice and at court. Inheriting this tradition, legal education in the Australian colonies was the responsibility of universities since the first law school was founded in the mid-nineteenth century. Curriculum focussed largely on practical subjects considered necessary for preparation for practice. Examination was — and continues to be — conducted by law schools, with admission to the profession then regulated by the relevant State or Territory admission board. Of significance for training in public law reasoning, standardised curriculum — requiring completion of eleven compulsory subjects ('the Priestley eleven') in addition to electives — separated constitutional and administrative law. Under the current system, and in contrast to the German system, subjects such as international law are offered as electives and taught as a distinct area of law. International law is of no effect domestically until it is implemented through legislation.[20] Completion of a law degree — whether as a Bachelor of Laws (LLB) often combined with another degree such as a Bachelor of Arts, Science, Commerce or Economics, or as a graduate Juris Doctor (JD) — confers a degree but does not entitle the graduate to 47udgmente. Additional practical training — either supervised by another legal practitioner (Supervised Legal Training) or though specialist practical colleges (Practical Legal Training) — provides the practitioner with further skills in work management, litigation, advocacy practice and procedure, negotiation and legal writing and drafting.[21] It is common for practitioners — particularly those intent on pursuing research or an academic career — to pursue postgraduate study in a foreign legal system. Preferred systems for postgraduate study tend to be located in the common law, Anglophone world. This is partly due to the limited language skills of Australian lawyers,[22] the

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[17] See, eg, Juergen R Ostertag, 'Legal Education in Germany and the United States-A Structural Comparison' 26(2) *Vanderbilt Journal of Transnational Law* 301. I discuss this structure further below.

[18] David Barker, *A History of Australian Legal Education* (The Federation Press, 2017) 26.

[19] Ibid.

[20] See, eg, David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Year Book of International Law* 105.

[21] See, eg, Barker (n 18) 140.

[22] See, eg, Justice Susan Kiefel, 'Comparative Analysis in Judicial Decision-Making: The Australian Experience' (2011) 75(2) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 369. "The reasons why Law Schools have not encouraged the study of comparative law may be many. They may consider it requires high levels second or even third languages, which

perception of a shared, genealogical relationship between Australian and other common law legal and constitutional systems which gives rise to shared legal problems,[23] and because institutions associated with prestige and professional weight in Australian legal professional culture and globally are predominantly located in the United Kingdom or United States. this extended intellectual context and the relationship that the Australian legal professional community perceives between its own system and others further interacts with how knowledge is produced and ideas are sourced. It affects how members of the legal professional community view institutions and actors abroad, and the sources to which they have been socialised to turn when responding to novel problems. I explore this in more detail below.

The professional separated solicitors and barristers during the seventeenth century — which Australia, unlike the United States, ultimately inherited.[24] The logic of that separation speaks to a particular understanding of expertise, even if that separation is no longer so meaningful in practice and has been removed in many common law and Australian state jurisdictions. Barristers acquire practical experience at court and primarily through experience in advocacy and argument. In theory, the barrister carries responsibility for advising on the law, and developing the argument, given their specialisation in advocacy. The solicitor carries responsibility for engaging with the client, and the administrative labour of the dispute. Barristers acquire their expertise through experience at the Bar. Experience at the Bar, and endorsement through professional chambers, traditionally drives appointment to the judiciary. The English common law created a close connection between the judiciary and the Bar and this affected the character of the judiciary and how it functions.[25] In its idealised account, the common law approach couples knowledge and specialisation with practical experience, acquired through exposure to concrete cases.

The structure of the German profession shares parallels with its Australian counterpart, but is also a contrast. Formal education is oriented toward preparation for the two state exams — the qualifications necessary to become a judge.[26] Formal legal education at university in Germany predated its common law counterpart by several centuries, implemented in Prussia in 1455.[27] In its contemporary form, education and training is oriented towards producing a comprehensive (Einheitsjurist) or fully qualified jurist (Volljurist), who is capable of working in any part of the legal profession, but whose education and training is essentially oriented toward the profession of a

is not common amongst students in Australia." Similar limitations apply to the pursuit of postgraduate study in foreign legal systems with languages of instruction other than English.

[23] See, eg, Justice Susan M Kiefel, 'Legal Influences– across Centuries and Borders' (at the Freeleagus Oration, Brisbane, 26 August 2016). See also Cheryl Saunders and Adrienne Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method' in Tania Groppi and Marie-Calire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing, 2013).

[24] Barker (n 18) 27.

[25] See, eg, John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press, 2006) 361. I explore this further in the next chapter.

[26] See, eg, Gerhard Köbler, 'Zur Geschichte der Juristischen Ausbildung in Deutschland' (1971) 26(23–24) *Juristen Zeitung* 768, 773.

[27] Ostertag (n 17) 307.

judge.[28] The form and requirement of legal education is governed by the German Judiciary Act,[29] with some variation in content between the Länder.[30] In this way it treats judicial knowledge as, at least as an ideal, a primarily academic quality. This accords with its treatment of career judges. A pathway for entry into the judiciary follows the competition of formal education and training, on the basis of academic excellence.[31] Appointment procedures differ for superior courts, including the German Federal Constitutional Court, which I explore further in the next chapter regarding institutional design and legal professional culture. German legal education entails a greater degree of compulsory subjects (Schwerpunktbereiche) than its Australian counterpart, grouped into public, private and criminal law streams. It entails four and half years of undergraduate study[32] and is not available to be combined with another degree: this may explain differences in approach to interdisciplinary scholarship, as I explore further below. Students must also complete a subject on at least one foreign legal system and in a foreign language.[33] This is often English, with the United States and United Kingdom preferred areas of study. Of relevance for public law reasoning, contemporary German legal education requires completion of three foundational subjects in constitutional law (Staatsrecht): organisation of the state — regarding the arrangement of institutions, federal competencies, and complaint procedures; a further semester focussed entirely on fundamental rights jurisprudence; and a semester focussed on the embeddedness of that public law system in a European and international legal framework. Subsequent semesters provide for more specific training in 'general' and 'particular' aspects of administrative law, which builds on the knowledge acquired in the preliminary three subjects.

Completion of compulsory education does not confer a degree. Students must then complete two state exams, separated by two years practical training across four or five practical modules, which vary according to the Land.[34] In Berlin, for instance, trainee lawyers (Halbjuristen) must complete stations in civil law (at a civil law court); criminal law (at the state prosecutor's office); public law (at a government, administrative department), at a law firm, and at a station of their choice.[35] Trainees receive a salary provided by the state. During this time trainees will acquire, amongst other things, practical knowledge in writing judgments while at court and in the practical skills necessary to translate formal theory acquired in legal education to concrete cases. At the completion of practical training, trainee lawyers will write a second exam — including an oral component — and if successful,

[28] Nigel Foster and Satish Sule, *German Legal System and Laws* (Oxford University Press, 4th ed) 97. Note that reforms have partially reoriented legal education and training toward private practice: at 98. See also Bell (n 25) 115.

[29] *Deutsches Richtergesezt* [German Judiciary Act] § 5 - § 7.

[30] Ibid § 5a(4).

[31] See, eg, John Bell's discussion of the German judiciary: Bell (n 25) 108-173.

[32] *Deutsches Richtergesezt* [German Judiciary Act] § 5a(1)

[33] Ibid § 5a(2).

[34] This preparatory training has existed since the 1700s: see, eg,Ostertag (n 17) 308.

[35] See, eg, Kammergericht Berlin, 'Stationsausbildung', *Das Kammergericht Berlin* (Web Page) <https://www.berlin.de/gerichte/kammergericht/>

be fully qualified (as a Volljurist). Approximately 5% will go on to occupy judicial office and three quarters will become lawyers, many with commercial firms. Others will serve within government offices and public administration.[36] As in Australia, it is popular for some law students to pursue a Master of Laws (LLM) in English speaking institutions to which cultural status and prestige attaches. This also interacts to a certain extent with knowledge coordinates, legal professional cultural identity and trans- and supranational dialogue.

In this account of German legal education and practical training, there are parallels to the discussion above of common law education and training. While the German system treats legal knowledge as primarily theoretical and academic, compulsory practical training — more comprehensive than its Australian counterpart — performs a similar function in anchoring knowledge to concrete method and case reasoning. The difference between the ideal and the everyday experience of deciding cases — as in Australia — matters for the nature of justification and presentation of reasons. I explore further below how this aligns with idealised differences between common law and civil law reasoning, which to a certain extent converge in practice. With respect to specialisation and the organisation of the profession, the German system provides its lawyers with a more comprehensive, 'common' training, from which greater professional divergence occurs.[37] This contrasts with the common law world, where a common practical basis — experience at the Bar — provides the basis for career progression and, ultimately, entry into the judiciary.

B *Doctrine, Dogmatik, Method*

Divergences in the form of legal education in Australia and Germany appear in how method is presented on its face. The common law method, as an ideal, holds that principles emerge from cases, 'bottom up'. The justice "decides the case first and determines the principle afterwards."[38] The justice should only determine the case before them and "on a given set of facts", with principles — doctrine — emerging over time through a series of cases on the same subject-matter.[39] In this way the common law method is inductive. Principles follow rather than precede a decision. Principles also remain defeasible and tentative — "remaining continuously open to defeat in a particular case or subject to modification as new situations arise."[40] As Oliver Wendell Holmes asserted, "[a] well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step."[41]

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[36] Bell (n 25) 114–15.

[37] Ibid 361.

[38] Oliver Wendell Holmes, 'Codes, and the Arrangement of Law' (1870) 5 *American Law Review* 1, 1.See discussion in Frederick Schauer, *Thinking like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009) 104.

[39] Wendell Holmes (n 38) 1. See also Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 2001).

[40] Schauer (n 38) 104–5.

[41] Wendell Holmes (n 38) 1.

The organisation of hierarchy between different courts structures the development of doctrine. If a principle can be deduced from a case decided by a superior court, it will bind the court of that instance (vertical precedent). If, however, a previous court of equal standing has decided a case, the principle deduced from that case will not be binding — it will only persuade (horizontal precedent).[42] The doctrine of precedent provides a formal mechanism for constraining outcomes and limiting the choices open to a judge. It reinforces the common law ideal of authority inhering in practical experience, formalised through hierarchy.

This account of the common law method contrasts with that idealised in 'civil law systems', or those based upon codification.[43] The German approach to legal method — at least as an ideal — presumes that law is an already existing, complete body. The application of existing principles to facts is deductive and 'top down'. This follows from the logic of codification and the approach to systematisation in German legal education. As Donald Kommers notes, the "ideology" underpinning German legal method flows from the premises of codification: "that written law is — or at least was — deemed conceptually self-sufficient and the key to the resolution of all human problems."[44] Unlike the common law trained lawyer, a 'continental lawyer' is socialised "to associate at least modern domestic law with a more or less closed and orderly system."[45] Precision in terminology, "conceptual specificity"[46] and exhaustive definitions are assumed in the codified tradition, where a common law trained lawyer assumes incompleteness.[47] A concern with conceptual specificity and precision of definition similarly distinguishes German legal scholarship from its Anglophone counterpart, which I explore further below.

The view that law is either already complete or an always expanding body, as well as the idealised account of where that law is sourced, influences how a legal professional community approaches method and the presentation and justification of reasons. In practice, the differences between civil law and common law may converge more than their idealised account would suggest. Australia, like many jurisdictions in the 'common law world', has trended toward a greater degree of legislating law. The role and method employed by the justice in public law questions is arguably different in the 'age of statutes'[48] to that presented by the above narrative. Statutory interpretation more closely resembles the task depicted in the narrative of the civil law tradition, with the justice applying provisions of a code.[49] Statutory interpretation now comprises a significant part of the Australian High

[42] See discussion in Schauer (n 38) 36–60.

[43] See, eg, Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 42 *Victoria University of Wellington Law Review* 817.

[44] Donald P Kommers, 'Germany: Balancing Rights and Duties' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2007) 161, 207.

[45] Mirjan Damaška, 'A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment' (1968) 116(8) *University of Pennsylvania Law Review* 1363, 1370.

[46] Ibid.

[47] Ibid 1373

[48] Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

[49] These statutes tend, however, to less detail than civil codes.

Court's diet.[50] I explore further in the next chapter how the institutional design of both the Australian High Court and German Federal Constitutional Court and the workload that design produces shapes the technique and mind that judges will bring to bear on constitutional questions. For present purposes, however, it challenges the traditional account of the common law justice explored above. Statutory interpretation socialises justices to approach method in a particular way — it is narrow, detail oriented and 'top down'.[51] The nature of legal reasoning in public law questions is more than simply 'bottom up'. That traditional account of the common law method, however, matters for self-perception in the Australian legal professional community. I explore this in my discussion of knowledge production and legal professional cultural identity below.

The narrative of German legal reasoning as purely deductive, systematic and removed from facts differs from the reality of practice. As in Australia, that narrative matters for self-perception and identity, and how reasons are presented and justified to the public. As I explored above, German preparatory training is more comprehensive than its Australian counterpart — it supplements education that is highly theoretical and systematised, anchoring it closer to a practical craft. This counterbalances the possibility of greater divergence in outcome in practice, where the possibility of law's application is not bound by analogous facts or cases, or a formal doctrine of precedent. Precedent, moreover, plays a role in German constitutional law similar to that in the common law world.[52] Particularly in fundamental rights jurisprudence, where legal concepts are more capable of multiple interpretations, precedent and doctrine developed by the Federal Constitutional Court are of greater importance than in other areas of law.[53] That precedent (Richterrecht) is then systematised into principles as Dogmatik,[54] presenting it in a way that coheres with German legal professional identity. In practice, there are some similarities between the method of the German Federal Constitutional Court and the Australian High Court. Principles are also derived from cases, systematised through academic scholarship (Dogmatik), and generalised and extrapolated to other circumstances.[55] Unlike the case method, however, the form of reasoning deployed by the German Federal

[50] See, eg, Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 110.

[51] See, eg, ibid.

[52] See, eg, Robert Alexy and Ralf Dreier, 'Precedent in the Federal Republic of Germany' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (Routledge, 1997) 17.

[53] See, eg, Thorsten Kingreen and Ralf Poscher, *Grundrechte Staatsrecht II* (C. F. Müller, 34th ed, 2018) 1.

[54] See, eg, Christian Bumke, *Rechtsdogmatik. Eine Disziplin und ihre Arbeitsweise: Zugleich eine Studie über das rechtsdogmatische Arbeiten Friedrich Carl von Savignys* (Mohr Siebeck, 2017) 36.

[55] See, eg, Michael Wrase, 'Methode der Grundrechtsinterpretation' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter. Zum Verhältnis von Verfassungsrechtswissenschaft und Verfassungsrechtsprechung* (Mohr Siebeck, 2019) 340; Michael Wrase, *Zwischen Norm und Sozialer Wirklichkeit — Zur Methode und Dogmatik der Konkretisierung Materialer Grundrechtsgehalte* (Duncker und Humblot, 2015).

Constitutional Court tends to entail more abstract, generalisable statements — what Oliver Lepsius has referred to as "thinking in standards" — that separate facts from reasons.[56]

'Dogmatik' differs from common law concept of doctrine, despite the tendency to translate the term into English as equivalent. Doctrine in the common law system refers to rules and principles that are established through practice and by the formal authority of courts. Dogmatik, in the German system, is the formulation of rules and principles through systematisation and abstraction.[57] Its sources are not confined to a court's ruling; its authority flows from elsewhere. To a certain extent this provides it with a precarious basis. Its authority isn't anchored to a formal source, as in the common law. It is self-referential.[58] The practice of Dogmatik also accords a greater role to the public law academy to perform the task of systematising principles and rules. The German practice of Dogmatik is distinctive in the weight it gives to academy, particularly where there is a dominant opinion amongst academic voices (a "prevailing opinion" or "herrschende Meinung"). Oliver Lepsius describes it in terms of the German 'Sonderweg' or special path, distinguishing the practice in German-speaking jurisdictions from other European jurisdictions.[59] This is possible because of the approach to the production of knowledge in the German legal professional community, which I explore further below. German academic culture is itself arranged with a degree of hierarchy and status — in Max Weber's terms, public law academics are 'honoratiores' within that legal professional culture[60] — which provides a degree of formal organisation and hierarchy able to resolve disagreement. It also follows from the German legal tradition's preference for producing knowledge through consensus or unanimity, which I explore further in the next chapter on court design.

German legal education provides for an academic understanding of method (Methodenlehre). This provides students with a formal induction into Dogmatik as a practice of legal justification, drawing its normative force its practice by a professional community.[61] It is responsible for furnishing members of the German legal professional community with the vocabulary and intellectual framing that they will bring to legal problems that they encounter

[56] Oliver Lepsius, 'Die Maßstabsetzende Gewalt' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag, 2011) 159. I explore this further in the next chapter on institutional design and work processes.

[57] See, eg, Oliver Lepsius, 'Kritik der Dogmatik' in Gregor Kirchhof, Stefan Magen and Karsten Schneider (eds), *Was Weiß Dogmatik?: Was leistet und wie steuert die Dogmatik des öffentlichen Rechts?* (Mohr Siebeck, 2012) 39, 39–40.

[58] Ibid 45–6.

[59] Ibid 47. See also Christoph Schönberger, *Der »German Approach« Die Deutsche Staatsrechtslehre im Wissenschaftsvergleich* (Mohr Siebeck, 2015).

[60] Max Weber, *Wirtschaft und Gesellschaft, vol III* (Mohr Siebeck, 1922) 455. See also Max Rheinstein, 'Die Rechtshonoratioren und ihr Einfluss auf Charakter und Funktion der Rechtsordnungen' (1970) 34(1) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1, 1. Hein Kötz, 'Scholarship and the Courts: A Comparative Survey' in David S Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker & Humblot, 1990) 183, 185.

[61] See, eg, Oliver Lepsius' description: Lepsius (n 57) 40–41. "Dogmatik steht für eine juristische Vorgehensweise; sie beschreibt einen Konsens, wie bei juristischen Begündungen vorzugehen ist… Dogmatik ist hier das Ergebnis einer Selbstverpflichtung professionell arbeitender Juristen. Daraus bezieht sie ihre normative Kraft." [Dogmatik encompasses a legal approach: it describes a consensus of how to approach legal justification… Dogmatik is the result of the self-obligation of legal professionals working professionally. It draws its normative force from that.]

throughout their career — including as judges. Yet given the indeterminacy of abstract legal method (Methodenlehre), preparatory training (the Rechtsrefendariat) is necessary to ground academic knowledge to concrete practice. In 1975 Josef Esser infamously argued that academic training in method provides limited assistance and certainty to judges when deciding on the facts.[62] Instead, the manner in which academic training in method is applied in concrete cases flows from professional socialisation — including how professionals frame a particular set of facts. Practical preparatory training assists in that process of socialisation — it instils the "professional sensibilities, habits of mind and intellectual reflexes"[63] I explored earlier in my discussion of legal professional culture.

IV SCHOLARSHIP AND PRODUCING KNOWLEDGE

A *Public Law Scholarship*

A key cultural difference between Australian and German legal professional communities is the role of academic commentary and public law professors, the nature of that commentary and the weight that is attached to it by courts and other members of the community. In one respect this is felt in processes of appointment to the Australian High Court and German Federal Constitutional Court. Public law academics — and academics generally — do not form part of the pool from which Australian High Court justices are drawn. Value is instead placed upon judicial experience and experience at the Bar or in other forms of practice. By contrast it is established practice in Germany to appoint public law professors to the Federal Constitutional Court. Differences in the role of public law academics — and the kind of scholarship they produce — affect the shape of a legal professional culture and the way in which it approaches method.

Public law scholars in Australia assume a less direct role in systematising legal doctrine than that assumed in Germany. Former Australian High Court Chief Justice French noted significant differences in the work of the courts and the purpose of legal scholarship, which perhaps explain the weaker dialogue between them in the Australia context. Judicial reasoning and legal scholarship differ in purpose, perspective and methodology.[64] French associated some of those differences with disagreement regarding the purpose of education and law schools more generally. He noted ene school of thought that law schools should produce scholarship that can be put to practical use, rather than abandoning "their proper place by emphasising abstract theory".[65] The purpose of legal scholarship is, however, broader. It exists to produce knowledge as an end in itself. Constitutional scholarship also holds constitutional reasoning to account.[66]

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[62] Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Athenäum, 1972) 7.

[63] Klare (n 14) 151.

[64] Chief Justice Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87(2) *Australian Law Journal* 96.

[65] Ibid 97.

[66] Liora Lazarus, 'Constitutional Scholars as Constitutional Actors' (2021) 48(4) *Federal Law Review* 483, 490.

Both former Chief Justice French and current Chief Justice Kiefel have distinguished extra-curially between scholarship that is directed toward judges — "traditional doctrinal scholarship" — and non-doctrinal scholarship and legal theory.[67] Kiefel notes scholarship directed toward judges assists the judge in developing the law correctly and coherently.[68] The specialisation of academics in a particular area of law means they may devote time and attention that a judge operating under time constraints may not. This conception of the public law academic accords with the division of labour and specialisation established by Australia's legal professional culture more generally. As High Court judges are generalists,[69] assistance from academic specialists — such as constitutional scholars — supplements a lack of specialisation. Despite this function, doctrinal scholarship does not dominate public law scholarship in Australia to the extent that it does in Germany.

As explored earlier in my discussion of Dogmatik, public law scholarship in Germany performs a function more directly involved in courts' development of law. Returning to the idea of legal professional culture as the infrastructure for organising constraint of choice, legal scholarship forms part of the body of materials that supply that constraint. A prevailing opinion amongst academic voices is influential upon the development of law and the German legal professional community's conception of a 'correct' decision and a good legal argument. In this way public law scholarship carries a different kind of institutional function and weight.

The function of public law scholarshIp in the German legal professional community has also developed and changed over time. Public law professors were historically responsible for developing civil law codes. They were also responsible for developing the centrality of the state in German public law.[70] During the Weimar Republic public law professors spearheaded rich theoretical debates regarding the role of the state, the structure of state authority, the nature and purpose of a constitution, and the judicial reasoning and methods that should be brought to bear upon constitutional questions.[71] Part of the richness and creativity of constitutional theory during this time arguably flowed from the fact that rights were not justiciable under the Weimar constitution. As Brun-Otto Bryde argues, forms of constitutional argumentation and scholarship were possible in the Weimar Republic that may not

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[67] French (n 64) 99; Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 1(44) *Melbourne University Law Review* 1.

[68] Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (n 67) 2.

[69] I explore this further in the next chapter on institutional design.

[70] Bernhard Schlink, 'Die Entthronung der Staatsrechtswissenschaft Durch Die Verfassungsgerichtsbarkeit' (1989) 28(2) *Der Staat* 161, 161–3.

[71] See, eg, Stefan Korioth, 'Erschütterungen des staatsrechtlichen Positivismus im Ausgehenden Kaiserreich: Anmerkungen zu frühen Arbeiten von Carl Schmitt, Rudolf Smend und Erich Kaufmann' (1992) 117(2) *Archiv des öffentlichen Rechts* 212; Christoph Möllers, 'Der Methodenstreit als Politischer Generationenkonflikt: Ein Angebot zur Deutung der Weimarer Staatsrechtslehre' (2004) 43(3) *Der Staat* 399; Christoph Möllers, *Staat als Argument* (Mohr Siebeck, 2nd ed, 2011); Ernst-Wolfgang Böckenförde, 'Die Methoden der Verfassungsinterpretation — Bestandsaufnahme und Kritik' 46 *Neue Juristische Wochenschrift* 2089; Arthur Jacobson and Bernhard Schlink (eds), *Weimar. A Jurisprudence of Crisis* (University of California Press, 2002).

have been possible under different constitutional conditions.[72] In its consolidation phase the German Federal Constitutional Court could then engage selectively with the debates that had been opened during the Weimar Republic, and theoretical schools that those debates established, settling controversies and establishing key doctrines — including the horizontal effect of fundamental rights[73] and the positive obligation that rights place upon the state.[74]

Another reason for the influence of public law professors and theorists during this era also flowed from the institutional disruption generated by the Weimar Republic and reimagination of the constitutional state in the post-war era. The Weimar Republic required the intellectual imagination of academic actors to resolve novel questions cast up by its transition to a parliamentary democracy. The early Republic faced similar challenges. Public law professors and theorists could assume the role of guiding the response to constitutional method because of the broader cultural value placed upon academic authority and expertise.[75]

As the Court consolidated its authority, academic commentary gave up its role in guiding constitutional theory and exposition. As early as 1962 Rudolf Smend observed that, in practical terms, the Basic Law applies as it is interpreted by the Federal Constitutional Court and the academic literature comments on it in that sense.[76] Public law academics nonetheless retain a greater influence on the development of constitutional method than in Australia because of how authority is allocated to certain forms of argument. As explored above, the form of argument that is accepted in the German legal professional community — Dogmatik — does not draw its authority from a formalised system of precedent, although precedent informs that authority to a certain extent in constitutional practice.[77] It acquires its authority from a technique that is formally self-referential, but in practical terms draws authority from its acceptance and establishment in a professional interpretive community, in which

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[72] Brun-Otto Bryde, 'Programmatik und Normativität der Grundrechte' in Hans-Jürgen Papier and Detlef Merten (eds), *Handbuch der Grundrechte* (2004) 679; Wrase, 'Methode der Grundrechtsinterpretation' (n 55) 362.

[73] See, eg, Hannah Birkenkötter, 'Art. 2. Abs. 1 GG als Allgemeines Freiheitsrecht und Auffanggrundrecht: Das Elfes-Urteil' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 9; Paolo Ramadori, 'Grundrechte als objektive Werte: Das Lüth-Urteil (1)' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019); Dominik Rennert, 'Die Verdrängte Werttheorie und ihre Historisierung: Zu "Lüth" und den Eigenheiten Bundesrepublikanischer Grundrechtstheorie' (2014) 53(1) *Der Staat* 31; Christian A Djeffal, 'Ausstrahlungs- und Wechselwirkung der Grundrechte: Das Lüth-Urteil (3)' in Dieter Grimm (ed) *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 99.

[74] See, eg, Pascal Langenbach, 'Die Grundrechtliche Schutzpflicht: Das Fristenlösung-Urteil' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 161.

[75] See, eg, Matthias Jestaedt, 'Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, 2011) 77, 126–7.

[76] Rudolf Smend, 'Das Bundesverfassungsgericht. Festvortrag zur Feier des zehnjährigen Bestehens des Bundesverfassungsgericht am 26. Januar 1962' in Rudolf Smend (ed), *Staatsrechtliche Abhandlungen und andere Aufsätze* (Duncker & Humblot, 1994) 582; Jestaedt (n 75) 127.

[77] Lepsius (n 57) 45–6.

the voices of public law academics carry significant weight. While German public law professors may not carry as much influence in breaking ground and doctrine theoretically, they perform a role in systematising Dogmatik. The proportion of public law scholarship comprised of Dogmatik related work has steadily increased over the past three or four decades.[78] Such work is also German language, directed internally and related to German-specific problems — an issue I consider further below in my discussion of identity and trans- and supranational dialogue. Mathias Jestaedt explained the assumption of the academy's role — as handmaiden rather than antagonist of the Federal Constitutional Court — in terms of the status and benefits that the post-war German constitutional paradigm has conferred upon public law scholarship. It became the "king amongst legal disciplines".[79] The prospect of serving upon the Federal Constitutional Court further acts as an incentive that shapes the tone and ambitions of public law scholarship. While theory therefore plays a lesser role in directing ground-breaking doctrinal approaches than it once did,[80] it supplements and supports the work of the Court and is therefore heavily cited. Michaela Hailbronner and Stefan Martini note that the Federal Constitutional Court has cited scholarship in 37 of its 40 most significant decisions, compared to the United States Supreme Court's citation of scholarship in 15 of its 40 most significant decisions.[81]

The comparison of Australia and Germany demonstrates how the culture within the academy, and the purpose, tone and function of legal scholarship, plays a role in how knowledge and authority is organised and generated within a legal professional community. This matters for the sources to which constitutional courts turn in moments where institutional practices within the court cannot supply an answer to a novel problem. In Australia legal scholarship can inform doctrinal development, supplementing the lack of specialisation of justices in a generalised, ultimate court of appeal. Doctrinal constitutional scholarship, however, does not dominate legal scholarship in Australia to the extent that it does in the German academy. In Germany, Dogmatik — a form of scholarship that more closely resembles the style of reasoning of judges — has increasingly preoccupied academic institutions over recent decades.

Exploring the difference between how Australian and German legal professional culture produces knowledge reveals other differences German public law scholarship's focus on 'Dogmatik', and the consideration that the Court gives to that scholarship when compared with Australia, flows from a deeper understanding of what law is and the sources from which it draws its authority. The correctness and authority of a legal argument is not formally anchored to endorsement by a superior court. The authority of 'Dogmatik' is self-referential. This points to an understanding of law as a system existing in the abstract, separate from cases in the courts, which opens the space for public law professors with primarily academic knowledge to engage. Australia, in contrast, retains its

[78] Ibid 46–7.

[79] Jestaedt (n 75) 128.

[80] Schlink (n 70).

[81] Michaela Hailbronner and Stefan Martini, 'Constitutional Reasoning in the German Federal Constitutional Court' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 356; Michaela Hailbronner, 'We the Experts. Die Geschlossene Gesellschaft der Verfassungsinterpreten' (2014) 53(3) *Der Staat* 425, 430.

idealisation of law and legal correctness as one that flows from experience with cases — even as public law scholarship acquires a role in supporting and theorising the work of courts to a certain degree.

B *Identity and Trans- and Supranational Dialogue*

Professional identity and tradition similarly shape how a professional culture reinforces the experience of constraint of choice in legal actors. I draw on John Merryman's description of a legal tradition as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught." In Merryman's terms, a "legal tradition relates the legal system to the culture of which it is a partial expression" and "puts the legal system into cultural perspective".[82] This concept of a legal professional tradition is relative: traditions can develop from earlier traditions, and draw upon parallel traditions where they experience an affinity or relationship between themselves and another. It affects which other legal systems members of a legal professional community perceive as familiar, and which foreign institutions they trust as a reliable source for ideas about their own law. In this way the experience of legal cultural identity and tradition influences the institutions to which courts turn for knowledge and inspiration when confronted with a problem that existing practices cannot resolve. Practices of constitutional 'borrowing' and reference to foreign precedent — institutions outside a jurisdictionally defined legal professional community — shape how knowledge is produced and a legal professional community develops. Similarly, vertical relationships established between traditions by the post-war era and diffusion of rights review — trans- and supranational dialogue — condition the sources and institutions that are perceived as authoritative within a legal professional culture.

The common law method Itself contemplates reference to experience from elsewhere — precisely because of the value that the common law places upon practical experience to produce and test ideas.[83] In Australia, constitutional knowledge building practices are coloured by Australia's identity as part of the Commonwealth and a "common law family"[84] and the relationship its legal professional community perceives between itself and other constitutional traditions within that family. Privy Council and English court decisions bound the High Court in its early years, influencing that perception.[85] Other common law jurisdictions also inspired the framers. The federal structure of the Australian Commonwealth was drawn from the model of the United States and Canada, although some reference was also made to the Swiss system. In other respects the framers drew on the British tradition of Westminster democracy and representative and responsible government. This may explain the weight that the Australian High Court has given to precedent from other common law nations. Australian law has tended to favour

[82] John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, 2nd ed, 1985) 10. See also Martin Krygier, 'Law as Tradition' (1986) 5(2) *Law and Philosophy* 237.

[83] See, eg, Stephen Gageler and Will Bateman, 'Comparative Constitutional Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 231, 267.

[84] Saunders and Stone (n 23) 15.

[85] See, eg, Gageler and Bateman (n 83) 266.

foreign public law precedent where drawn from the United Kingdom, New Zealand and Canada.[86] As Cheryl Saunders and Adrienne Stone argue, the Australian Constitution "creates institutions and relies on assumptions that are shared by most other common law states."[87] It developed precepts of a constitutional kind that were a product of the common law. Saunders and Stone note those precepts included a particular understanding of the value of freedom of speech, the scope and relationship between executive and legislative power and a dualist approach to international law.[88]

In other respects, however, Australia's reference to precedent within the common law family cannot be entirely explained by a commonality of assumptions that are distinct from those outside the common law world. The High Court has engaged with precedent from the United States, Canada and New Zealand even where the reference legal system did not directly influence the feature under consideration when the Australian Constitution was drafted. For instance, the Australian High Court referred to precedent from the United States' Supreme Court when developing the doctrine of the implied freedom of political communication — despite the basis of that precedent in the First Amendment and a Bill of Rights. In other circumstances ideas drawn from foreign precedent have been rejected on the basis that they are not compatible with the Australian constitutional tradition or common law method. The rejection of structured proportionality by Justices Gageler and Gordon is a notable instance of this — despite the acceptance of structured proportionality in common law countries such as Canada.[89] Which jurisdictions are considered relevant comparators, and the instincts of members of the Australian legal professional community to turn to those comparators, is shaped by broader factors than structural relevance and similarity alone. The manner in which comparative law is taught, as well as broader issues of language and cultural identity — what I have described as societal cultural coordinates above — also impact upon the selection of comparators. In 2011 Susan Kiefel observed in extra-curial writing that Australian litigation lawyers lack a background in comparative method and theory. Legal education also tends to be monolingual and restricted to English language sources.[90] As I have argued in this chapter — and develop further in the next — how ideas emerge in constitutional cases, particularly in an adversarial system, is shaped by the career structure of the members of its legal profession. The background and exposure of 'peak' Australian litigators — those likely to appear in the High Court — therefore matters for the influence of comparative law upon knowledge building practices in Australia. As explained above, it is popular for members of the Australian legal profession to pursue postgraduate study in

[86] See, eg, Saunders and Stone (n 23) 22; Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36(1) *Federal Law Review* 1, 2. See also Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 *The University of Queensland Law Journal* 317, 331. Aroney notes that, "[a]lthough the High Court has in recent years become increasingly open to the citation of foreign cases from a range of countries, British and American case-law has remained easily the most common. Generally speaking, the next most prevalent have been decisions of other countries within or to some extent associated with the British Commonwealth, most notably Canada, India, South Africa and Ireland, followed lastly by jurisprudence of European civil law countries, especially Germany and the European Union": at 331.

[87] Saunders and Stone (n 23) 15.

[88] Ibid.

[89] I explain the significance of structured proportionality in Australian constitutional law more fully in chapter nine.

[90] Kiefel, 'Comparative Analysis in Judicial Decision-Making: The Australian Experience' (n 22) 369.

academic institutions in the common law world to which status and prestige attaches. "[V]alue patterns" acquired in foreign legal training[91] also colour the Australian approach to foreign precedent in constitutional development.

The German Federal Constitutional Court's practice of referring to foreign precedent has fluctuated over time. While the Court cited foreign precedent during its earlier 'consolidation' period, this practice declined as the Court consolidated its authority.[92] In a parallel to the Australian High Court, citation of foreign precedent started to become frequent again during the 1990s, associated with globalisation and transnational engagement within politics and law.[93] Stefan Martini explains German Federal Constitutional Court engagement with foreign precedent in terms of the 'bowl thesis': young constitutional courts need to "accumulate symbolic capital" within a new and insecure institutional landscape. Citation of foreign precedent invokes the authority of established institutions and legal systems elsewhere.[94] It also provides a source of ideas regarding law. Over time, the Court became more capable of referring to its own authority — a trend which began to reverse as transnational and supranational influences during the 1990s challenged the inward focus of constitutional systems.

Overall — at least upon the surface of its judgments — the German Federal Constitutional Court appears more introverted than its Australian counterpart.[95] Writing extra-curially in 2005, then First Senate judge Brun-Otto Bryde noted that the modern Court rarely openly cites precedents from foreign courts. While reference to foreign precedent does not attract the controversy that it does in the United States' Supreme Court, the Constitutional Court has developed a style of reasoning that predominantly refers to its own precedent.[96] This relates to the presentation of reasoning and deliberation processes of the Court more generally: precedent is cited by number, removing the year and party names; the Court reaches decisions unanimously, with dissenting opinions delivered in rare circumstances. This style supports a particular understanding of institutional authority, which as a corollary 'buries' aspects of judicial deliberation and confines certain considerations to the informal debate that takes place between justices when deliberating.[97] The intellectual influence of foreign precedent and judicial socialisation — "value patterns" acquired in foreign training and transnational judicial dialogue — is therefore felt behind closed

[91] Stefan Martini, 'Lifting the Constitutional Curtain? The Use of Foreign Precedent by the German Federal Constitutional Court' in Tania Groppi and Marie-Calire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing, 2013) 229, 250.

[92] Martini (n 91); Brun-Otto Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue' (2005) 80 *Tulane Law Review* 203, 204–5; Axel Tschentscher, 'Dialektische Rechtsvergleichung — Zur Methode der Komparatistik im Öffentlichen Recht' (2007) 62(17) *Juristenzeitung* 807, 807–8. See also Basil Markesinis and Jörg Fedtke, 'The Judge as Comparatist' (2005) 80 *Tulane Law Review* 11.

[93] Martini (n 91) 242.

[94] Ibid.

[95] Ibid 230.

[96] Bryde (n 92).

[97] I explore this further in the next chapter on court design and internal work processes.

doors.[98] The extent to which it does so is also largely determined by German comparative law scholarship,[99] returning engagement with ideas abroad — and the experience of legal professional cultural identity — to the nature of public law scholarship in Germany.

Unlike Australia, the experience of legal professional cultural identity — relative to other legal families — does not fracture along a "civil law family" or linguistic lines. Conducting an empirical survey of citations during the 1950s, 1970s and 2000s, Stefan Martini concluded that the Constitutional Court referred to case law from the United States, Switzerland, France, Italy, Austria and Great Britain to a greater extent than other systems. Reference to the United States was particularly marked.[100] Both Martini and Bryde note that influence and reference is often unacknowledged. Martini describes the Wunsiedel decision, for instance, as a result of a "silent dialogue between German and US constitutionalism" regarding freedom of speech doctrine. Martini also notes that the career of the justice preparing the draft decision was influenced heavily by comparative law and foreign engagement.[101]

A comparison of Australian and German engagement with foreign constitutional precedent reveals two trends relevant to an account of legal professional culture. Firstly, the comparison reveals how the experience of identity and tradition can shape practices of knowledge building. That identity may flow partly from the experience of an inherited, colonial legal tradition, but may also be shaped by the socialisation of members of its legal professional community and exposure to ideas abroad. The comparison between Australia and Germany is instructive in this regard. Australia's practices of comparative reference and constitutional borrowing are justified by its participation in a 'common law family'. Monolingualism and the tradition of education in certain Anglophone jurisdictions reinforces those tendencies. In Germany, however, reference to foreign precedent is not determined by participation in a broader 'family' or tradition. The German Federal Constitutional Court's reference to the United States indicates that socialisation and the prominence of ideas — in this case, the dominance of the United States in shaping post-war debates regarding constitutionalism, and the academic training of German lawyers in the United States — may play as much of a role as tradition.

Secondly, the extent of reference to foreign precedent — including the extent to which it is openly cited — can change over time. There are parallels in the way in which both the Australian High Court and German Federal Constitutional Court relied upon foreign precedent during their early consolidation period at a time when their own institutional traditions were underdetermined. Similarly, both courts were influenced by trends of

[98] See, eg, discussion by former First Senate justice Brun-Otto Bryde, who notes that the Votum — the material prepared by the judge responsible for the first draft of the judgment, that informs the debate and deliberation processes between justices — often includes comparative material: Bryde (n 92) 206–7.

[99] Ibid 207.

[100] Martini (n 91) 248. See similar conclusions reached by Markesinis and Fedtke (n 92) 37.

[101] Martini (n 91) 250–1.

globalisation and internationalisation during the 1980s and 1990s, which entailed greater reference to ideas from elsewhere.

V SUMMARY

Formal institutions such as written constitutions and systems of court hierarchy matter for legal professional culture and constitutional development. Yet legal professional culture also encompasses informal institutions, including processes of education, training and knowledge production. A comparison of Australian and German professional cultural institutions suggests that informal institutions contribute to the socialisation of legal actors. These processes of socialisation can shape the sources that legal actors perceive as authoritative and where they source ideas.

In Germany legal scholarship, which is predominantly doctrinal, forms part of the body of legal materials that courts use to assess the authority of particular principles. This connects with embedded professional narratives and beliefs regarding the nature of legal principle. German legal actors are socialised to view law as an academic discipline, which also reflects in the structure of judicial careers and judicial qualification. Australian legal actors are socialised to accept practical experience as the basis for a principle's authority, which in turn orients professionals towards a particular type of reasoning and reference to comparative law. Embedded beliefs and narratives about the nature of law and the source of a principle's authority in turn distribute power to particular institutions within the German and Australian legal profession. In Germany, public law scholars acquire a particular position of influence, albeit an influence auxiliary to the agenda of the Federal Constitutional Court. In Australia the professional Bar performs the comparable function, with the majority of High Court justices appointed from its pool.

CHAPTER FOUR: COURT DESIGN

I INTRODUCTION

In this chapter I explore how the institutional design, composition and operation of the Australian High Court and German Federal Constitutional Court interacts with their respective legal professional cultures. While much has been written on the differences between diffuse and centralised systems of judicial review, less literature has considered how those systems structure the input of the knowledge and perspectives of the legal professional community more broadly into constitutional adjudication. I explore this function of channelling of knowledge and perspectives and connect it with my account of professional cultural institutions. I also compare how court design and processes of deliberation manage dissent and disagreement between judicial actors. I argue that these institutional differences matter for reinforcing particular approaches to method, how legal principles acquire their authority and weight, and the capacity of courts and method to resolve certain disagreements at scale. These in turn affect the development of method and experience of constraint of choice in legal actors.

In the first part of the chapter I contrast the features of the centralised German Constitutional Court with Australia's diffuse system of judicial review. I also discuss the extent to which some of the key features of both courts, but particularly of the German Constitutional Court, developed organically and independently of constitutional design. I provide a narrative that links that development to features of the early Republic's legal professional culture. I argue that a centralised court design itself accelerated and consolidated particular trends within that legal professional community because of the direct dialogue it created between members of the Court and public law theorists. The Court became a specialised forum for engaging with, and extrapolating, theory regarding both the role of the Constitutional Court and the nature of fundamental rights. This theoretical engagement could develop less inhibited by the concerns, perspectives, or culture that other legal specialities entailed. This contrasts with the Australian diffuse system of judicial review, where the High Court's constitutional engagement sits alongside a predominantly non-constitutional workload and a public law focus shaped by the logic of statutory interpretation.

Interwoven with this account is an overview of the constitutional jurisdiction and proceedings available for parties seeking access to both courts. These differences affect the workload of constitutional courts, which also matters for how those courts draw upon expertise and present it in their reasoning. I also describe differences in the process of appointing judges and the professional background of those judges. These factors influence how both institutions, and the legal professional cultures that support them, understand technical expertise in the context of politically sensitive disputes as well as expertise more generally.

In the final part of this chapter, I consider the specific mechanisms that allocate work, structure judicial deliberation, and determine the delivery of judgment in both the FCC and HCA. These differences also go to how legal professional authority is applied — and presented to the broader legal professional community and the public — when producing constitutional decisions.

II SYSTEMS OF JUDICIAL REVIEW

A *Diffuse and Centralised Systems of Review*

The Australian Constitution adopted the British and common law world's system of diffuse judicial review. The German Federal Constitutional Court is a centralised constitutional court. Inherent within this difference are contrasting understandings of expertise in constitutional adjudication and approaches to incorporating legal professional specialisation in constitutional decision making.

Diffuse systems of review tend to treat constitutional adjudication as one form of legal reasoning amongst many. While an apex court in that system — such as the Australian High Court — may possess original jurisdiction for constitutional disputes,[1] constitutional jurisdiction may be exercised by other courts. Any judge of any court may declare a law constitutionally invalid where the parties to a dispute make the argument.[2] This reflects a view that constitutional interpretation is a technical skill. As ascertaining the content of norms is the function of all judges, constitutional reasoning becomes one form of legal reasoning amongst many.[3] The diffuse system's origins may explain its prevalence in the common law world. As the older system, diffuse judicial review developed within an existing court system and structures for judging. In Marbury v. Madison[4] the United States Supreme Court grounded its introduction of judicial review in "the province and duty of the judicial department"[5] and "the essence of judicial duty"[6] as a general category. Judicial review formed part of what was already there, woven into existing the judicial function.

The centralised model of a constitutional court first described by Hans Kelsen distinguishes judicial review from other forms of judicial function. Kelsen, influenced by his predecessor, Georg Jellinek, contributed significantly to the foundation of the Austrian Constitutional Court in 1920. Jellinek first called for a constitutional court as a specialised body to better demarcate competences between the Centre and Länder in Austria.[7] Much of the rationale for a specialised court was connected with a belief that political opponents of a system of judicial review

[1] *Australian Constitution* s 76; *Judiciary Act 1903* (Cth) s 30. See, eg, Kristen Walker, 'Authority of the High Court of Australia' in Cheryl Saunders and Adrienne Stone (eds), *Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018).

[2] See, eg, discussion in Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000) 32, 32.

[3] See, eg, Mauro Cappelletti and William Cohen, *Comparative Constitutional Law: Cases and Materials* (Bobbs-Merrill Company Inc, 1979) 75-6.

[4] 5 U.S 137 (1803).

[5] Ibid 141.

[6] Ibid 142.

[7] Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (A. Holder, 1885); See also, Sara Lagi, 'Hans Kelsen and the Austrian Constitutional Court' (2012) 9(16) *Revista Co-herencia* 273, 276–7.

would be more inclined to accept it were it confined to a carefully demarcated forum.[8] The Court — a creature of the 1920 Austrian Constitution — emerged amidst intense disagreement regarding constitutional form and procedures for constitutional adjudication.[9] Installing a specialised Court provided a means of building consensus between two hostile camps: a political elite suspicious of the judiciary and a pan-European movement that favoured introducing judicial review as practiced in the United States.[10] By isolating that power within a specialised court, the operation of constitutional review and the identity of its judges could be more easily controlled. Building consensus amongst actors hostile to judicial review prompted Kelsen's classic description of the Court as a 'negative legislature': a specialised constitutional court does not make law freely in the 'creative' and positive manner of a true legislature.[11] The Court's work is instead reactive: it shadows and responds to initiatives of the legislature and is narrowly confined in that activity by the terms of a constitution.[12]

The centralised model became the dominant form adopted by democracies reimagined in the post-war era. Its structure loaned itself well to legal systems founded on rupture and radical change, where there was often deep distrust of majoritarian institutions and the existing judicial establishment.[13] Some scholarship has argued such courts have been particularly successful in societies with a complex relationship to authority, or a nondemocratic past, precisely because they exploit claims to authority and expertise relied upon prior to the democratic transition.[14] Constitutional courts dominate in the states comprising the European Union and post-communist Europe[15] but emerge elsewhere in transitional democracies in Africa, Latin America and Asia.[16] Confining constitutional adjudication to a specialised forum also served the legal culture and professional structure of many

[8] Alec Stone Sweet, 'Why Europe Rejected American Judicial Review and Why It May Not Matter' (2003) 101 *Michigan Law Review* 2744, 2766.

[9] See, eg, Lagi (n 7).

[10] Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (n 2) 34–5.

[11] Hans Kelsen, 'Wesen und Entwickung der Staatsgerichtsbarkeit' in Robert Chr van Ooyen (ed), *Wer soll der Hüter der Verfassung sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie. Herausgegeben, mit einer Einleitung und einem Nachtrag zur Kelsen-Rezeption Versehen von Robert Chr. van Ooyen* (Mohr Siebeck, 2008) 26.

[12] Ibid.

[13] See, eg, László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary' (2003) 18(1) *International Sociology* 133, 135; Francisco Ramos Romeu, 'The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions' (2006) 2 *Review of Law and Economics* 103.

[14] Christoph Schönberger, 'Anmerkungen zu Kalrsruhe' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, 2011) 9, 43–5. For an English language translation, see Christoph Schönberger, 'Karlsruhe: Notes on a Court' in Matthias Jestaedt et al (eds), *The German Federal Constitutional Court: The Court without Limits,* tr Justin Collings (Oxford University Press, 2020). See also, Michaela Hailbronner's explanation of the 'success' of the German Federal Constitutional Court: Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press, 2015).

[15] See, eg, Victor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 265, 265.

[16] See, eg, Robert Chr van Ooyen, 'Verfassungsgerichtsbarkeit' in Rüdiger Voigt (ed), *Handbuch Staat* (Springer, 2018) 917, 918.

continental European jurisdictions. Mauro Capelleti and William Cohen, for instance, argue that the "psychology" of career judges in continental European traditions is ill suited to dealing with the "value-oriented, quasi-political functions involved in judicial review".[17]

Significantly, Kelsen explicitly opposed that specialised constitutional courts become for a for adjudicating rights claims.[18] Kelsen acknowledged that constitutional reasoning entailed an inherent political dimension. a This recognition lay at the heart of his conception of a constitutional court, with specialised processes of appointment to carefully structure the influence of political parties upon the Court[19] that I discuss further below. Nonetheless, constitutional reasoning must remain guided by relatively determinate standards in a constitution. In Kelsen's view, standards such as "equality" and "freedom" are too imprecise to guide the application of technical reasoning.[20] Principles expressed in terms of values are capable of too many interpretations and confer too much power on a constitutional court.[21] This would compromise the principle of the court as 'negative legislator' — a technical tribunal carefully controlled by a constitutional document and restricted in its creative freedom. Conferring so much discretionary power on the Court would also complicate the relationship between judiciary and legislature too greatly — already a dynamic that creating a specialist court seeks to stabilise.[22]

Kelsen's caveat regarding rights adjudication largely fell away in the post-war model of constitutionalism that emerged across Europe and in many transitional democracies.[23] The preference for rights catalogues fused with Kelsen's concept, with key features of that model — constitutional questions confined to the constitutional court; a strict conception of separation of powers; a reactive, rather than active, role for constitutional courts — eroding to some extent through political and judicially-driven developments that followed.[24]

B *Historical Contexts of Institutional Design*

1 *The Australian High Court*

[17] Cappelletti and Cohen (n 3) 81; see also Schönberger (n 14) 12–13.

[18] See, eg, Kelsen (n 11) 40–1. Christoph Schönberger, 'Die Verfassungsgerichtsbarkeit bei Carl Schmitt und Hans Kelsen: Gemeinsamkeiten und Schwachstellen' in Pasquino P and Beaud O (eds), *La Controverse sur le Gardien de la Constitution et la Justice Constitutionnelle* (Pantheon-Assas, 2000) 177.

[19] Kelsen (n 11) 27–88.

[20] Ibid 40.

[21] Ibid 39–40. See also Shu-Perng Hwang, 'Rechtsanwendung in der Pluralistischen Demokratie: Hans Kelsens Verständnis der Verfassungsgerichtsbarkeit unter besonderer Berücksichtigung seiner Demokratietheorie' (2007) 46(3) *Der Staat* 442.

[22] See, eg, Kelsen (n 11) 40.

[23] See, eg, Tom Ginsburg, 'The Global Spread of Constitutional Review' in Keith E Whittington, Daniel R Keleman and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 81.

[24] See, eg, discussion by Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (n 2) 127–33.

At the time of Australian federation, the concept of a centralised constitutional court did not exist. Australia's adoption of a diffuse system was less a result of design choice and debate than an inheritance and adaption of the sole model practiced. Federating the colonies would require an institutional arbiter capable of resolving federal disputes — some kind of Commonwealth court was therefore an "essential concomitant" of federation.[25] Proposals for the High Court were largely discussed during the 1891 constitutional convention held in Sydney to consider initial drafts of a constitution, including that prepared by Inglis Clark.[26] Two main issues regarding the Court dominated discussion. The convention was initially unclear as to the extent to which judicial power should be vested in the Court, or whether Parliament should merely retain the power to 'establish a Court' — a point that became crucial for the current separation of powers in Australia.[27] The role of the Privy Council and options for appeal from the High Court also engendered debate. Inglis Clark's original draft for the constitution designed the High Court as the final court of appeal for the Commonwealth.[28] Clark's interest in establishing an Australian tribunal as a final court of appeal stemmed partly from his own negative experience conducting appeals to the Privy Council. That experience had brought home both the technical limitations of the Privy Council as well as the value of an independent tribunal that could allow Australian law to diverge from that of the Empire when justified by local circumstances.[29] The constitutional convention debates reveal resistance to Clark's proposal, particularly in Sydney in 1891. Concerns were raised that removing the option of appeal to the Privy Council, and even the establishment of a High Court at all, would make those then living in the federation "foreign subjects" and affect the federation's relationship with the Empire. Other concerns — relevant for present purposes — turned on a belief that the Privy Council would have greater technical competence as a "court in which the highest legal talent of the empire ought to be available...".[30]

At surface glance, the debate regarding appeal options to the Privy Council — or even whether the Commonwealth required a superior court of its own at all — seems a mere result of birthing pains of a new federation building its own identity. On closer scrutiny, however, the debate does reveal premises and ideas relevant for how the Australian founding approached specialisation in constitutional reasoning and the nature of expertise within the legal profession. Figures who advanced the Privy Council as the best institution able to adjudicate on Australian disputes viewed the legal skills and technique necessary for that task as transferable. Those who argued for an Australian final court of appeal, in contrast, were recognising a relationship between the technical skill and

[25] John Williams, *One Hundred Years of the High Court of Australia* (Menzies Centre for Australia Studies, 2003) 4–5.

[26] Official Report of the National Australasian Convention Debates, Sydney, 2 March — 9 April 1891. See also Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 48–65.

[27] Williams, *One Hundred Years of the High Court of Australia* (n 25) 5–6. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[28] Ibid 6.

[29] See John Williams' discussion in ibid 6–7.

[30] *Official Report of the National Australasian Convention Debates*, Sydney, 6 April 1891, 786 (Munro Dibbs).

expertise required to resolve constitutional disputes, and national identity and control.[31] While proponents of retaining the Privy Council's may have also founded their support in notions of empire, that too was an argument that recognised a relationship between technical skill and competence and broader national or imperial experience. To a certain extent the debate about the final court of appeal was a debate about technical expertise and its connection with national identity. That debate was ultimately resolved in favour of appeals to the Privy Council — except in some cases — to which appeals from the High Court were finally abolished in 1968 and 1975 after Australia developed a more independent identity.[32] Nonetheless, the convention debates reveal limited reflection as to whether constitutional reasoning differs from other forms of judicial activity — particularly when compared with the debates forming the backdrop of the German Federal Constitutional Court that I explore below. The convention debates instead were informed by traditions and endorsed principles regarding the judiciary that were themselves "a product of many choices made over more than a thousand years".[33]

Chapter III of the Australian Constitution establishes the structure of the federal judiciary. Section 71 vests the Commonwealth's judicial power in a "Federal Supreme Court, to be called the High Court of Australia". Sections 73 and 75 vest it with original jurisdiction in constitutional matters, as well as appellate jurisdiction from other courts. The Constitution does not explicitly refer to judicial review — or confer that power on the Court — but the convention debates indicate that the framers clearly intended that the High Court would exercise it.[34] Brian Galligan notes that judicial review was "a dominant theme that constantly recurred through the debates on the judiciary clauses".[35] Both Owen Dixon and Anthony Mason — leading Chief Justices of their time — acknowledged the basis for the Australian practice of judicial review in the reception of ideas from the United States.[36] Drafters such as Alfred Deakin and Inglis Clark had been inspired by the American federal judiciary — a copy of James Bryce's work, the American Commonwealth, was said to lay on the table of the 1897-98 convention proceedings in Sydney and Melbourne.[37] Discussion in the convention proceedings made frequent reference to the experience of the United States Supreme Court.[38]

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[31] Ibid 787 (John Downer).

[32] *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth). See discussion in Walker (n 231) 456; Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 110, 113.

[33] Nicholas Owens, 'The Judicature' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 643, 644.

[34] See, eg, Mason (n 32) 110.

[35] Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (n 26) 56.

[36] See, eg, Justice Owen Dixon, 'Two Constitutions Compared' in in Susan Crennan and William Gummow (eds), *Jesting Pilate: And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 220, 222-3; Mason, 'The Role of a Constitutional Court in a Federation' (n 32) 113.

[37] John Andrew La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 273; Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (n 26) 270.

[38] See, eg, *Official Report of the National Australasian Convention Debates* (n 30), 6 April 1891.

The framers ultimately left details regarding the organisation of the High Court to the legislature.[39] That legislature passed the *Judiciary Act 1903* (Cth), establishing the Court and its procedures and clarifying its jurisdiction. Section 30(a), for instance, provides the High Court with original jurisdiction in "all matters arising under the Constitution or involving its interpretation". Other provisions — as well as s 75 of the Constitution — grant the Court jurisdiction over disputes between the Commonwealth and the states. A significant limit on the Court's jurisdiction is the requirement that it concern a concrete dispute.[40] Abstract review is not available. This also accords with the understanding of constitutional expertise typical of diffuse systems of judicial review that I explored above. Justices have generalist technical competence that allows them to adjudicate in disputes, but only for the purpose of resolving that dispute.

The Constitution provides that the High Court consist of at least three justices — a Chief Justice and two others — which ultimately expanded to the Court's current bench of seven in 1912.[41] Cases are normally heard by a full panel of seven justices when they involve constitutional interpretation, an invitation to depart from a previous decision or whether the legal principles "is one of major public importance".[42] Throughout its expansion, the Court always had an odd number of judges, continuing the tradition in common law courts of deciding via majority.

In certain relevant respects, the Australian system diverged from that of the United States. This exaggerated trends regarding constitutional workload that already feature in the United States Supreme Court. Unlike the United States Supreme Court, the Australian High Court has general appellate jurisdiction and a workload that is predominantly non-constitutional. In contrast, the United States Supreme Court is competent only in federal matters and has "become something of a roving constitutional commission" due to its enforcement of the Bill of Rights.[43] That the High Court is a general appellate court — as well as its practice of hearing constitutional matters before the full court — has implications for the nature of the constitutional claims that it hears. Unlike litigation in a specialist constitutional court such as the German Federal Constitutional Court, constitutional litigation in the High Court is expensive and the Court must actively intervene to control its workload in a way that the Federal Constitutional Court need not. Constitutional matters can be heard in the Court's original jurisdiction, generally after being heard by a single justice of the Court in the first instance. This accounts for the majority of the High

[39] *Official Report of the National Australasian Convention Debates*, Melbourne, 31 January 1898, 295. Cf *Australian Constitution* s 71.

[40] This can be attributed to an interpretation of the Court's jurisdiction in "matters" or "any matter": see, eg, *Constitution* s 75 and s 76.

[41] See also *High Court of Australia Act 1979* (Cth) s 5.

[42] See, eg, High Court of Australia, 'Operation of the High Court', High Court of Australia (Web Page, 2020) <https://www.hcourt.gov.au/about/operation-of-the-high-court>.

[43] Mason, 'The Role of a Constitutional Court in a Federation' (n 34) 115.

Court's constitutional workload.[44] Alternatively, an applicant can apply for special leave to appeal constitutional decisions heard by lower courts. Regardless of the avenue, the High Court hears a relatively small number of constitutional cases each year.

The High Court's largely non-constitutional workload has implications for its methods and approach to constitutional reasoning. Former Chief Justice Anthony Mason suggested that the High Court's commitment to legalist reasoning has largely flowed from that distinctive workload.[45] A significant extent of the High Court's workload involves addressing the complexities of statute and statutory interpretation, which more readily lends itself to legalist assumptions. Statutes "often have a relatively narrow focus and are fairly detailed". Statutes are also applied against the background that they may be amended easily when circumstances change; constitutions, in contrast, are framed so as to "accommodate the changing course of events."[46] While these details in the day-to-day operation of the Court appear distant from questions of constitutional method, they impact on the technical expertise of judges and the lens through which those judges consequently view questions of constitutional method and reasoning. In judicial review of legislation the weight and balance of judicial discussion is normally devoted to interpreting the statute being challenged.[47] This grounds constitutional argument more firmly within familiar terrain for High Court justices.

2 *The German Federal Constitutional Court*

In contrast to the Australian Constitution, the Basic Law was drafted in the direct shadow of Weimar constitutional theory, its treatment of judicial review and its treatment of specialist constitutional courts. It was drafted with an eye to avoiding the perceived failures of the Weimar Republic.[48] A prominent debate in the Weimar Republic had been the appropriate institution to decide on constitutional disputes. Schmitt infamously advocated that the President hold that power[49] Kelsen and his adherents promoted a specialised constitutional court.[50] A related dispute concerned problems entailed within judicial review. Schmitt for instance had argued that judicial review

[44] Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (No 92, 25 October 2001) 115.

[45] Mason, 'The Role of a Constitutional Court in a Federation' (n 34) 5.

[46] Ibid.

[47] See, eg, the implied freedom cases *McCloy v New South Wales* (2015) 257 CLR 178 and *Brown v Tasmania* (2017) 261 CLR 328.

[48] For an analysis of that historical context and the various political interests involved see Michael Fronz, 'Das Bundesverfassungsgericht im politischen System der BRD. Eine Analyse der Beratungen im Parlamentarischen Rat' (1971) 2 *Sozialwissenschaftliches Jahrbuch für Politik* 629.

[49] Carl Schmitt, 'Der Hüter der Verfassung' (1929) 55(2) *Archiv des öffentlichen Rechts* 161.

[50] Hans Kelsen, 'Wer Soll der Hüter der Verfassung Sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie' in Robert Chr van Ooyen (ed), *Wer Soll der Hüter der Verfassung Sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie Herausgegeben, mit einer Einleitung und einem Nachtrag zur Kelsen-Rezeption Versehen von Robert Chr. van Ooyen* (Mohr Siebeck, 2008) 58.

of legislation would recruit the judiciary to a legislative function, entangling judges in political choices to which they were ill suited.[51]

The Parliamentary Council that drafted the German Basic Law was comprised of seventy delegates convened at the behest of the allied occupiers.[52] It devoted comparatively little attention to either the Constitutional Court or to the rights catalogue that became so fundamental to the expansion of the Court's power.[53] The Parliamentary Council deliberated whether a new court adjudicating on the Basic Law should be a Supreme Court like that of the United States or a specialised institution alongside other specialised courts.[54] With parallels to similar concerns raised during the design of the Austrian Constitutional Court thirty years prior, the professional establishment in the German Republic opposed the creation of a generalist superior court that would also exercise constitutional review. As Christoph Schönberger notes, the traditional legal establishment believed that ordinary law was nonpolitical while constitutional law was inherently so. That establishment feared that a superior court required to apply both political and non-political law would result in the judiciary as a whole being politicised, compromising its authority.[55] Other reasons for establishing a new, dedicated constitutional court flowed from the involvement of the judiciary in the National Socialist regime.[56] Installing a new court with specialist appointment procedures provided a means of quarantining constitutional questions so crucial to West Germany's reconstruction from association with that historical legacy. Additionally, several constitutions established in 1948 and 1949 in Länder in the French and American occupied zones had installed specialist constitutional courts.[57] This provided a backdrop for the development of a specialised constitutional court at the Federal level.

The Court's division into two senates is a key mechanism through which constitutional specialisation is further differentiated. This design choice partially flowed from peculiarities in existing German legal professional culture

[51] Schmitt (n 49); Matthias Jestaedt, 'Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, 2011) 77, 96–7.

[52] Justin Collings, 'Introduction' in Matthias Jestaedt et al (eds), *The German Federal Constitutional Court: The Court without Limits*, tr Justin Collings (Oxford University Press, 2020) xiii, xvi.

[53] Karlheinz Niclauß, 'Der Parlamentarische Rat und das Bundesverfassungsgericht' in Robert Chr van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (VS Verlag für Sozialwissenschaften) 117, 117; Schönberger (n 51) 12; Hailbronner, *Traditions and Transformations* (n 14) 2. Karlheinz Niclauß notes a lack of academic analysis of the Parliamentary Council discussion of judicial review, and explains that records of the main committee's debates are not available: at 118.

[54] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 51) 13. See also Jestaedt (n 51) 81.

[55] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 51) 13–14.

[56] Ibid 15.

[57] Jestaedt (n 51) 98.

and was settled through debates in the early Republic's Parliament.[58] The Federal Constitutional Court Act,[59] adopted in 1951, established the system to organise and select the Court's judges. This included the design of the Court's twin Senate structure. While the Social Democrats (SPD) proposed that the Court be composed of ten, high profile judges that would hear each case as plenum, the Christian Democrat (CDU) government proposed adapting the German tradition of anonymous, interchangeable judges deciding each case in more discrete panels. This latter model prevailed, largely because of its compatibility with an existing German understanding of legal professional specialisation.[60] It was also compatible with the German preference for consensus- rather than majority-based means of reaching decisions[61] — a preference that is replicated throughout the design of government in the new Republic.[62] Just as judicial appointment procedures to the Court require political parties in the Bundestag and Bundesrat — themselves proportionately elected — to agree, so too do decisions within the Senate require endorsement by, and consensus of, the whole. This is significant for processes of constitutional reasoning and the way that the Court unites various perspectives to speak in a single voice of institutional authority, which I explore further in the final section of this chapter.

In its current form, each Senate is composed of eight judges. The First Senate determines individual rights complaints, comprising more than 95% of the Court's workload,[63] while a Second Senate decides institutional questions such as disputes between institutions, electoral law and proceedings against political parties, and the relationship between domestic and international law. Given the high volume of rights cases when compared to institutional questions, the Second Senate now also considers some fundamental rights questions.[64] The dual Senate structure — coupled with specialist procedures for appointment to the Court — has evolved over time in a way that channels and structures legal professional input. For instance, the twin Senate has facilitated a practice whereby political parties, through the proportionate procedure for appointment, cooperate to appoint members of particular theoretical orientations to particular tribunals.[65] The twin Senate structure also interacts with the

[58] Collings, 'Introduction' (n 52) xv.

[59] Bundesverfassungsgerichtsgesetz [German Federal Constitutional Court Act].

[60] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 51) 18.

[61] Ibid 18–19.

[62] See Jörn Ipsen's description of the Basic Law's construction of a "state of the middle", seeking to create balance and moderation throughout all arms of government: Jörn Ipsen, *Der Staat der Mitte: Verfassungsgeschichte der Bundesrepublik Deutschland* (C.H. Beck, 2009).

[63] Between 7 September 1951 and 31 December 2019, 96% of the Court's workload concerned constitutional rights complaints: Bundesverfassungsgericht, *Jahresstatistik 2019* (2020).

[64] Michaela Hailbronner and Stefan Martini, 'Constitutional Reasoning in the German Federal Constitutional Court' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 356, 365.

[65] See, eg, Schönberger, 'Anmerkungen zu Kalrsruhe' (n 14) 19. I discuss this process further below.

German Court's approach to consensus decision making. In cases heard as a full plenum of both senates, it is possible for the FCC to divide equally — in which case a constitutional violation cannot be found.[66]

Two further features of the Court are crucial to understand the power and role that the Court has assumed throughout its history and how that ascent was propelled by a particular professional cultural conception of authority and expertise. The first of these is the Court's status as a constitutional organ, equal to that of the Bundestag or the Federal Government. The second feature is the Court's deployment of its fundamental rights jurisprudence, which I explore more fully in chapter six. Neither of these features was inherent to the design of the Court, preordained, or contemplated by the framers. As Mathias Jestaedt has noted, the Court was a "delayed constitutional organ" [67] — the path it has taken has been particularly undetermined given its status as one of the first of the post-war constitutional courts. At the same time, it is difficult to see how either of these features could have evolved as they did without the Court's organisation as an independent, specialist court. That independence and specialisation allowed the Court to selectively engage with legal professional culture and legal and political traditions during the new Republic's transitional period. In its early years, the Court was able to engage with a legal culture and tradition that placed extensive faith in authority and technical expertise. [68] It benefitted from a tradition where the "the rule of law" was "prized over democracy"[69] and where political parties and parliamentarism were held in lower regard.[70] The Constitutional Court could step into a vacuum of institutional authority. It could also secure the respect traditionally afforded to higher courts in the German system,[71] even where that authority had not yet extended to resolving constitutional or political disputes prior to the Basic Law. The Court then spearheaded the new Republic's liberalisation project — a "midwife" for the Republic's transition to democracy[72] — interweaving the new and the old to co-create a liberal, pluralist democracy built upon the authority of a "judicial state".[73] That "liberalising effect" extended into West German public law scholarship[74], which further accelerated and cemented particular trends taking place within legal professional culture.

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[66] Ibid.

[67] Matthias Jestaedt (n 51) 79; see also Niclauß (n 53).

[68] See Christoph Schönberger's argument in Schönberger, 'Anmerkungen zu Kalrsruhe' (n 14) 27–48. See also, Hailbronner, *Traditions and Transformations* (n 14) 69–86; Brun-Otto Bryde, 'Die Rolle Der Verfassungsgerichtsbarkeit in Umbruchsituationen' in Joachim Jens Hesse, Gunmark Folke Schuppert and Katharina Harms (eds), *Verfassungsrecht und Verfassungspolitik in Umbruchsituationen* (Nomos, 1999) 197.

[69] Collings (n 52) xxxv.

[70] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 14) 44.

[71] Ibid 27.

[72] Ibid.

[73] See, eg, Mathias Jestaedt's description: Jestaedt (n 51) 77. See also, Frieder Günther, 'Wer Beeinflusst Hier Wen? Die westdeutsche Staatsrechtslehre und das Bundesverfassungsgericht während der 1950er und 1960er Jahre' in RC van Ooyen and Christoph Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (VS Verlag für Sozialwissenschaften, 2006) 129.

[74] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 14) 29–30. I have borrowed phrasing here from Oxford University Press' official translation: Schönberger, 'Karlsruhe: Notes on a Court' (n 14) 12.

That the Constitutional Court wrested the status of a constitutional organ for itself reflects how shifting trends and patterns of intellectual engagement within a legal professional culture can be entrenched by choices of a court and its actors. Gerhard Leibholz, a public law professor and initial judge, famously authored a report on the status of the Constitutional Court that declared itself a constitutional organ, a guardian of the constitution and an "equal alongside the Bundestag, Federal Council and Federal Government".[75] This declaration — the Constitutional Court's "magna carta"[76] — responded to the Court's supply and personnel shortages, which were then dependent upon governmental delays.[77] But Leibholz was also influenced by concepts of institutional independence to which he had been exposed during his exile in Great Britain in the National Socialist era.[78] The status report was endorsed by the Court and submitted as a Memorandum to the government in 1952.[79] As a constitutional organ, the Court acquired autonomy with regard to its organisation, its procedural rules and its budget, and independence from other constitutional organs.[80] Unlike other constitutional organs, this autonomy was not guaranteed by the Basic Law or other legislation.[81] Leibholz's status report was controversial and received critically by some schools within public law scholarship, and even within the Court.[82] However, with the institutional backing and univocity that a centralised court allowed, the Memorandum entrenched one particular school of thought that would then become the mainstream understanding of the Court's role. Significantly, it also did this through an act of scholarship — a scholarly treatise — speaking to the influence of scholarship and theory within the German legal professional community. This contrasts with the history of many other courts, which have tended to assert power through judgments.[83]

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[75] Gerhard Leibholz, 'Der Status des Bundesverfassungsgerichts: Eine Materialsammlung mit einer Einleitung' (1957) 6 *Jahrbuch des öffentlichen Rechts der Gegenwart* 109. I have borrowed the English translation of Schönberger, 'Karlsruhe: Notes on a Court' (n 14) 9. Peter Unruh, 'Erinnerung an Gerhard Leibholz (1901-1982) — Staatsrechtler zwischen den Zeiten' (2001) 126(1) *Archiv des öffentlichen Rechts* 60, 89. Justification is also found in the reference in the Bundesverfassungsgerichtsgesetz [German Federal Constitutional Court Act] to "all other constitutional organs" at §1.

[76] Unruh (n 75) 90.

[77] For a more detailed discussion see Konstantin Chatziathanasiou, 'Die Status-Denkschrift des Bundesverfassungsgerichts als informaler Beitrag zur Entstehung der Verfassungsordnung' (2020) 11 *Rechtswissenschaft* 145. In particular the Court was dependent at a time when the then justice Minister Thomas Dehler had expressed disapproval of the first judicial appointments to the Federal Constitutional Court. See Felix Lange, 'Der Dehler-Faktor: Die wiederwillige Akzeptanz des Bundesverfassungsgerichts durch die Staatsrechtslehre' (2017) 56(1) *Der Staat* 77.

[78] Schönberger, 'Anmerkungen Zu Kalrsruhe' (n 14) 24.

[79] Ibid.

[80] Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidungen. Ein Studienbuch* (C.H. Beck, 11th ed, 2018) 19–25.

[81] Ibid 20.

[82] Schönberger, 'Anmerkungen Zu Kalrsruhe' (n 14) 25. In particular Leibholz' description of constitutional law as political law — though not identical with politics — contradicted ideas held by those in the legal professional community concerned with judicial restraint, including adherents to Carl Schmitt's ideas: Chatziathanasiou (n 77).

[83] Christoph Möllers, 'Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag, 2011) 281,

The German Constitutional Court's fundamental rights jurisprudence was also a key means through which the Court assumed such a strong role. While I explore this in more detail in chapter six, it is relevant to briefly comment on the emergence of that body of jurisprudence partly through the Court's own initiative, enabled through a centralised structure and the organisation of its workload. At its inception the Basic Law provided the Constitutional Court with express jurisdiction in institutional disputes, such as those between constitutional organs[84] and between the Länder and the Federation.[85] It also provided the Constitutional Court with jurisdiction to review legislation where incidental to a dispute on foot in another foot — concrete review[86] — as well as the power of abstract review of legislation where an application is brought by the Bundesrat (federal upper house) or a government or parliament of the Länder.[87] The constitutional complaint procedure that allows individuals to challenge legislation or other acts of the state that violate fundamental rights did not feature in the original version of the Basic Law, but was later introduced through compromise in the Bundestag in 1951.[88] This was entrenched through a constitutional amendment in 1969.[89] That procedure now accounts for more than 95% of the Court's workload.[90] Some of the Court's earliest decisions explain that expansion and the volume of cases that the Court now considers. The Lüth decision provided the Constitutional Court with jurisdiction to assess the compatibility of decisions of other courts with fundamental rights provisions. This now provides an overwhelming majority of the Court's constitutional complaint workload. In 2019, 2,600 constitutional complaints were lodged against decisions of other courts; only 64 were lodged against legislation or omissions on the part of the legislature.[91] The constitutional complaint procedure is often credited for the popular success of the Federal Constitutional Court,[92]

357. Illustrations of this include *Marbury v Madison*, 5 US 137(1803) and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[84] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 93(1) nr 1. See also *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §13 Nr 5, §63.

[85] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 93(1) nr 3. See also *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §13 nr 7, §68.

[86] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 100(1). See also *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §13 nr 11, §80.

[87] Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany] art 93(1) nr 2a. See also *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §13 nr 6a, §76.

[88] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 93(1) nr 4a, also *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §13 nr 8a, §90. See, eg, discussion in Schönberger, 'Anmerkungen zu Kalrsruhe' (n 14).

[89] See discussion by Hailbronner and Martini (n 64) 362–3.

[90] See, eg, Bundesverfassungsgericht (n 63).

[91] Ibid 40. See also Mathias Jestaedt's argument in Jestaedt (n 51).

[92] See, eg, arguments of Schönberger, 'Anmerkungen zu Kalrsruhe' (n 14); Jestaedt (n 51); Christoph Möllers, 'Scope and Legitimacy of Judicial Review in German Constitutional Law — the Court versus the Political Process' in Hermann Pünder and Christian Waldhoff (eds), *Debates in German Public Law* (Hart Publishing, 2014) 3; Hailbronner, *Traditions and Transformations* (n 14); Möllers, 'Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts' (n 83).

which routinely enjoys a greater degree of public trust and acceptance than any other state institution.[93] Through the constitutional complaint procedure, the Court "comes into direct contact with the concerns of citizens".[94] The volume of claims that the German Federal Constitutional Court hears and the speed with which they are resolved ensures that the cost of constitutional litigation remains affordable for members of the public. In this way the Court's transformation into a specialist rights tribunal that predominantly considers rights questions was to a large extent on its own initiative. It has also been responsible for the kind of claims that it hears and how it is perceived by the public. The First Senate became a laboratory for rights specialists, primarily in dialogue with rights specialists within the academy and other professional circles. And its early decisions — particularly Lüth — expanded the terrain over which that technical competence could extend.

III JUDICIAL APPOINTMENT

A *The Australian High Court*

Judicial appointment to the Australian High Court both reflects, and reproduces, a view that constitutional reasoning does not require specialist perspectives or knowledge other than that attainable through generalist practice. Appointments are made from professionals who have acquired experience at the Bar as generalist lawyers and acquired esteem amongst peers at the Bar. In practice this means High Court justices tend to emerge from a background in predominantly commercial practice. Solicitor-Generals are sometimes also appointed. Appointments are also driven through the executive, and through a less formal process than the German system I explore below.

Section 72 of the Constitution provides that members of the High Court be appointed by the Governor General in Council. In practice, the Governor General appoints members on recommendation of the Federal Cabinet. The Cabinet in turn founds that recommendation on the advice of the Commonwealth Attorney-General, who is required to consult with the state Attorney-Generals.[95] The remainder of the process has evolved through convention and varies between Attorney-Generals. The Commonwealth Attorney-General may advise the state and territory Attorney-Generals of a vacancy and invite them to nominate candidates worthy of consideration. A list is then compiled that is circulated to all state and territory Attorney-Generals, together with the number of nominations received and the names of any additional candidates who the Commonwealth may wish to include.[96] The Attorney General may also engage in discussions with other professional associations such as bar associations

[93] Collings (n 52) xxx.

[94] Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' in Matthias Jestaedt et al (eds), *The German Federal Constitutional Court: The Court Without Limits*, tr Justin Collings (Oxford University Press, 2020) 131, 138.

[95] *High Court of Australia Act 1979* (Cth) s 6.

[96] See account provided by Simon Evans, 'Appointment of Justices' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (online at 1 March 2021).

and law societies. These discussions all remain private.[97] After that consultation process the Attorney-General advises Cabinet of her or his recommendation, which then advises the Governor General in Council who to appoint. Cabinet may also propose someone other than the Attorney General's recommendation.[98] Appointees must be drawn from amongst either state Supreme Court or Federal Court judges or members of the professional community who have been enrolled for 5 or more years.[99] In modern practice, appointees are largely drawn from the former group. Selection also appears to take into account the 'spread' of justices on the High Court between states. Once appointed, justices serve until they reach the mandatory retirement age of seventy.[100] During the early years of the High Court, members were appointed who sat in Parliament. Of the initial thirty appointments to the High Court — between 1903 and 1975 — seventeen had some degree of party-political activity and thirteen had sat in a Parliament. This practice was discontinued over time. Suggestions for appointments of academics have also been roundly rejected. When Lionel Murphy, during his time as Commonwealth Attorney-General, suggested appointing academic Colin Howard to the High Court, then Prime Minister Gough Whitlam responded that Australians were not ready for an academic to be appointed to the Court.[101]

Despite being driven by the executive of the day, appointments to the High Court — particularly in recent years — seem to have avoided the overt taint of partisanship seen in the United States.[102] This may be explained by the greater degree of cohesion in professional cultural institutions. Literature has noted that it is often difficult to associate a particular justice's judgment with the political party that appointed them.[103] Some Labor appointed justices — Justices Murphy, Kirby and Keane for instance — have tended toward forms of reasoning more willing to depart from legalist justifications. Justice Heydon, a legalist devotee,[104] was appointed by a conservative government after a speech critiquing the activist turn of the High Court.[105] At the time the Deputy Prime Minister

[97] See, eg, Joe McIntyre, 'Congratulations to Our New Judges, but Let's Do It Differently next Time', *Inside Story* (online, 30 October 2020) <https://insidestory.org.au/congratulations-to-our-new-judges-but-lets-do-it-differently-next-time/>

[98] Evans (n 96).

[99] *High Court of Australia Act 1979* (Cth) s 7.

[100] *Australian Constitution* s 72.

[101] Troy Simpson, 'Appointments That Might Have Been' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court* (online at 1 March 2021).

[102] For a history of the 'judicial activism' debate in Australia and its reception from its origins in the United States see Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

[103] See, eg, Walker (n 1) 461.

[104] See, eg, Justice JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110.

[105] Walker (n 1) 461. The published version of Dyson Heydon's speech was redacted when it became known that he had secured an appointment to the High Court. An unredacted version emerged elsewhere. See, eg, Justinian, 'The Dicing of Heydon's Job Application', *Justinian* (Blog Post, 13 February 2004) <https://www.justinian.com.au/archive/the-dicing-of-heydons-job-application.html>

had publicly expressed an Intention to appoint a 'capital-C conservative' to the Court.[106] Kristen Walker[107], as well as Andrew Lynch and George Williams,[108] have noted that such appointees tend to have a greater rate of dissent. Nonetheless, the profession and the broader public largely perceive the High Court as a political-party neutral institution.[109] Academic critique has however suggested a tendency for the Commonwealth to appoint judges who appear likely to side with the Commonwealth in federal disputes.[110]

The method of appointing justices to the High Court produces a narrow pool of candidates. If members are appointed largely from the ranks of Federal and Supreme Court justices, then the tendencies of appointment processes in those 'feeder' courts are in turn entrenched. Appointments to the Federal and State Supreme courts are drawn primarily from successful practitioners at the Bar. Literature has often explained a lack of diversity amongst justices in superior courts through the constraints — practical, economic and cultural — that persist at the Bar and are magnified as practitioners' careers progress.[111] The effect of informal networks is also felt within the process of appointing justices to the High Court itself,[112] with calls for the process to involve more transparency.[113] While some progress has been made toward appointing more women to the bench,[114] less attention has been focussed on other diversity issues such as its racial, cultural and socioeconomic homogeneity.[115]

The process of appointing justices to the High Court, and the narrow pool from which it draws, has implications for how the Court understands constitutional expertise and specialisation. It also impacts how it interacts with Australian legal professional culture more generally. The process for appointing High Court justices reinforces

[106] Walker (n 1) 461.

[107] Walker (n 1).

[108] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2011 Statistics' (2012) 35 *University of New South Wales Law Journal* 846.

[109] See, eg, Walker (n 1) 461. See also, from the Australian Judicial Officers Association: "In Australia to date, with very few exceptions, the political party in power when a judge was appointed to the High Court has been irrelevant." Justice Judith Kelly, 'No Place for Politics in Anointing Judges to the High Court', *The Australian* (online, 24 February 2020) <https://www.ajoa.asn.au/no-place-on-high-court-bench-for-politics/>.

[110] Joe McIntyre, 'Two High Court Judges Will Be Named Today — Unlike Amy Coney Barrett, We Know Nothing about Them', *The Conversation* (online, 20 October 2020) <https://theconversation.com/two-high-court-of-australia-judges-will-be-named-soon-unlike-amy-coney-barrett-we-know-nothing-about-them-147853>; Anne Twomey, 'Inside the Mason Court Revolution: The High Court of Australian Transformed by Jason L Pierce' (2007) 31(3) *Melbourne University Law Review* 1174. McIntyre (n 97).

[111] See, eg, Pip Nicholson, 'Appointing High Court Judges: Need for Reform?' (1996) 68(3) *The Australian Quarterly* 68; Walker (n 231); Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and Bench of the High Court of Australia' (2003) 27(3) *Melbourne University Law Review* 819.

[112] See, eg, George Williams, 'High Court Appointments: The Need for Reform' (2008) 30(1) *Sydney Law Review* 161; Davis and Williams (n 111); Evans (n 96).

[113] See, eg, Nicholson (n 111); Davis and Williams (n 111).

[114] Davis and Williams (n 111); Walker (n 1).

[115] Walker (n 1) 461.

the tendencies explored in my earlier discussion of diffuse judicial review. Justices are not appointed as constitutional specialists, and exclusively so. Their skills in constitutional reasoning will have been considered alongside skills demonstrated in other areas of law, all of which will have been honed by practical experience at the Bar. This contrasts with the appointment of dedicated constitutional specialists, often academics, alongside justices of other Federal courts to the German Federal Constitutional Court.

Appointments to the High Court are governed by formal mechanisms, as well as informal mechanisms that rely upon networks and professional reputation. Those informal mechanisms for career progression have a tendency to affirm the status quo and legal establishment,[116] in turn reinforcing beliefs and narratives that maintain the stability of practices of reasoning. The primacy of the Bar rather than the academy in driving appointments to the High Court also entrenches certain professional cultural institutions that I explored in the previous chapter, including judicial approaches to engagement with academic material,[117] the weight the Court attaches to the ideas of particular institutions, and how justices approach comparative precedent and principles.

B *The German Federal Constitutional Court*

Appointment to the German Federal Constitutional Court reflects a view of constitutional reasoning as a specialised process that must be carefully controlled by integrating perspectives across professional cultural institutions. The German Federal Constitutional Court consists of two senates, each composed of eight judges. Each serves for a term of twelve years[118] or until they are sixty-eight,[119] whichever is sooner. Three judges in each Senate must be elected from amongst Federal judges serving on other Federal courts.[120] The remainder may be comprised of other legal professionals provided that they are over forty years of age, are eligible to be elected to the Bundestag[121] and have completed both state examinations and preparatory training to qualify as full lawyers

[116] See, eg, comments of Nicholson (n 111) 76-9. "The current system relies heavily on existing networks in the legal establishment and within the governments of the states to bring candidates to the attention of the Attorney-General. The informality of networks is a major concern. There is a risk that networks can be conservative and closed to some members of the profession who are relative late-comers to legal circles."

[117] See, eg, Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 1(44) *Melbourne University Law Review* 1.

[118] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] § 4(1).

[119] Ibid § 4(3).

[120] Ibid § 2(3). *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 94(1) sentence one also provides that at least two justice of each senate fulfil this requirement.

[121] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §3(1). Justices must also provide written consent to their appointment.

(Volljuristen).[122] In modern practice other justices are mainly appointed from amongst public law professors,[123] with a historical practice of appointing former members of parliament gradually discontinued. Justices must not hold any other occupation at the same time as serving on the Federal Constitutional Court, with the exception of employment at a university.[124] In the interests of 'federal parity', half of the justices are elected by the Bundestag with the other half by the upper house Bundesrat, which is the house of the states.[125] Legislation requires a two-thirds majority of all votes cast for the election of a justice in either house[126] and at least an absolute majority among members of the Bundestag.[127] In practice this means that justices must be elected through negotiation and compromise between various political fractions in Parliament, itself elected proportionally. This provides 'parity between coalition and opposition'.[128] A list of candidates is prepared by the Electoral Committee, which itself is proportionally composed of twelve members of the Bundestag.[129] Like the Australian process, however, aspects of the appointment process remain opaque from the public. Historically, appointment has tended to reinforce the preferences of what were the two major parties.[130] The Electoral Committee's discussions must also remain confidential.[131] In practice this means that justices meet with representatives of political parties behind closed doors.[132]

On surveying the above, two key differences become apparent between the appointment process to the German Federal Constitutional Court and Australian High Court. Members of the Federal Constitutional Court are drawn from more than one subset of the legal professional community. Contrasting this with the account of the Australian High Court above, the FCC draws expertise from at least two different career 'streams'. One includes justices of German Federal courts, who can provide experience and knowledge of other areas of law, relevant where decisions

[122] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] § 3(2) which provides that justices must be qualified to hold judicial office under the *Deutsches Richtergesetz* [German Judiciary Act], or hold a Diplomjurist degree. To qualify to hold judicial office under the German Judiciary Act a justice must complete both state examinations as well as a period of preparatory training between both state exams: *Deutsches Richtergesetz* [German Judiciary Act] §5. These requirements were explained in the previous chapter.

[123] See eg, Jestaedt (n 51) 108; Hailbronner and Martini (n 64) 365.

[124] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] § 3(4), §101(1).

[125] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 94(1) sentence 2; ibid §5(1); Schlaich and Korioth (n 80) 30–2.

[126] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §7.

[127] Ibid §6(1).

[128] Schlaich and Korioth (n 80) 32.

[129] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §6.

[130] Ernst-Wolfgang Böckenförde, *Verfassungsfragen der Richterwahl. Dargestellt anhand der Gesetzentwürfe zur Einführung ser Richterwahl in Nordrhein-Westfalen* (Duncker & Humblot, 1998); Schlaich and Korioth (n 80) 32.

[131] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §6(4).

[132] See eg, Christine Landfried, 'Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität' in RC van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (VS Verlag für Sozialwissenschaften, 2006) 229. See also, Michaela Hailbronner, *Traditions and Transformations* (n 14) 11.

of other Federal courts are brought to the Constitutional Court for review. The other stream includes specialist public law academics who have engaged exclusively with constitutional theory for the large part of their career, who can bring methodological and theoretical depth and specialist perspective to the questions before them. This contrasts with the Australian approach to appointment, which relies upon a single pipeline to affirm expertise. The profession finds its technical peak through career progression at the Bar and the decision of the executive of the day. The German process instead emphasises cooperation and collaboration between different perspectives — professionally and politically.

A second difference concerns the involvement of Parliament in the appointment process as a means of addressing the political accent of Constitutional Court decisions. This process was anticipated by Kelsen. Kelsen's proposal for appointing justices to a constitutional court sought to combine two principles. On the one hand, constitutional adjudication is a technical — specialist — exercise. Judges should therefore be drawn from a pool of constitutional specialists. Kelsen contemplated the involvement of universities and the legal academy. For instance, Kelsen suggested that law faculties, or a commission comprised of all the law faculties in a jurisdiction, could be responsible for appointing at least a part of a constitutional court.[133] On the other hand, constitutional adjudication by its nature involves value judgments. Appointing judges purely on the basis of technical expertise is therefore insufficient to control the influence of value judgments potentially aligning with a political orientation. Appointment processes to constitutional courts therefore often include sophisticated mechanisms that require support of both the parliament and the executive of the day. Kelsen considered that, while it would be desirable to remove political party influences from appointment processes, it would be preferable to provide for a structured and proportionate process for political parties to influence the composition of a constitutional court than to allow that influence to operate by unofficial, uncontrolled default.[134] He also contemplated mechanisms that would allocate appointment of justices according to the proportionate strength of a political party in that parliament.[135]

Much of Kelsen's reasoning ultimately found traction in the early days of the Republic. During this period framers were confronted with not only the questions that had remained unresolved within the legal community during the Weimar period, but also the unique questions that the Republic's reconstruction posed. The framers grappled with the special nature of constitutional reasoning and how this would be best addressed in the selection of justices. For instance, the framers considered whether electing laypersons to the Federal Constitutional Court would help make a break from the past and free the Court from the political taint of the judicial establishment's role in the Weimar Republic and under National Socialism. Constitutions emerging at the level of the Länder at the time provided for 'career judges' to comprise a minority on Länder constitutional courts; the remaining places would be held by laypersons. Those laypersons would also be elected.[136] These questions were ultimately settled by the

[133] Kelsen (n 59) 27.

[134] Ibid.

[135] Ibid 26–7.

[136] Niclauß (n 53) 119.

new Republic's Parliament. The Court became a 'lawyers' court', but only a minority of its justices were required to have served on other federal courts.

The proportional process for electing justices to the Federal Constitutional Court also addressed Kelsen's distrust of majoritarianism. As the Court's role is to protect the rights of minorities against a popularly elected legislature, members of that Court should require the endorsement of more than just the majority-elected executive of the day. To this end, two-thirds majorities are the "classic instruments" for the protection of minorities.[137] As noted above, however, the appointment process led to a historical practice that reinforced the influence of two major parties. This influence was felt upon the composition of the Court. In the early years of the Republic in particular the two major parties — the Social Democrats (SPD) and Christian Democrats (CDU) — would apportion justices across the two Senates in a way that spoke to the perceived political significance of the two areas of constitutional specialisation. The Christian Democrats underestimated the significance fundamental rights adjudication would assume and allowed the Social Democrats to propose appointments to the First Senate. In return, the Christian Democrats controlled appointments to the Second Senate, which dealt with what were perceived by the conservatives as 'true' constitutional questions — the organisation of the state and disputes between state institutions.[138] For some time, this earned the Court a description in terms of 'red' (SPD) and 'black' (CDU) senates.[139] The dominance of those two parties in determining judicial appointments has waned in recent years to include influence from other parties.[140] As in Australia, however, the Court is considered to be marked by a high degree of judicial integrity and professionalism.[141]

IV DECISION MAKING AND DISSENT

A *Deliberative Processes*

How a court reaches decisions and presents reasoning for that decision similarly reflects, and reinforces, practices of constitutional reasoning and argument within a legal professional culture. Deliberative processes interact with professional cultural beliefs and narratives about constitutional method and the extent to which they incorporate value judgments and judicial choice. This in turn shapes the experience of constraint of choice. The German Federal Constitutional Court reaches decisions unanimously, with a limited practice of dissent. This supports a belief that the authority of a legal principle attaches more to the institution or court that declares it rather than the method through which the result is achieved. Beliefs and narratives necessary for the stability of constitutional reasoning therefore connect more with institutions than particular methods. The Australian High Court adopts the

[137] Schlaich and Korioth (n 80) 32.

[138] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 14) 19–22.

[139] Ibid 21.

[140] On the rise of the Greens in German politics and their influence on constitutional development, see Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951 - 2001* (Oxford University Press, 2015) 207–217.

[141] See, eg, Jestaedt (n 51) 108; Dieter Grimm, 'Was ist Politisch an der Verfassungsgerichtsbarkeit?' (2019) 66(1) *Zeitschrift für Politik* 86.

more general common law practise of dissenting judgments. This means its reasoning is more dependent on beliefs and narratives independent of institutions to ensure consistency and professional cultural stability.

As explained above, the Australia High Court hears most constitutional matters as a full court of seven. This practice is sustainable given the lower volume of matters that the Court hears compared to the German Federal Constitutional Court. Constitutional matters are also filtered through other mechanisms. In cases where special leave is required — that is, where the matter comes as an appeal from another court — the Court may determine the matter on the papers without an oral hearing (or with an oral hearing on the question of special leave, usually only heard by three justices). Constitutional matters commenced in the Court's original jurisdiction are also generally listed before a single justice of the Court in the first instance.[142] Parties provide comprehensive written submissions before the matter proceeds to an oral hearing before the Full Court. Internal deliberation does not follow the same formal structure or fixed practice seen in the German Federal Constitutional Court. Justices will usually prepare for the oral hearing by familiarising themselves with relevant legislation and precedents. In the current Court, the justices meet informally before and after the hearing to discuss preliminary views. The Chief Justice steers that conversation. If a clear majority view emerges from that discussion, the Chief Justice may assign one of the justices the task of writing an initial draft of the judgment on behalf of the others. Often a justice with a particular interest in the matter or areas of law will be allocated that task.[143] The purpose of writing a draft is to gain agreement and avoid "unnecessary" judgments.[144] It is circulated and where other justices agree, they may join in the judgment. Alternatively, they may choose to write their own judgment in response, agreeing in the outcome but for different reasons. This process is burdensome, but possible because of the relatively limited number of cases that the High Court hears each year.

The process of conferring and sharing views within the High Court means that justices may tend to produce individual judgments. It also follows the logic of majoritarianism that I examined in relation to the diffuse system above. Judicial disagreement is presented openly; the outcome of the matter is determined by the majority position, even where justices in that majority may disagree on the reasons for that outcome. A strong practice of dissent has been evident since the Court's early days.[145] At times the Chief Justice has moved to encourage more joint

[142] See High Court of Australia, *High Court of Australia Annual Report 2019-20* (High Court of Australia, 30 October 2020).

[143] See explanations provided by current High Court Chief Justice Susan Kiefel, 'Judicial Methods in the 21st Century' (Lecture, Banco Court, Supreme Court of Victoria, 16 March 2017) and former High Court Justice Michael Kirby, 'What Is It Really Like to Be a Justice of the High Court of Australia? A Conversation between Law Students and Justice Kirby' (1997) 19(4) *Sydney Law Review* 514.

[144] See Kiefel (n 143)

[145] See, eg, Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102.

judgments, such as under the Knox[146] and Kiefel courts.[147] This has been motivated partly by a desire for institutional clarity. Australian High Court justices have cited the difficulty of negotiating and arriving at common reasons as the reason for fewer joint judgments.[148]

The deliberative process followed in the German Federal Constitutional Court contrasts starkly with its Australian counterpart. The Federal Constitutional Court speaks unanimously, with dissenting opinions only permitted since 1970[149] and only emerging in a minority of cases. Of the 2295 matters that proceeded to a decision by a full senate between 1971 and 2019, less than eight percent of those matters produced a dissenting opinion.[150] I explored earlier the historical preference for consensus-oriented processes of judicial decision making in German legal professional culture. The process of judicial deliberation in the FCC responds to that culture. Justices meet with the conscious aim of persuading one another until a consensus position is reached.

The Court must hear all fundamental rights complaints provided that they meet formal requirements. However, all proceedings in the FCC are heard in their preliminary stages before a chamber of three justices that determines whether the complaint should be admitted to the full senate for a decision. Each Senate is divided into three 'chambers' of three justices.[151] There is no oral hearing at the chamber stage.[152] If the chamber is satisfied that the FCC has already determined the area of law that would provide the basis for the complaint before the chamber, the chamber can grant the constitutional complaint if it is well founded.[153] Otherwise it must proceed to decision before the full senate.[154]

[146] Ibid 104.

[147] Michael Pelly, 'Chief Justice Susan Kiefel Says High Court Has Changed the Way It Works', *Australian Financial Review* (online, 16 August 2018) <https://www.afr.com/companies/professional-services/chief-justice-susan-kiefel-says-high-court-has-changed-the-way-it-works-20180815-h1412o>.

[148] For instance, former Chief Justice Anthony Mason noted that "Cole v Whitfield on s 92 was the result of an intensive collective effort by the court to produce a unanimous judgment. But that effort was expensive in terms of time and effort. It was not an effort that could be readily repeated": Mason, 'Reflections on the High Court: Its Judges and Judgments' (n 145) 166.

[149] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §30(2) sentence one. See Schlaich and Korioth (n 80) 36–9.

[150] *Bundesverfassungsgericht* (n 63) 12. Nonetheless, the percentage of matters producing a dissenting opinion has increased in recent years: Schlaich and Korioth (n 80) 39.

[151] See description in Gertrude Lübbe-Wolff, *Wie funktioniert das Bundesverfassungsgericht?* (V&R unipress, 2015) 14. See also Schlaich and Korioth (n 80) 28.

[152] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] § 93d(1).

[153] Ibid § 93c(1).

[154] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] § 93b. In particular, the chamber must admit the complaint if it is of general constitutional significance and if it is appropriate to enforce the complainant's rights: § 93a(2).

In 2019 less than one percent of matters heard in a First Senate chamber proceeded to a decision of the full senate; less than two percent of chamber determinations proceeded to a full decision of the Second Senate. Refusal to admit a constitutional complaint to a full senate does not require reasons.[155] Approximately eighty percent of chamber decisions did not provide any reasons in 2019.[156] The bulk of the Court's work is therefore preoccupied with 'chamber work': smaller matters that never proceed to full determination with reasons provided to the public and profession. In discharging its 'chamber' workload, the Court is heavily reliant upon the work of academic assistants, who will often assist in dismissing applications that are obviously inadmissible or unlikely to succeed.[157] While, on the one hand, a question of legitimacy may affect this reliance upon assistants who are not themselves justices, their involvement does provide "fresh air" in the development of doctrine,[158] again providing perspectives and input from the profession more broadly. Those assistants — ironically referred to as the "third senate"[159] — often have judicial experience or are drawn from the academy.[160] Some are also drawn from administrative departments and ministries.[161] Justices who are also professors will often draw upon their assistants at their chair or colleagues, who remain for two or three years before returning to their academic institution. This also reinforces the dialogue between academic constitutional law specialists and the Constitutional Court that I have explored above. Academic specialists will acquire practical experience in constitutional reasoning; the Court draws upon specialist knowledge. Moreover, the career circuit between academic assistants from across the legal professional community and the FCC ensures a "constant transfer of constitutional sensibility and competence to all areas of the law"[162] including in assistants who then return to work in government departments. This contributes to the strong constitutional consciousness across the legal profession and all areas of legal life in which former assistants are active.

Once the matter has proceeded to the full senate, a justice is assigned to prepare a report. Assignments to particular justices follow a formal work assignment plan, which also creates a system of sub-specialisation within the Court.[163] The report states the facts and procedural history of the matter, analysing any relevant precedents,

[155] Ibid §93d(1).

[156] Bundesverfassungsgericht (n 63) 18.

[157] Lübbe-Wolff, *Wie Funktioniert das Bundesverfassungsgericht?* (n 151) 17.

[158] Rüdiger Zuck, 'Die Wissenschaftlichen Mitarbeiter des Bundesverfassungsgerichts' in RC van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im Politischen System* (VS Verlag für Sozialwissenschaften, 2006) 283, 290.

[159] Schlaich and Korioth (n 80) 34.

[160] Zuck (n 158).

[161] Lübbe-Wolff, *Wie Funktioniert das Bundesverfassungsgericht?* (n 151) 14–15.

[162] Ibid 15.

[163] The work assignment plan (Geschäftsverteilungsplan) allocates work based on a justice's area of expertise, but expertise is also created through that allocation. That a justice has experience or an academic interest in a particular area of constitutional law, or a particular fundamental right, will not necessarily guarantee that they are assigned competence for it. Competencies will change with the retirement, and replacement, of each justice. For a detailed explanation of the institutional problems this creates see ibid 16–17.

doctrine and decisions of foreign courts. It develops a position on each relevant question and a proposed outcome. Those reports will often run to 150-200 pages, and be far longer than the final decision produced and presented to the public. Justices again rely heavily upon their assistants in this work, who will often prepare template judgments in advance of matters even being heard, based on the assigned competence of that justice. That report remains confidential and closed to the public, though a recent amendment makes those reports available after sixty years.[164] There are then two conferences. The first is focussed on deciding an outcome and reaching consensus amongst the whole senate, as well as a rudimentary agreement of the reasons for that outcome.[165] If a vote is required, a two-thirds majority is required to endorse the majority position.[166] The contents of the judicial conference, and how justices have voted individually, remain strictly confidential. That obligation — referred to as 'deliberation secrecy' (Beratungsgeheimnis) — extends to after the justice has left judicial office, with criminal penalties attached to anyone who breaks silence.[167] The justice responsible for preparing the report will then prepare a second draft, responding to points raised at the initial conference, and circulate it where it is discussed at a second conference. That second conferences involves a 'reading deliberation' where the revised judgment is finalised.[168]

B *Implications for Constitutional Method and Institutional Authority*

The above suggests that the German FCC process channels judicial reasoning toward consensus and collaboration. Consensus emerges not because of a lack of judicial disagreement, but rather, because of a view that the authority and clarity that flows from a unanimous position better serves the institution and produces better 'law' than individualised judgments. Gertrude Lübbe-Wolff, a former justice of the Second Senate, notes that justices must be prepared to "swallow massive interferences with their drafts", but that this is made easier by the acceptance that "on the whole, the cooperative way of producing decisions does much to improve the quality of decisions".[169]

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[164] See Florian Meinel's work on the significance of the amendment for archival research: Florian Meinel and Benjamin Kram, 'Das Bundesverfassungsgericht als Gegenstand Historischer Forschung' (2014) 69(19) *Juristen Zeitung* 913; Florian Meinel, 'The Constitutional Miracle on the Rhine: Towards a History of West German Constitutionalism and the Federal Constitutional Court' (2016) 14(1) *International Journal of Constitutional Law* 277.

[165] Gertrude Lübbe-Wolff, ''Die Beratungskultur des Bundesverfassungsgerichts. Rede zur Verabschiedung aus dem Amt der Richterin des Bundesverfassungsgerichts' (2014) 41 (17-19) *Europäische Grundrechte-Zeitschrift* 509. For an English language explanation see Gertrude Lübbe-Wolff, 'Cultures of Deliberation in Constitutional Courts' in Patricio Maraniello (ed), *La Justicia Constitucional en los Differentes Ámbitos del Derecho y sus Nuevas Tendencias* (Chaco (Contexto), 2016) 37.

[166] *Bundesverfassungsgerichtsgesetz* [German Federal Constitutional Court Act] §15(4), § 105(5); Schlaich and Korioth (n 80) 35.

[167] *Deutsches Richtergesetz* [German Judiciary Act] §43. For a detailed description of the internal deliberation process see Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgehieimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgericht* (Springer VS Verlag für Sozialwissenschaften, 2010).

[168] Lübbe-Wolff, 'Cultures of Deliberation in Constitutional Courts' (n 165).

[169] Ibid 42. See also Gertrude Lübbe-Wolff, *Beratungskulturen: Wie Verfassungsgerichte arbeiten, und wovon es abhängt, ob sie integrieren der polarisieren* (Konrad-Adenauer-Stiftung e.V., 2022) 130–40.

In contrast, the Australian High Court process of delivering judgment understands the possibility of dissent in the context of judicial independence.[170] Inheriting the British tradition, the Australian process emphasises the individual freedom of the justice. It also believes that judgment pluralism enhances the capacity of the Court to provide a comprehensive coverage of legal issues at stake: that pluralism facilitates an openly ventilated competitive dialogue between reasons that allows the law to develop over time. Within this understanding, the pressure to produce unanimous judgments becomes a form of coercion and a fetter upon judicial independence. Andrew Lynch, for instance, defends the practice of dissent in the High Court by arguing that pressure to conform produces "an artificial unanimity."[171] Requiring consensus, in the common law ideal, produces a lack of transparency because it conceals the process of negotiation and compromise. Lynch also critiques consensus oriented decision-making processes as producing a lower quality of judgment — "the lowest common denominator of consensus"[172] — and compelling justices to conform to views they do not actually hold, against their judicial oath. Lynch also argues that the publication of opinions that disagree serves to improve the internal functioning of the Court; dissenting opinions that are circulated prior to publication may be incorporated in the majority approach, rendering it more comprehensive and cogent.[173]

A dialogic process of improvement is incorporated in the consensus approach adopted by the German FCC; the identity of the dissenter merely remains anonymous and only the final product is made public. To a certain extent, differences may merely be a result of tradition, around which justifications have emerged. Former Federal Constitutional Court justices, for instance, describe their deliberative culture as one where notions of judicial independence and objectivity reject the "competitive dominance" and "interest to save face" that a norm of individual judgment entails.[174] As John Bell notes in his comparative study of European judiciaries, the "impersonality of the collegial decision" emphasises "the role of the institution, not the person, in coming to decisions…" To a certain extent this reflects the origins of the German judiciary in German bureaucracy.[175]

The way that both institutions conceive of deliberation and dissent speaks to deeper differences in the understanding of method and the nature of constitutional reasoning. On the one hand, this flows from how both courts seek to integrate perspectives from different sources within the legal professional community. The German FCC draws its expertise from across academic specialists and former justices of federal specialist courts. While all justices will have identical practical training, the perspectives they bring will differ. The collaborative process

[170] See, eg, Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27(3) *Melbourne University Law Review* 724.

[171] Ibid 738.

[172] Ibid.

[173] Ibid 741.

[174] Lübbe-Wolff, 'Die Beratungskultur des Bundesverfassungsgerichts' (n 165) 511. Compare also Gertrude Lübbe-Wolff's claim that the prospect of individual attention may motivate judicial dissent in the common law tradition. She cites the phenomenon of judicial celebrity in the United States to this end: Lübbe-Wolff, *Beratungskulturen* (n 169) 141–7.

[175] John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press, 2006) 144–5.

of reaching unanimous judgment works to smooth those perspectives into a single institutional voice. That institution produces law through integration, rather than competitive dialogue. This need was not felt in the common law tradition, with justices emerging from a relatively homogenous technical background and a common practical experience at the Bar. At the same time, the common law method understands development through a process of competitive dissent. Majority and minority positions emerge and recede over time: "A dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom."[176]

The constitutional reasoning of the Federal Constitutional Court tends to separate reasons for judgment from facts and context, and constitutional questions from other legal questions. This contrasts with the common law approach to judicial reasoning, where facts and reasons are intimately intertwined. To a certain extent the distinction between common law method and that employed by the FCC may be one of self-perception and an ideal.. For present purposes however, those differences matter for processes of deliberation; they also affect how reasons must be presented so that they support, rather than undermine, institutional authority. When articulating the 'law' that will apply to the facts, the Court will remove context and history. Precedent is cited by number, rather than by date, parties or year — further removing it from the facts and specific context of that precedent. Oliver Lepsius has referred to this practice of the Court as "thinking in standards"[177]; Michaela Hailbronner describes it as a form of "judicial maximalism".[178] That the Court speaks unanimously serves to support how the Court presents its reasoning — abstract, decontextualised statements of principle — to the public. The common law presents its reasoning in terms of facts, history and analogy, and within that method there is scope for deviation between individual justices. Deviation may be justified by a different interpretation to facts, and it may form the basis for a later majority position to emerge. Divorced of facts and historical bases in its presentation of reasons — these matters remaining secret, behind doors — reasoning in the FCC lacks the explicit anchor to facts and context that the common law possesses. Judicial disagreement, then, has a greater potential to compromise the authority of the institution. There is a greater risk of judicial divergence in the abstract statements of rule towards which FCC judgments tend.

That the Australian High Court and German Federal Constitutional Court differ in deliberative processes also responds in part to a difference in institutional self-understanding. The FCC embraces a signal function; it communicates the limits of constitutional possibility to other arms of government and other courts. The clarity and brevity that FCC judgments produce assists to that end. The law is not a 'brooding spirit', 'waiting for discovery' as a question to be tested. The Court seeks to state the law in a generalisable way that clearly creates

[176] *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, 314 (Mason CJ, Wilson, Dawson and Toohey JJ). I draw this example from Chief Justice Susan Kiefel's address: 'Judicial Courage and the Decorum of Dissent' (Selden Society Lecture, Supreme Court of Queensland, 28 November 2017) <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ28Nov2017_1.pdf>.

[177] Oliver Lepsius, 'Die Maßstabsetzende Gewalt' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag, 2011) 159.

[178] Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (2014) 12(3) *International Journal of Constitutional Law* 626, 114–117. I explore this further in chapter six.

de facto legislative constraints[179] rather than deferring questions to the future. Its clarity and unanimity — as well as the anonymity of its justices[180] — also serves the Court's institutional authority. Where the law is unanimous, it is less assailable; the individual justice is more impervious to attack. It is significant that Chief Justice Marshall sought to require unanimous judgments in the United States Supreme Court at a time when the Court introduced judicial review.[181] Similarly, the FCC relies upon its institutional unanimity to support its relationship with the legislature.

V SUMMARY

The design of a constitutional court, its process for judicial appointments, and the processes it deploys for deliberating and producing judgment, provide ways of mediating and ordering authority within a particular legal professional community and consolidating that authority within the voice of an institution. These features affect how the court interacts with the perspectives and professional cultural practices within the broader professional community.

Moreover, design features and internal processes — particularly how agreement is reached and reasons are presented — reflect and reinforce cultural beliefs and narratives regarding the nature of 'law', the contestability of legal reasoning, and the involvement of 'value' judgments and judicial choice. The FCC practice of reaching decisions by consensus, integrating perspectives from scholarship and federal court justices, and concealing the contents of deliberative debate from the broader professional community reflects certain beliefs about the role of institutions in ensuring the stability and authority of legal reasoning. These beliefs recognise that judicial choice and 'value judgments' are involved in constitutional reasoning but characterises these as potential threats to stability and authority. The Australian High Court, in contrast, reflects a belief that stability can be guaranteed through method and reasoning, and the authority of that reasoning is improved through contest between justices. It nonetheless relies on other features, practices and professional cultural institutions to ensure stability and consistency in value judgments. In particular, the Australian High Court draws its justices from a narrow pool — predominantly justices of other courts who in turn are largely sourced from the commercial Bar — which works to ensure homogeneity in judicial choice and limit the risk of excessive disagreement between justices. This maintains the impression of constraint of choice.

[179] Hailbronner, *Traditions and Transformations* (n 14) 116.

[180] See eg, Oliver Lepsius, 'La Couer, c'est Moi: Zur Personalisierung der (Verfassungs-)Gerichtsbarkeit im Vergleich Deutschland — England — USA' (2016) 64 *Jahrbuch des öffentlichen Rechts der Gegenwart* 123.

[181] See eg, John Kelsh, 'The Opinion Delivery Practices of the United States Supreme Court 1790-1945' (1999) 77(137) *Washington University Law Quarterly*.

PART TWO: ‘STABILITY SEEKING’ DECISION

CHAPTER FIVE: 'STABILITY SEEKING' DECISIONS

I INTRODUCTION

This chapter sets out my account of 'stability seeking' decisions. I begin with a discussion of historical institutionalist descriptions of institutional change and canvas how other literature has applied these to the study of courts and formal and informal rules controlling legal reasoning. I rely on historical institutionalist concepts to frame my argument that institutionalised reasoning practices can experience periods of 'greater' or 'lesser' stability. I compare my account of stability with the description of critical junctures in historical institutionalist literatures.

I then describe a type of decision that I refer to as 'stability seeking'. A 'stability seeking' decision responds to instability within a legal professional community regarding cultural beliefs and assumptions that underpin method. This may be the case where there is a lack of agreement about core beliefs and narratives or where those beliefs, narratives and values become contestable and begin to lose their hold, and legal professional actors perceive it necessary to revisit them. During periods of instability the experience of constraint of choice that I have described in earlier chapters may be less compelling. 'Stability seeking' decisions attempt to introduce ideas or narratives that can reintroduce the experience of constraint of choice. This may involve 'shoring up' or buttressing the belief or narrative to be more viable in new conditions. In other cases, it may involve introducing a new idea or narrative altogether.

In a final section I canvas notable literature that has explored constitutional decisions or clusters of decisions, that have had profound consequences for constitutional reasoning. Such decisions have been variously described as 'landmark judgments', or reflecting 'constitutional moments' or 'constitutional revolutions'. I explore the extent to which these literatures reflect a concern with dissonance as a driver of constitutional development and where my professional cultural account of 'stability seeking' decisions differs.

II CRITICAL JUNCTURES AND HISTORICAL INSTITUTIONALISM

A *New Institutionalism and Historical Institutionalism*

My description of practices of reasoning as an informal institution brings it into dialogue with an existing body of literature regarding institutional development and change. This has been applied to the study of courts, especially within scholarship in the United States. I provide a brief intellectual history here of the 'institutional turn' in the social sciences before considering the impacts of these approaches on legal scholarship.[1]

[1] For a more comprehensive overview of the migration of historical institutionalist approaches to legal scholarship see Rogers M Smith, 'Historical Institutionalism and the Study of Law' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* 46; Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018) 35–43.

In the late nineteenth and early twentieth centuries institutional analysis had a natural home in the social sciences. During a period of extreme political and social upheaval, scholarship that would now be considered the predecessor of modern political science was largely concerned with how to design the perfect constitution. This in turn led to a preoccupation with institutions and how institutions structure the behaviour of the individual actors who participate in them. Institutional analysis fell from grace following the failure of Weimar democracy,[2] Just as the social sciences became dominated by approaches originating in the United States in the post-war era, so too did the centre of theoretical gravity in the social sciences shift toward 'behaviouralism'. Emerging in the United States during the interwar era, behaviouralist approaches in the social sciences sought to provide objective, quantifiable explanations for individual behaviour. Sven Steinmo traces the ascendency of behaviouralist approaches in the social sciences to 'physics envy': as the physical sciences rapidly advanced and acquired prestige during the post-war years, the social sciences were influenced by them. "If social science was to be a science… it, too, must build predictive theories that are falsifiable and testable."[3] This came at the expense of thicker, descriptive accounts of social and political processes. These 'micro-analyses' of political behaviour were complemented by 'grand theories' that sought to explain politics at the macro-level, such as Marxism, functionalism, systems theory and rational choice theory. The political sciences therefore bifurcated into micro and macro-analyses of political life at the expense of thicker, more detailed descriptions of institutional processes.[4]

The 1980s witnessed a renaissance for institutions in the social sciences, which had become globally dominated by funding and research agendas in the United States.[5] Scholars began to become interested again in the causal impact of historical processes and institutions on politics.[6] This gave rise to a "new institutionalism", which was concerned with understanding how formal and informal institutions constitute and constrain the choices and behaviour of their members.[7] In this regard it owed an intellectual debt to much earlier theorists such as Karl Polyani and Max Weber, who were interested in institutions and who had sought to explain political phenomena

[2] Sven Steinmo, 'Historical Institutionalism' in Donatella Della Porta (ed), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (Cambridge University Press, 2008) 118, 119.

[3] Ibid 120.

[4] Ibid 122. "Thus, by the 1960s and 1970s, social science's cutting edges had moved in quite distinct directions: the largely atheoretical micro-analyses of political behaviour on the one hand; and the macro- (and remarkably non-empirical) theorizing of Marxism, functionalism, systems theory and rational choice on the other." Steinmo notes that the position was distinct in European universities due to institutional funding arrangements: in Europe there was "less pressure to adopt hard-science norms and practices to help fund social science programmes." See also Kathleen Thelen and Sven Steinmo, 'Historical Institutionalism in Comparative Politics' in Sven Steinmo, Kathleen Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press, 1992) 1, 5.

[5] Orfeo Fioretos, Tulia Falleti and Adam Sheingate, 'Historical Institutionalism in Political Science' in The Oxford Handbook of Historical Institutionalism (Oxford University Press, 2016); Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2 *Annual Review of Political Science* 369.

[6] Fioretos, Falleti and Sheingate (n 5) 5.

[7] See, eg, John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) *American Journal of Sociology* 340. See also Elizabeth Sanders, 'Historical Institutionalism' in *The Oxford Handbook of Political Institutions* (Oxford University Press, 2008) 39.

by using history as an analytic tool.[8] New institutionalism sought to provide a generalisable account of how institutions perform that constitutive and constraining function through comparing institutions, rather than accounting for individual institutions in isolated detail.[9]

Historical institutionalism emerged to describe a distinctive type of approach amongst several characterising new institutionalism.[10] It focussed in particular on how historically contingent events cause institutions to originate and transform over time, altering the rules that constrain the behaviour of its member actors.[11] In general terms, it seeks to understand the "construction, maintenance and adaption of institutions."[12] Schematically, two key concepts — a 'critical juncture' and 'path dependency' — drive the historical institutionalist approach to analysing institutional development. During critical junctures, the choices of actors are "causally decisive" for the development of the institution in one direction as opposed to another.[13] Critical junctures therefore involve situations of uncertainty when the institution is less determined by its past practices. Path dependency, in contrast, refers to the effect of choices made during critical junctures that then set in train new institutional directions or systems of rules. Path dependency does not mean that the institution ceases to develop, but rather that "previous institutional arrangements limit the number of available alternatives" for the institution's direction.[14]

Historical institutionalist approaches, described schematically, therefore involve a dual model of institutional development. This consists of "relatively long periods of path-dependent institutional stability and reproduction that are punctuated occasionally by brief periods of institutional flux... during which more dramatic change is possible."[15] Choices made during critical junctures then foreclose other possibilities.[16] In early literature scholars often explained critical junctures as the result of 'exogenous shocks': a rapidly occurring change in the context in

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[8] Steinmo (n 2) 122; Thelen and Steinmo (n 4) 3.

[9] See, eg, Thelen and Steinmo (n 4).

[10] These include rational choice institutionalism, historical institutionalism and sociological institutionalism. For an explanation of historical institutionalism's distinctiveness see Thelen (n 4) 369–70.

[11] See, eg, Fioretos, Falleti and Sheingate (n 5); Thelen and Steinmo (n 4); Thelen (n 5).

[12] Sanders (n 7) 42.

[13] Giovanni Capoccia, 'Critical Junctures' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2016) 89, 89.

[14] Edward Anthony Koning, 'The Three Institutionalisms and Institutional Dynamics: Understanding Endogenous and Exogenous Change' (2016) 36(4) *Journal of Public Policy* 639, 646.

[15] Giovanni Capoccia and R Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 *World Politics* 341, 341.

[16] Ibid.

which the institution sits that destabilises the institution's equilibrium.[17] Exogenous shocks can be caused by contingent events — such as a war or an economic crisis — or the influence of other institutions.[18]

As it developed, historical institutionalist scholars grappled with complexity within this dual model. A persistent problem for scholars was historical institutionalist's schematic conception of change. The dual model of institutional development supposed "punctuated equilibrium":[19] that "institutions remain essentially stable (at equilibrium) until they are faced with an external (exogenous) shock."[20] Key scholars such as Kathleen Thelen began to challenge this notion, increasingly recognising the complexity of internal processes within institutions as drivers of that institution's development.[21] These scholars noted that internal tensions within institutions can also be significant drivers of an institution's development.[22] Approaches to institutional change began to conceptualise institutions as "arenas of conflict", rather than as equilibria: "Institutions are constantly reshaped and reinterpreted by groups vying for power, trying to bend the institution to their priorities and preferences."[23] This in turn led to less interest in critical junctures as an explanation for institutional change.[24]

Similarly, scholars began to study how conflict between distinct but interacting institutions can act as a motor for institutional development.[25] This is sometimes referred to as "intercurrence".[26] Intercurrence posits that

[17] See, eg, James Mahoney, Khairunnisa Mohamedali and Christoph Nguyen, 'Causality and Time in Historical Institutionalism' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2016) 71.

[18] See, eg, Koning (n 14) 646.

[19] Thelen and Steinmo (n 4) 15.

[20] Steinmo (n 2) 129.

[21] Kathleen Thelen and James Conran, 'Institutional Change' in Orfeo Fioretos, Tulia Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2016) 51. See also Mahoney, Mohamedali and Nguyen (n 17); Capoccia and Kelemen (n 15); Johannes Gerschewski, 'Explanations of Institutional Change: Reflecting on a "Missing Diagonal"' (2021) 115(1) *American Political Science Review* 218; Koning (n 14). A related critique was directed at historical institutionalism's tendency to minimise the significance of human agency, including in brining about critical junctures: see Thelen and Steinmo (n 4) 129.

[22] See, eg, Thelen and Conran (n 21) 61–2.

[23] Capoccia and Kelemen (n 15) 100.

[24] Capoccia and Kelemen argue that "when institutions develop according to the patterns of long-term, gradual, endogenous and transformative change such as conversion and layering, critical junctures have no place in the analysis…": ibid 100–1.

[25] Karen Orren and Stephen Skowronek are credited for initiating this line of inquiry. See, eg, Karen Orren and Stephen Skowronek, 'Beyond the Iconography of Order: Notes for A New Institutionalism' in Lawrence Dodd and Calvin Jillison (eds), *The Dynamics of American Politics: Approaches and Inter-pretation* (Westview Press, 1994) 311. Orren and Skowronek also identified the limitations of existing descriptions of path dependency. If critical junctures can only follow from exogenous shocks, rather than factors internal to the institution, "then the notion of path dependence loses much of its interest, reduced to the idea that politics follows a particular course until something happens that changes the course": Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge University Press, 2004) 103.

[26] Orren and Skowronek, 'Beyond the Iconography of Order: Notes for A New Institutionalism' (n 25); Fioretos, Falleti and Sheingate (n 5) 12–13.

"institutions change because they are inextricably bound up with the operations of other institutions" that are "themselves developing according to their own logic".[27] The concept of intercurrence is but one example of the difficulty historical institutionalist approaches experience when confronted with the slipperiness and complexity of institutional change.[28] On close inspection, periods of ostensible stability within an institution reveal themselves to be contested both internally and externally. Institutions are always subject to the "push and pull" of "multiple institutional arrangements with diverse historical origins",[29] each developing according to different rules and constraints and in response to different challenges and pressures. Institutional responses to critical junctures thus have a degree of path dependency. They are "themselves informed by structures, identities, programs [and] agendas present in the prior period"[30] and driven by institutional developments elsewhere.

A further critique of historical institutionalist approaches developed regarding their description of the role of ideas.[31] While early historical institutionalist approaches acknowledged the role of ideas in driving institutional development, this attention was short-lived. To a certain extent the minimisation of ideas followed from the schematising tendency in historical institutionalist approaches to change. If institutions were to have "causal primacy over the individuals that occupy them at any moment", then ideas and human agency cannot precede those institutions.[32] The dualist model of change assumed by early historical institutionalist approaches also excluded a role for ideas as endogenous drivers of institutional development. Early historical institutionalist approaches also sought to make their work more 'scientific' by focussing on material, causal explanations for institutional development. Ideas, like culture, were viewed as unreliable variables whose causal influence could not be materially demonstrated.[33] More recent, "ideational" scholarship has sought to draw more attention to the role of ideas in institutional development.[34]

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[27] Thelen and Conran (n 21) 61.

[28] Some of the concepts that have been developed to accommodate different types of change include 'layering' (when new rules are attached to existing ones that affect how the old rules structure behaviour), 'drift' (when changes in the institution's context cause its rules to acquire a different meaning), 'conversion' (when existing rules are interpreted in a new way) and 'exhaustion' (where the institution collapses). See Thelen and Conran (n 21); Koning (n 14).

[29] Karen Orren and Stephen Skowronek, 'Institutions and Intercurrence: Theory Building in the Fullness of Time' (1996) 38 *Political Order* 111, 138.

[30] Orren and Skowronek, *The Search for American Political Development* (n 25) 103.

[31] 'Ideas' here is used in the "sense that ideas are creative solutions to collective problems": Steinmo (n 2) 130–1.

[32] Mark Blyth, Oddny Helgadottir and William Kring, 'Ideas and Historical Institutionalism' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2016) 142, 147.

[33] Ibid.

[34] See, eg, Jeremy Rayner, 'Is There a Fourth Institutionalism? Ideas, Institutions and the Explanation of Policy Change' in John Hogan et al (eds), *Policy Paradigms in Theory and Practice: Discourses, Ideas and Anomalies in Public Policy Dynamics* (Palgrave Macmillan UK, 2015) 61; Martin B Carstensen, 'Bringing Ideational Power into the Paradigm Approach: Critical Perspectives on Policy Paradigms in Theory and Practice' in John Hogan and Michael Howlett (eds), *Policy Paradigms in Theory and Practice: Discourses, Ideas and Anomalies in Public Policy Dynamics* (Palgrave Macmillan UK, 2015) 295. Sven Steinmo notes that "integrating ideas" into historical institutionalist analyses makes institutions "both a constraining/incentivizing force and the object of political contestation": Steinmo (n 2) 133.

B *Historical Institutionalism and Courts*

Despite their schematising tendencies — and as I argue below, perhaps because of those tendencies — historical institutionalist approaches have proven attractive to legal scholars and public law theorists.[35] On the one hand, such approaches lend support to an institutionalised understanding of legal reasoning and judicial decision-making. This institutionalised understanding emphasises the constraints to which individual actors and judges within the legal profession are subject.[36] As I explored in chapter two, key legal professional cultural distinctions cohere around 'external' and 'internal' binaries. Legalist reasoning supposes that judicial choice can be sufficiently constrained by legal materials; where it cannot be so constrained, judicial choice can be guided by principles located outside the personal preference of the judge. Similarly, where legal reasoning must incorporate value judgments, these judgments can be drawn from values that are external to the person of the judge. Those values must, however, be internally accepted within the legal profession as technical rather than political in nature. In this way judicial decision making and legal reasoning lends itself naturally to institutional analysis: institutions are a structure for rule-based behaviour, defined in terms of externalities and internalities.

Historical institutionalist approaches are therefore compatible with mainstream legal professional understandings of legal reasoning and judicial behaviour. Just as law's autonomy from politics requires that it retain its structure in the face of political change, so too is an institution guided by its internal rules and the path dependencies that cause it to resist contextual change. And yet historical institutionalist approaches are able to explain why legal institutions — however defined — can adapt and change direction notwithstanding their internal logic. The periodisation of legal development into 'path dependencies' and 'critical junctures' complements and completes scholarly accounts of law's traditionality. It recognises that legal development must be 'past-referent' and consistent with already accepted practices while allowing scholars to theorise the conditions in which development may depart from that tradition.

Public law scholars in the United States grasped the relevance of historical institutionalist approaches to their discipline at an early stage.[37] Historical institutionalism offered an antidote to the deficiencies of behaviouralism — which as I explored above, had emerged in the interwar era and dominated the social sciences since the 1950s. Behaviouralism had also shaped US legal scholarship in the post-war era, leading to a preoccupation with measuring judicial voting behaviour and explaining it in terms of judicial political allegiance. The scholarly focus remained on "individual justices and how they cast their votes, leaving a great deal of the judicial process

[35] See, eg, Smith (n 1).

[36] See, eg, Theunis Roux, 'Reinterpreting the Mason Court Revolution: An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43(1) *Federal Law Review* 1, 11.

[37] See, eg, Rogers M Smith, 'Political Jurisprudence, the "New Institutionalism", and the Future of Public Law' (1988) 82(1) *American Political Science Review* 89.

relatively unexplored".[38] The conditions that allowed behaviouralist approaches to flourish in US-American legal scholarship also supported an interest in legal realist theories of judicial behaviour.[39] Behaviouralist approaches were also associated with an "attitudinalist" model of judicial decision-making, which holds that "judges decide cases based on their ideological attitude towards various policy outcomes".[40] For those legal scholars, "[t]he background influences that determined how each of those nine justices chose to cast his vote were of far more interest than the rules that made up the judicial institution and determined how those votes were to be aggregated."[41]

Historical institutionalist approaches underscored that courts cannot be reduced to the individual actors that comprise them. It offered an opportunity to 'bring law back' into the study of 'judicial politics', presenting law as more than a material for individuals to use in pursuit of their policy preferences.[42] As Keith Whittington notes, "[i]n many ways, historical new institutionalism rehabilitates elements of traditional public law." It linked "the normative and legal concerns of traditional public law scholarship with the empirical concerns of judicial politics literature."[43] The concept of an institution was sufficiently capacious for the approach to be applied to different objects of study in public law. The adoption of historical institutionalist approaches also coincided with other related trends in American legal scholarship. Bruce Ackerman's work on 'constitutional moments', which I explain further below, broke in the early 1990s and was part of an interest in combining historical periodisation with constitutional and legal theory. Although Ackerman did not explicitly adopt a historical institutionalist approach, historical institutionalist scholars have considered his work on 'constitutional moments' as part of the field.[44]

[38] Keith E Whittington, 'Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics' (2000) 25(2) *Law and Social Inquiry* 601, 601.

[39] In very general terms, legal realism is concerned with law's indeterminacy. Early legal realist works therefore sought to uncover the factors that explain judicial choice, often through recourse to the political leanings or ideology of the individual judge. The similarities to behaviouralism — ie, the individual judge as unit of analysis — can be seen in Karl Llewellyn's work. "Behind decisions stand judges; judges are men; as men they have human backgrounds": Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) *Harvard Law Review* 1222, 1222.

[40] See, Whittington (n 38) 605–6. See also James L Gibson, 'Judicial Institutions' in Sarah A Binder, R A W Rhodes and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2008) 515–18. See also Yair Sagy, 'The Missing Link: Legal Historical Institutionalism and the Israeli High Court of Justice' 31(3) *Arizona Journal of International and Comparative Law* 2014.

[41] Whittington (n 38) 605.

[42] Ibid 619–26.

[43] Ibid 613.

[44] See, eg, Orren and Skowronek, 'Institutions and Intercurrence: Theory Building in the Fullness of Time' (n 29) 121–3. As I explored above, Orren and Skowronek were key figures in the move to bring more complexity into the analysis of path dependency and broader institutional interactions. They notably cite Ackerman's binary description of 'constitutional' and 'normal politics' as an example of a failure to take into account more complex dynamics of change within dualist models.

Early applications of historical institutional approaches focussed on the establishment of judicial review in the United States.[45] This use of historical institutional analysis has persisted in the United States[46] and influenced the application of the framework in other jurisdictions. It has also been applied comparatively. In 1992 Alec Stone employed historical institutional analysis to describe how the French Constitutional Council established its authority within the French legal-political landscape.[47] European scholars have similarly applied the framework to the development of institutions in the European Union[48] and other work that has loosely adopted its precepts has analysed courts in Colombia[49] and India.[50] Some literature has combined historical institutionalist approaches with comparative law. Theunis Roux for instance employed a historical institutionalist approach comparatively to develop a theory of how societal conceptions of the division between law and politics interact with the establishment of judicial review systems.[51]

Other works have adopted historical institutionalist scholarship's more recent interest in the role of ideas to explore how contestation within the judiciary affects the role of doctrine.[52] Erik Bleich, for instance, applied the concept of intercurrence to explore how French judicial decisions considering hate speech have been influenced by institutional interactions with the European Court of Human Rights.[53] Yair Sagy applied "legal historical institutionalism" to trace a history of the Israeli High Court of Justice, though noted that the framework could be equally applied to law schools, the Bar and other legal institutions.[54] Yet another strand of public law scholarship

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[45] Howard Gillman and Cornell W Clayton (eds), The Supreme Court in American Politics: New Institutionalist Interpretations (University of Kansas Press, 1999). See also Roux (n 1) 39; Smith (n 1) 49.

[46] See, eg, Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press, 2006); Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (n 4). See discussion in Roux (n 1) 40–1; Smith (n 1) 48–9.

[47] Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press, 1992). See also Smith (n 1) 49.

[48] See, eg, Roland Lhotta and Jörn Ketelhut, 'Bundesverfassungsgericht und Europäische Integration' in Robert Chr van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im Politischen System* (V.S. Verlag für Sozialwissenschaften, 2006) 465.

[49] Pablo Rueda, 'Legal Language and Social Change during Colombia's Economic Crisis' in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press, 2010) 25.

[50] Nick Robinson, 'The Supreme Court of India: An Institutional Overview' in Gerald N Rosenberg, Sudhir Krishnaswamy and Shishir Bail (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge University Press, 2019) 21.

[51] Roux (n 1).

[52] See, for instance, Alec Stone Sweet's theory of how path dependency operates within judicial adjudication: Alec Stone Sweet, 'Path Dependence, Precedent, and Judicial Power' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics, and Judicialization* (Oxford University Press, 2002) 112.

[53] Erik Bleich, 'Historical Institutionalism and Judicial Decision-Making: Ideas, Institutions, and Actors in French High Court Hate Speech Rulings' (2018) 70(1) *World Politics* 53.

[54] Sagy (n 40) 712.

has drawn upon historical institutionalist approaches to analyse adaptation in constitutional institutions beyond the judiciary.[55]

As I explored earlier, the schematising tendency of historical institutional analysis presented a problem for political science theorists. Mainstream political science methods aim for rigour and causal claims that can be tested. The same problem that led post-war political science to neglect institutions —ie, their resistance to analysis through testable and falsifiable propositions[56] — plagued historical institutionalist approaches as they began to develop. Historical institutionalism, as seen above, is a "messily eclectic genre" that straddles detailed, empirical description and inductive theory.[57] Scholars struggled to reconcile the use of "dense, empirical description"[58] in historical institutionalist approaches with the inductive, generalisable models of institutional development that they sought to produce. Detailed, empirical descriptions of institutional development revealed ever more complexity and difference in the way that institutions operate in various disciplines and settings. Historical institutional theorists responded to this problem by introducing concepts such as 'intercurrence' and 'layering' to account for endogenous change and changes that occur in some institutions but not others.

Unlike political scientific accounts of institutional development, however, legal scholarship applying historical institutionalist approaches only seeks to explain the development of a particular type of institution — those connected with law. Located within a discrete discipline, legal theory that adopts historical institutionalist frameworks did not need to style itself as a 'science'. Where historical institutionalism's schematising tendency appeared a weakness for political science, it became a strength for legal scholarship. The simplicity of the historical institutionalist dual model of change allowed legal scholars to readily grasp and apply it to describe legal institutional development. The thick, empirical description used by legal scholars to apply the framework was also compatible with existing methods in legal research and theory centred on doctrinal analysis. Historical institutionalist approaches provided an easily accessible vocabulary or 'theoretical shell' for legal scholars to take doctrinal analysis and legal principles seriously, while accounting for extra-legal influences upon law.

III 'STABILITY SEEKING' DECISIONS

A *Qualities of 'Stability Seeking' Decisions*

Historical institutionalist concepts can assist in explaining how institutionalised practices of constitutional reasoning interact with professional beliefs and narratives. I draw on those concepts — particularly that of critical junctures and intercurrence — to support the account of stability and legal professional culture I set out in earlier chapters. In those chapters I argued that practices of reasoning are stable when there is basic agreement about the

[55] See, eg, Yee-Fui Ng, 'Towards Constitutional Consonance: Institutional Adaptation and the Administrative State' (2021) 44(3) Melbourne University Law Review 889.

[56] Steinmo (n 2) 120.

[57] Sanders (n 7) 44.

[58] Ibid 43.

core beliefs, narratives and assumptions that organise constitutional method. The range of meanings and interpretations that can attach to a constitutional text is limited when certain beliefs and narratives are assumed and widely shared within a professional community. Legal actors experience a greater constraint of choice. During these period of greater stability in professional beliefs, narratives and values, practices of reasoning experience path dependency. Patterns of constitutional reasoning and argument tend to reproduce themselves with slower incremental change. This does not mean that practices of reasoning are entirely coherent, consistent and conflict-free when there is greater stability or path dependency. Practices of constitutional reasoning and argument are sites of conflict where legal actors or groups compete "for power, trying to bend" existing arguments, methods, ideas and precedents "to their priorities and preferences".[59]

'Intercurrence' — the idea that institutions evolve through interaction with other institutions — is also a useful way to conceive of the influence of professional cultural practices on constitutional development. In the previous chapter I explored how professional cultural institutions interact with practices of reasoning. Education and scholarship are carried out according to a distinct set of rules, conventions and preferences. As these conventions and preferences change, they can exert an influence on practices of reasoning. The example of public law scholarship throughout German constitutional history, which I explore more fully in the next chapter, demonstrates how the prominent, creative role of scholarship during the Weimar Republic ultimately shaped the approach taken by the first Federal Constitutional Court during its early years. The reactive, doctrinal focus that public law scholarship assumed in subsequent decades opened the space for the Court to take a greater 'steering' role. In both of these instances the institutions of scholarship and knowledge production, and the institution of the Court and the reasoning it applied, were influenced by their relationship with each other.

Periods of time when professional beliefs and narratives lose as strong a hold can be 'critical junctures'. During these periods legal actors may experience less constraint of choice. Alternative arguments may become more plausible and persuasive in the absence of a shared set of beliefs and narratives, leading to a greater range of choice. If these new arguments are adopted by courts or authoritative actors, and then accepted by the professional community as a whole, they can give rise to new beliefs and narratives. The critical juncture in which those arguments were first adopted and then metabolised by the professional community becomes causally determinative for later practices of argument and reasoning.

A decision that 'seeks stability' introduces reasoning aimed at bringing coherence to coordinating beliefs and narratives within the broader professional community. The reasons, ideas or methods that it introduces intend to respond to instability, perceived or actual, in the shared beliefs or narratives that the professional community requires to apply method consistently. In the case studies I explore in the following chapters, stability seeking decisions emerged during periods that followed extreme professional conflict regarding method, the introduction of a new court and constitution, the introduction of a second set of legal sources and integration within a supranational system, and the gradual decline of legalist narratives. Those decisions then introduced new principles or ideas that provided frameworks for navigating constitutional meaning in a new context. By providing

[59] Capoccia and Kelemen (n 15) 100.

interpretive frameworks, stability seeking decisions can reintroduce an experience of constraint and choice in legal reasoning that I have argued defines legal professional culture.

Decisions that seek stability may not necessarily achieve stability in practice. Stability seeking decisions introduce ideas or narratives that have the potential to consolidate as beliefs, or seek to fortify existing beliefs and narratives. But the extent to which those ideas and narratives become embedded as cultural beliefs — widely shared and accepted as true — depends on broader professional cultural context and institutional conditions. Historical institutionalist concepts can assist in framing how a professional community accepts or rejects stability seeking reasoning. A greater degree of stability and path dependency flows from acceptance of the reasoning in a stability seeking decision. Protracted instability and further attempts to introduce principles or ideas — a need for further 'stability seeking' — follows from a lack of acceptance. In certain circumstances, a kind of path dependency can emerge from the legal profession's partial acceptance of the reasoning in a decision that seeks stability.[60] The reasoning sets the agenda for further contestation and attempts to broker agreement between different groups that support or oppose it.

B *Significance for Legal Professional Culture*

Stability seeking decisions are a useful lens to explore how legal professional culture interacts with constitutional development. In previous chapters I defined legal professional culture as the process through which constraint and choice in legal reasoning is controlled. I described processes of socialisation in constraint of choice, including education, training and scholarship, and their relationship to institutionalised practices of reasoning. Stability seeking decisions shed light on how professional cultural institutions and courts interact to produce practices of reasoning and negotiate challenges to the beliefs that assist the experience of constraint. They reflect awareness that beliefs and narratives can change and that courts play a role in steering beliefs and narratives. But they also reflect courts' awareness of their dependence on professional cultural processes and need to engage with professional cultural currents. The reasoning in stability seeking decisions often justifies the new ideas and narratives it introduces in terms of existing or emerging values or beliefs. It appeals to the professional community for acceptance. As I explore in subsequent case studies, the reasons given in stability seeking decisions can tend to be longer and more detailed than in other judgments on constitutional questions.

Studying stability seeking decisions highlights their relationship to professional cultural processes. Their emergence and durability draw attention to professional cultural beliefs and narratives. With the exception of reasoning that is doctrinally implausible, the reasoning in stability seeking decisions will persuade the professional community or fail based on compatibility with prevalent beliefs or narratives. Certain professional cultural conditions must exist for the ideas contained in that stability seeking reasoning to become embedded as cultural beliefs or narratives in their own right. Observing how legal professional cultural conditions perform this function sheds light on the role of legal professional culture in constitutional development more generally. Stability seeking decisions further provide a lens to explore how cultural beliefs and narratives fluctuate over time and how

[60] I explore this with respect to European integration decisions in chapter seven and the implied freedom of political communication in chapter nine.

legal institutions structure that fluctuation. Courts engage in stability seeking reasoning when they perceive a belief or narrative to be unstable, unsustainable or lacking and perceive a need to fill that 'gap'.

C *'Stability Seeking' Decisions in Literature*

Compressed periods of time when judgments exerted a decisive influence on constitutional development have attracted significant attention in scholarship. Some literature has sought to explore this under the umbrella of 'landmark' decisions. András Jakab, Arhur Dyevre and Giulio Itzcovich employed the phrases 'landmark judgments' and 'leading cases' in their 2017 comparative study of constitutional reasoning across diverse jurisdictions.[61] Dieter Grimm referred to the English phrase, "[l]andmark [c]ases", in a German language study of constitutional developments that were "particularly innovative".[62] The German Federal Constitutional Court website lists decisions that reflect 'milestones' in its history.[63] Phrases such as 'landmark', 'milestone' and 'leading' are used in constitutional traditions elsewhere,[64] often where a decision consolidates, summarises or "settles"[65] an area of law.

This literature tends to define 'landmark' decisions in terms of professional cultural perception. For the purposes of their study Jakab, Dyevre and Itzcovich defined "leading cases" as those which were "deemed the most important in the legal community of the court under consideration".[66] Eleonora Bottini's work on landmark judgments similarly defines a "landmark" judgment in terms of the "consensus" that supports its significance.[67] In their investigation of the "canons of constitutional law", Jack Balkin and Sandford Levinson note that how we

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[61] András Jakab, Arthur Dyevre and Giulio Itzcovich, 'Introduction: Comparing Constitutional Reasoning with Quantitative and Qualitative Methods' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 1.

[62] Dieter Grimm, 'Eine Unaufgeklärte Kontroverse' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien Zum Verhältnis von Verfassungsrechtsprechung Und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 3, 4–5.

[63] Bundesverfassungsgericht [German Federal Constitutonal Court], 'Meilensteine in Der Geschichte Des Bundesverfassungsgerichts', Bundesverfassungsgericht [German Federal Constitutional Court] (Web Page, 2021) https://www.bundesverfassungsgericht.de/DE/Das-Gericht/Zeitstrahl/zeitstrahl_node.html; Ali Ighreiz et al, 'Karlsruher Kanones? Selbst- und Fremdkanonisierung der Rechtsprechung des Bundesverfassungsgerichts' (2020) 245 *Archiv des öffentlichen Rechts* 537.

[64] See, eg, Eleonora Bottini, 'Guest Editorial – Constitutional Landmark Judgments in Central and South America', *IACL-AIDC Blog* (Blog Post, 9 July 2020) <https://blog-iacl-aidc.org/constitutional-landmark-judgments-in-central-and-south-america/2020/7/9/guest-editorial-constitutional-landmark-judgments-in-central-and-south-america>; Eleonora Bottini, 'Guest Editor's Introduction: Constitutional Landmark Judgments in the Commonwealth', *IACL-AIDC Blog* (Blog Post, 3 December 2019) <https://blog-iacl-aidc.org/constitutional-landmark-judgments-in-the-commonwealth/2019/12/3/guest-editors-introduction-constitutional-landmark-judgments-in-the-commonwealth>; Eleonora Bottini, 'Symposium: Constitutional Landmark Judgments in Asia', *IACL-AIDC Blog* (Blog Post, 1 December 2020) <https://blog-iacl-aidc.org/2020-posts/2020/12/1/constitutional-landmark-judgments-in-asia-wnw2z>

[65] See, eg, Ivor Richardson, 'What Makes A "Leading" Case' (2010) 41 *Victoria University of Wellington Law Review* 317, 336.

[66] Jakab, Dyevre and Itzcovich (n 61) 27.

[67] Bottini, 'Constitutional Landmark Judgments in the Commonwealth' (n 64).

define "landmark", "milestone" and "turning point" judgments turns to a certain extent on that functional component.[68] Balkin and Levinson distinguish between the pedagogical, academic theoretical and cultural functions of constitutional law canons: canons are selected to instruct and educate lawyers in constitutional courses,[69] as the material that informs academic inquiry and debate because of its proximity to theoretical problems, and because of their significance in shaping constitutional understanding outside a legal professional community.[70]

Bruce Ackerman's work on 'constitutional moments' in the United States heavily influenced Anglophone theories of constitutional development after the early 1990s. Challenging the linear narrative of constitutional development — one in which critical periods such as the Reconstruction and the New Deal are merely 'read in' to the logic of the Constitution as it was at founding — Ackerman argued that constitutional moments reflected "self-conscious acts of constitutional creation" that rivalled that of the constitutional founding "in their scope and depth".[71] Ackerman proposed a broader understanding of revolution: one in which "large numbers of people… invest their energies and identities in the collective process of political redefinition".[72] A constitutional moment reflects such a revolution, even if the social and political order is not remade or violence is not involved. Ackerman's project significantly shaped English language constitutional theory over the coming decades, with competing accounts of the constitutional moment following over subsequent years.[73] More recently Gary Jeffrey Jacobsohn and Yaniv Roznai developed an account of the "constitutional revolution":[74] a "species of change that entails significant breaks or departures in the workings of the constitutional order".[75] Jacobsohn and Roznai also describe constitutional revolution as "a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity."[76]

Like 'landmark decisions', 'constitutional moments' and 'constitutional revolution' have definitions connected with professional cultural perception. Constitutional moments are experienced in terms of collective 'acts of constitutional creation'. 'Constitutional revolutions' similarly occur because of paradigm shifts that the legal

[68] See, eg, Balkin and Levinson (n 73).

[69] Ibid 975.

[70] Ibid 976.

[71] Bruce Ackerman, *We The People: Volume I, Foundations* (Harvard University Press, 1991) 43.

[72] Ibid 203.

[73] See, eg, Jack M Balkin and Sanford Levinson, 'Understanding the Constitutional Revolution' (2001) 87(6) *Virginia Law Review* 1045. For a fuller account of this literature see Antonia Baraggia, 'Constitutional Moment' in *Max Planck Encyclopedia of Comparative Constitutional Law* (online at 1 June 2022).

[74] Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020).

[75] Ibid; Gary Jeffrey Jacobsohn, 'Theorizing the Constitutional Revolution' (2014) 2(1) *Journal of Law and Courts* 1, 1.

[76] Jacobsohn and Roznai (n 74) 19.

professional community perceives. This shares similarities with my account of 'stability seeking' decisions, which I've defined as responsive to instability in professional cultural beliefs and narratives.

My account of 'stability seeking' decisions differs, however, in its explicit focus on 'internal' professional cultural processes of mediating constitutional development. Both Ackerman and Jaobsohn and Roznai's accounts direct their attention toward the legitimation problem of constitutional development: the challenge of explaining why the Court has approached a problem in a way that departs significantly from existing practices, without the exercise of a formal amendment procedure providing a mandate for that departure. Ackerman identifies that mechanism in periods of popular mobilisation. Legitimacy for the Court's articulation of the constitutional moment flows from a particular type of popular mandate.[77] This authorises the Court in its interpretation notwithstanding that a formal amendment procedure or formal recognition of a revolution has not occurred. While less prescriptively than Ackerman, Jacobsohn and Roznai trace the "constitutional revolution" that they theorise to current concerns in comparative constitutional studies: the notions of constituent power[78] and constitutional identity.[79] Jacobsohn and Roznai claim a "condition of disharmony" is present in the constitutional experience. This condition "functions as the engine for change".[80] Their description of disharmony is not directed so explicitly towards the competition between technical, professional approaches to constitutional interpretation that characterises the legal professional cultural condition. It is instead more general and societally situated: "Through creative interaction between divergent strands within an extant constitutional tradition, the specific components of an identity evolve as these elements play off against one another within the national historical narrative". In Jacobsohn and Roznai's account, "constitutional identity" arises through an interplay of forces aimed at introducing "greater harmony" or creating "further disharmony" into the "constitutional equation".[81]

My account of 'stability seeking' decisions is not incompatible with the above descriptions of 'constitutional moment' or 'constitutional revolution'. In focussing on 'internal' processes, however, it confines its focus to how and why a professional community perceives that moment or revolution. By explaining this in terms of beliefs and narratives, and ideas that are introduced when they are less stable, I also encompass non-incremental development driven by internal or 'endogenous' processes whose relationship to broader societal processes is less clear.

IV SUMMARY

As I have argued in earlier chapters, practices of constitutional reasoning can fit the description of an institution. Reasoning is structured by formal and informal rules and conventions, and appeals to a common practice. Cultural

[77] Ackerman, *We The People: Volume I, Foundations* (n 71) 41.

[78] Jacobsohn and Roznai (n 74) 14.

[79] Ibid 15. See also Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010).

[80] Jacobsohn and Roznai (n 74) 15.

[81] Ibid 22. Elsewhere Jacobsohn and Roznai describe disharmony that can be "manifest in the incongruities lodged within a constitution or in the gap between inscribed commitments and external realities": ibid 265.

beliefs and narratives assist in ‘plugging gaps’ in rules and conventions to ensure that members of the legal profession experience constraint of choice when interpreting legal materials.

Beliefs and narratives are reproduced within legal cultures through processes of professional socialisation. They may, however, become less entrenched and stable though the passage of time and for new professional generations. In this chapter I have described a type of judicial decision that responds to this situation of instability. ‘Stability seeking’ decisions tend to emerge when a court perceives cultural beliefs or narratives that are important constitutional method to be unstable.

In the following chapters I explore decisions that emerged following protracted professional conflict regarding method (chapter six), a threat to a certain narrative regarding institutional authority (chapter seven), the introduction of a new constitution to which existing beliefs were ill adapted (chapter eight), and a gradual loss of credibility and functionality in core narratives (chapter nine). In these cases the court introduced new ideas that were intended to either shore up, or replace, the belief whose influence was waning. As I argued in this chapter, and demonstrate in the subsequent case studies, ‘stability seeking’ decisions may not necessarily succeed in embedding their ideas as new cultural beliefs or narratives. Whether those decisions succeed depends in turn on professional cultural conditions and institutions.

‘Stability seeking’ decisions and the cultural response to them highlight the relationship between legal professional culture and constitutional development. They reveal that conflict regarding method takes place beyond courts alone. Professional culture sets the stage for courts to reason in a certain way. Courts in turn reason with an eye to professional beliefs and narratives, and the replicability of reasoning across the community. Professional culture also affects whether judicial reasoning endures and reproduces over time.

CHAPTER SIX: FUNDAMENTAL RIGHTS AND THE EARLY GERMAN FEDERAL CONSTITUTIONAL COURT

I INTRODUCTION

Novel developments in fundamental rights jurisprudence in the West German Federal Republic tell not just a story of the new Basic Law, but also of the legal professional institutional reorganisation that accompanied it. In this chapter I use that story to support my account of how legal professional institutions not only shape the development of constitutional reasoning, but also ensure the acceptance, continuity and stability of that reasoning over time. Key fundamental rights developments driven by the Federal Constitutional Court were rooted in legal professional debates and institutional conflicts of the Weimar Republic. The centralised structure that the German Federal Constitutional Court introduced provided a means of resolving those conflicts and establishing a coherent practice of constitutional reasoning, toward which other legal professional institutions could turn for guidance. The development of the early Court's fundamental rights jurisprudence illustrates how institutional interactions can influence the development, and establishment, of constitutional method. As a moment of radical institutional rearrangement the early years of the German FCC highlight how much legal professional institutions matter.

I begin by tracing the origins of crucial early German FCC fundamental rights developments in legal professional cultural conflicts of the Weimar Republic. Disagreement regarding the direction of constitutional method acquired its shape, heat and significance precisely because of the diffuse structure of authority within the Weimar Republic's legal professional culture. A new constitution with new structures and institutions, a loss of faith in 'positivist' methods and generational change within the legal profession led to a number of new methodological approaches emerging in public law theory. In the absence of a court system with an established tradition, around whose agenda public law theory could orient itself, public law or 'state law' scholars (Staatsrechtslehrer) competed to secure a monopoly over the interpretive direction of public law. I discuss the 'methods debate' that took place in the Weimar Republic with a particular focus on debates regarding the role of values in constitutional reasoning. This then frames my analysis of key FCC transformative developments related to fundamental rights — the Elfes and Lüth decisions as well as proportionality analysis — in terms of their selective engagement with Weimar legal professional debates.

I then conclude by exploring how the new legal professional institutional structure of the West German Republic provided a means of receiving, absorbing and 'smoothing' the Court's developments into a coherent institution of constitutional reasoning. I argue that the success of the Court's developments can be explained in terms of the new Republic's legal professional structure. West Germany's legal professional culture became centrifugal, with other legal professional institutions taking the FCC and its initiatives as their centre of gravity. The means through which German lawyers are educated and trained and a new dynamic between the FCC and scholarship practices — supportive, informal legal professional institutions — allowed for early fundamental rights developments to become accepted as legalist, uncontroversial principles of legal reasoning.

II THE WEIMAR REPUBLIC AND INSTABILITY

A *Legal Professional Conflict and Institutional Organisation*

The Weimar Republic's legal professional culture was marked by a high degree of conflict. It also lacked authoritative mechanism for resolving that conflict. There was no dominant legal professional institution, formal or informal, that could bring stability practices of reasoning and force their adoption by other legal professional institutions. The Weimar Republic's legal professional institutions also found themselves in increasingly unstable societal conditions. Several features of Weimar Republic's legal professional culture explain why it was susceptible to instability. Firstly, the introduction of a new constitution — particularly one that had been the product of great compromises — accelerated existing academic debates regarding interpretive method. Secondly, the dominant voices in the Weimar Republic's legal professional community responsible for interpreting the new institutions and ideas that the Weimar constitution introduced were divided. Public law professors and scholars held a more prominent role than courts in steering professional debates regarding method. They were often required to comment on the concrete political problems that a new constitution and period of political upheaval raised. The nature of scholarship practices as an institution, however, meant an absence of mechanisms designed to promote coherence and cohesion for the legal professional community. Finally, the public law debates that preoccupied the Weimar Republic's legal profession connected with a decline in legal professional support for the positivist methods that had dominated public law during the German Empire.

The Weimar Republic introduced a new constitution that exposed the legal profession to novel public law questions. It transitioned Germany's system of government from monarchy to parliamentary democracy, combined with a president, and introduced an extensive rights catalogue.[1] That constitution emerged, however, from contested political origins with varied advocates for republicanism, parliamentarism, federalism and socialism brokering compromises between themselves.[2] Questions were left open to be resolved by the parliament and the judiciary.[3] For instance, the National Assembly responsible for introducing the Weimar constitution incorporated a significant list of rights, in various forms, that expressed the myriad concerns of those who had brought the constitution together. This included traditional "liberal" rights such as protection of property and freedom of speech, social and economic rights, rights that protected "communal life" such as family and marriage, and rights that were held by groups or entities such as public institutions and churches.[4] The National Assembly left open how such rights were to be applied.[5] The "details" of a right to unemployment benefits, for instance,

[1] Michael Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3. Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914 bis 1945, vol 3* (C. H. Beck, 1999) 80–6.

[2] Ibid 90.

[3] Christoph Gusy, *100 Jahre Weimarer Verfassung: Eine gute Verfassung in schlechter Zeit* (Mohr Siebeck, 2018) 9.

[4] Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press, 1997) 73–74.

[5] Ibid 73–8.

were left to be determined by subsequent laws of the Reich.[6] The terms on which the president could rely upon the article 48 presidential emergency powers clause were also left vague, granting the power where "public safety and order" were "considerably disturbed or endangered".[7]

The uncertainty persisting in the Republic's constitution was compounded by the pace of political, social and economic change in the early years of the Weimar Republic.[8] This cast public law questions before legal professional institutions that had not been anticipated when the constitution was drafted, nor for which existing public law theory was equipped. From its origins the new Republic found itself in a state of chaos, requiring significant intervention of the state in society and the economy.[9] Both the revolutionary right and revolutionary left rejected the new constitution. The first president, social democrat Friedrich Ebert, responded to resulting political upheaval by relying on the article 48 emergency powers clause. Emergency powers were also used to respond to hyperinflation and economic crisis in 1922 and 1923, allowing the president to adopt legislative and budgetary powers.[10]

Because the Weimar constitutional drafting process involved complex compromises, these problems did not have easy answers. The intervention of the president in economic matters was an instance of this. Lawyers questioned whether the impoverishment of certain social groups through inflation and currency revaluation amounted to discrimination, violating the constitutional right to equality. Others argued it had amounted to appropriation without compensation, also in breach of constitutional norms.[11] Similarly, political instability within the Reichstag increasingly shifted the balance of power toward the president. Although the president was intended to to be a counterweight to the Reichstag, the lack of stability within the parliament and its inability to reach compromises or form coalitions foisted a greater degree of power on the president by default.[12] The Weimar Republic didn't have established practices of constitutional reasoning that could answer the novel questions — like the role of the president — raised both by the constitution and by the unprecedented political and economic circumstances in which it found itself. At the same time the legal profession needed to answer those novel questions and develop those answers into replicable practices of constitutional reasoning. This experience of urgency and instability was in some ways more significant for the intellectual currents of the Weimar Republic's legal professional culture

[6] *Die Verfassungs des Deutschen Reichts 1919* [Constitution of the German Empire] art 38; ibid 74.

[7] *Die Verfassungs des Deutschen Reichts 1919* [Constitution of the German Empire] art 38. See also Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 116.

[8] See, eg, Jacobson and Schlink's argument that "[t]he fact that the short history of the Weimar Republic was above all a history of its crises was not primarily the fault of the Constitution": 'Introduction. Constitutional Crisis: The German and the American Experience' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis*, tr Belinda Cooper (University of California Press, 2000) 1, 11.

[9] See, eg, Caldwell (n 4) 6; Jacobson and Schlink (n 8) 1.

[10] Caldwell (n 4) 5; Jacobson and Schlink (n 8) 13.

[11] Caldwell (n 4) 6.

[12] Jacobson and Schlink (n 8) 12–13.

than the concrete questions themselves.[13] Even during periods when the economic and political turmoil of the Weimar Republic calmed, the experience led state law scholars to question received tenets of the theory of the state.[14]

In earlier chapters I explored the role of superior courts in coordinating practices of reasoning across a professional community. Courts in the Weimar Republic were unable to fully embrace this role. They lacked clear jurisdiction for many of the burning public law questions that preoccupied the Weimar Republic. The National Assembly only explicitly provided the Staatsgerichtshof[15] with competence for federal disputes and complaints against the president, chancellor and ministers.[16] Its explicit competencies were less than those of the contemporary Austrian Constitutional Court.[17] It issued judgments rarely and was restrained when it did so.[18] It consisted of the president of the Reichsgericht and a panel of seven other judges. A separate Reichsgericht — a vestige of the German Empire — was competent to express an opinion as to whether Länder legislation was compatible with federal legislation.[19] Fundamental rights in the Weimar constitution only explicitly bound Länder legislatures.[20] Their status at the federal level was more complex.[21] They only clearly bound executives[22] and their relevance to the legislature was debated.[23] Although superior courts became steadily more active as crises in the Weimar Republic

[13] Ibid 4. Jacobson and Schlink argue that "[t]he transformations [in state and society] themselves are less interesting than the experiences they occasioned, and more interesting than the experiences is the processes of self-examination and re-examination in the theory of the law of the state that the experiences awakened."

[14] Ibid; Caldwell (n 4) 6.

[15] I have avoided translating this term as 'Constitutional Court' to retain the emphasis in the original German on a court that adjudicated laws of the *state* rather than of a *constitution* (Verfassung), a term which forms part of the title of the modern Federal German Constitutional Court. While the Staatsgerichtshoft was one of the two courts closest to a tribunal for constitutional disputes during the Weimar Republic, its jurisdiction for many questions of a constitutional quality was unclear. Arthur Jacobson and Bernard Schlink argue that the term 'Verfassungsrecht' tends to be preferred by the political "left" because it emphasises principles of a law animated by constitutional principles. 'Staatsrecht', in contrast, does not foreclose "the possibility of a law of the state animated by [something] other than constitutional principles": Jacobson and Schlink (n 8) 2.

[16] Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 117. See also Jörg Berkemann, 'Der Staatsgerichtshof und die Verfassungsrechtliche: Rechtsprechung des Reichsgerichts 1919–1933' (2016) 17(1) *Jahrbuch der Juristischen* Zeitgeschichte 120.

[17] Berkemann (n 16) 123; Stolleis, *Geschichte Des Öffentlichen Rechts in Deutschland Band 3* (n 1) 117.

[18] Bernhard Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit' (1989) 28(2) *Der Staat* 161, 166.

[19] Berkemann (n 16) 143.

[20] Horst Dreier, 'Grundrechtsrepublik Weimar' in Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie: Eine Anatomie der Weimarer Reichsverfassung* (C.H. Beck, 2018) 175, 186–7.

[21] Ibid 187–91; Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 117; Caldwell (n 4) 73. I explore this further below.

[22] See Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 117; Caldwell (n 4) 73.

[23] Gusy (n 3) 241; Dreier (n 20).

mounted, their jurisdiction in doing so was unclear and generated further debate within the Republic's legal professional culture.[24]

In the absence of a court system that could provide a 'steering' function for constitutional reasoning practices during a period of turmoil, the space was opened for public law scholars. Public law scholars were the 'honoratiores' of the Weimar Republic's legal professional culture: actors who possessed a high degree of prestige and credibility amongst other members of that culture.[25] That burning questions of the Weimar Republic — the role of the president, the correct role and legitimacy of judicial review, the role of the constitution and of rights review — could not be resolved by courts, pushed public law scholars into even greater prominence. The ability of courts to review legislation for their constitutional compatibility was a question debated by state law scholars, not courts.[26] Public law scholars were increasingly called upon to provide answers to the concrete problems attending the Republic — not courts.[27] In doing so, state law scholars became the 'face' of the legal profession, addressing themselves directly to the public and the educated middle class.[28]

In the absence of court system that could set the agenda, scholarship practices were ill suited to providing the guidance and coherence necessary to resolve public law problems and consolidate new approaches to reasoning. The nature of legal theory and legal scholarship can partly explain a lack of capacity in this regard. The formal and informal rules that tend to characterise the academy as an institution — those that constrain and structure the behaviour of scholars — are directed toward producing knowledge and verifying and testing that knowledge between peers. Knowledge institutions interact with other legal professional institutions in both supportive and critical ways.[29] That production of knowledge does not occur in a vacuum; scholarship can also be produced with an eye to following or synthesising the work of courts, as it does in contemporary German legal professional culture. However, the institutional rules that structure those processes are not directed toward producing collective coherence or resolving disagreement regarding the correct legal solution for a problem. Courts involve formalised processes for resolving disagreement in a way that other legal professional institutions do not.[30]

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[24] See, eg, Gertrude Lübbe-Wolff, 'Safeguards of Civil and Constitutional Rights — The Debate on the Role of the Reichsgericht' in Hermann Wellenreuther (ed), *German and American Constitutional Thought: Contexts, Interaction, and Historical Realities* (Berg, 1990) 353, 359–65.

[25] I explored this idea earlier in chapter two, including in relation to the changing role of German public law professors over the last century.

[26] Jacobson and Schlink (n 8) 11; Caldwell (n 4) 81; Stolleis, *Geschichte Des Öffentlichen Rechts in Deutschland Band 3* (n 1) 117.

[27] Christoph Möllers, 'Der Methodenstreit als Politischer Generationenkonflikt: Ein Angebot zur Deutung der Weimarer Staatsrechtslehre' (2004) 43(3) *Der Staat* 399, 399.

[28] Schlink (n 18) 166.

[29] I explored this idea in chapter four.

[30] I explored this idea in chapter five.

The Weimar Republic provides examples of crises, creating public law problems, that legal theorists could not resolve using existing forms of constitutional reasoning, 'positivist' methods or through recourse to a binding court that could authoritatively 'steer' reasoning into a new terrain. An early example arose for instance in relation to the role of the state in stabilising the Weimar Republic's monetary system. The first world war had inflicted significant damage on German industry and the means of production and the Weimar Republic owed significant reparations to the victors. The war had been financed in a way that destabilised the German monetary system and created hyperinflation. To stabilise hyperinflation, the government requested and received an enabling law that transferred legislative power to it and allowed it to violate fundamental rights. It banned the revaluation of currency in a way that particularly impacted the German middle class. In doing so, it overrode an earlier decision of the Reichsgericht that would have potentially given rise to millions of claims for violation of fundamental rights to property.[31] The seven members of the directorate of the Judges' Association of the Reichsgericht in turn issued a letter threating to nullify aspects of those laws for breaching the right of equality due to their disproportionate impact on the German middle class.[32] It triggered a heated debate regarding the nature of constitutional equality protections between public law scholars.[33] Gerhard Anschütz argued for a procedural interpretation while Heinrich Triepel argued for a substantive meaning that could be enforced through judicial review, modelled in the style of the United States Supreme Court. In doing so he also relied on theories of natural law. Erich Kaufmann also relied upon theories of natural law but concluded that constitutional equality protections entailed a redistributive dimension.[34] This produced a different practical outcome to the problem than that favoured by Triepel. In addition, the government of the day revisited the revaluation of currency in response to the letter.[35] This further escalated debates regarding the ability of superior courts to review decisions of the president or the Reichstag for their constitutionality.

To the extent of their engagement with public law questions, the Weimar Republic's legal professional institutions were in flux. The jurisdiction of courts was unclear, leading court decisions to generate more controversy than they resolved. Public law scholars therefore assumed a role in responding to novel public law challenges that a more authoritative, centralised court system or stable practices of reasoning would have foreclosed. Because there was no established answer to novel constitutional questions, new forms of argument became available to public law scholars. These could in turn resonate within the Weimar Republic's legal professional culture and society more generally because of crisis conditions. And yet those public law scholars could not create a new practice of reasoning to compensate for a lack of alternative institutional guidance. Mechanisms designed to bring more coherence to public scholarship — such as the creation of the Association of Public Law Scholars ("Vereinigung

[31] Caldwell (n 4) 79–80.

[32] Ibid 148.

[33] Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 189–92.

[34] Caldwell (n 4) 148–53.

[35] Ibid 80; Peter C Caldwell and William Scheuerman, *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic* (Humanities Press, 2000) 140.

der Deutschen Staatsrechtslehrer") — did not resolve those disagreements but instead created a platform for those disagreements to consolidate.[36]

B *Collapse of the 'Positivist' Consensus and Ensuing Methods Debate*

As I explored in chapter two, a legalist tradition of public law reasoning — statutory positivism — could develop during the German Empire because of a high degree of stability in its political and constitutional structure and the clarity and stability of legal professional institutional roles. Statutory positivism purported to interpret norms, including constitutional norms, according to the "will of the state".[37] Figures such as Carl Friedrich von Gerber and Paul Laband adopted methods that had developed in private law reasoning and applied them to the interpretation of statutes and constitutional provisions. These methods excluded what the legal professional culture of the time regarded as extra-legal, historical political or philosophical considerations.[38] More contemporary scholarship has argued that statutory positivism nonetheless affirmed certain political values.[39] Michael Wrase, for instance, argues statutory positivism maintained the prevailing political power structure of the late German Empire, affirming the power of the monarch in spite of constitutional norms designed to temper it.[40] It could conform to the prescriptions of legalism — insisting on a hard distinction between legal and extra-legal considerations — because it affirmed a status quo.[41]

The German Empire's legal professional culture was influenced by certain conditions. In addition to the style of positivist reasoning — "rationalistic, formal, and scientific"[42] — the debates and questions around which methods formed were relatively stable. The constitution was relatively stable and did not present so great a break from the previous political order. A balance between monarchical and bourgeois interests was precarious, but one that was

[36] See eg, Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 158, 186-92. See also the argument of Christoph Schönberger, who argues that Heinrich Triepel, one of the initial founders of the Association of Public Law Scholars, was motivated to preserve the 'national-conservative establishment' in universities: Christoph Schönberger, 'Ein sonderbares Kind der Revolution: Die Gründung der Vereinigung und die Weimarer Zeit' in Pascale Cancik et al (eds), *Streitsache Staat: Die Vereinigung der Deutschen Staatsrechtslehrer 1922 – 2022 im Auftrag der Vereinigung der Deutschen Staatsrechtslehrer e.V.* (Mohr Siebeck 2022) 3, 11..

[37] Caldwell (n 4) 4.

[38] Michael Wrase, 'Die Methode der Grundrechtsinterpretation' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 339, 353.

[39] See Möllers, 'Der Methodenstreit als Politischer Generationenkonflikt' (n 27) 404.

[40] Wrase, 'Die Methode der Grundrechtsinterpretation' (n 38) 353.

[41] Ibid. See also Möllers, 'Der Methodenstreit als Politischer Generationenkonflikt' (n 27) 404; Caldwell (n 4) 18–20; Frieder Günther, *Denken vom Staat her. Die Bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949 - 1970* (Oldenbourg Wissenschaftsverlag, 2004) 30–3. In a conflict between the monarch and representative assembly regarding the constitutional requirement that both pass budgetary statutes together, Laband notably relied upon an ostensibly "rationalistic" and "formal" interpretation to argue the constitutional norm did not apply.

[42] Caldwell (n 4) 19.

assisted by the positivist insistence that constitutional reasoning could be 'value free' and apolitical.[43] Political and economic change was also relatively stable. This created the conditions for a tradition of reasoning to form and the experience of external constraint that I described in earlier chapters to inform the interpretation of public law norms. Those conditions began to crumble around the turn of the century. A new generation of public lawyers emerged who had been socialised in the convictions of positivism[44] but were also educated around the time that emerging political dynamics — like the tension between elected representatives and the monarch — posed problems that positivist methods struggled to resolve.[45] That new generation also carried with them the broader social and intellectual currents of their time.[46] Key public law scholars such as Carl Schmitt, Rudolf Smend and Erich Kaufmann published works that disputed the ability of legal materials alone to constrain judicial choice.[47] In Stefan Korioth's words, "the Weimar discussion took up issues and provided answers to questions that were of longer standing."[48] Frieder Günther argues that a fissure grew between the worldview of legal positivism, which tended to prop up monarchical power and the status quo, and an emerging political and social reality that required the state to transform its role, particularly as it intervened in social and economic affairs and the administrative state expanded.[49]

The Weimar Republic's new constitution collapsed what remained of the positivist consensus because it exploded the conditions on which it rested. Positivist methods — a purportedly neutral and technical exposition of statutes or constitutional norms — could not answer the most important constitutional questions that animated the Weimar Republic. That inability can be explained in terms of my theory: new public law problems appeared for the Republic, were exacerbated by a new and contradictory constitutional text and emerged at a pace at which the legal profession could not adapt its tradition of public law reasoning. The Weimar Republic's professional culture lost its institutionalised, authoritative framework of reasoning. The 'anti-positivist' methods that emerged in its aftermath, spearheaded by Weimar public law scholars, notably sought to provide comprehensive frameworks that could perform a stabilising function in social, economic and political crisis conditions. The frameworks suggested by Weimar theorists were alternatives to positivism. Key debates emerged around the role of the president and the nature of sovereignty, with Carl Schmitt's work championing the clarity and decisiveness a

[43] Stefan Korioth, 'The Shattering of Methods in Late Wilhelmine Germany: Introduction' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press, 2000) 41, 43.

[44] See generally Möllers, 'Der Methodenstreit als Politischer Generationenkonflikt' (n 27).

[45] See generally Stefan Korioth, 'Erschütterungen des Staatsrechtlichen Positivismus im Ausgehenden Kaiserreich: Anmerkungen zu frühen Arbeiten von Carl Schmitt, Rudolf Smend und Erich Kaufmann' (1992) 117(2) *Archiv des öffentlichen Rechts* 212.

[46] Stolleis (n 1)

[47] Korioth, 'Erschütterungen' (n 45) 217–28.

[48] Korioth, 'The Shattering of Methods in Late Wilhelmine Germany' (n 43) 41.

[49] Günther, *Denken vom Staat her* (n 41) 31–3.

sovereign president could provide.[50] Kelsen, in contrast, found that stability in a constitutional court — a legal professional conflict I explored more fully in chapter four.

The role of values in constitutional reasoning emerged as an academic debate for similar reasons. The anti-positivist theorists rejected the possibility that purely 'legal' materials could guide constitutional reasoning without recourse to value judgments. Theorists turned to how such values should be incorporated and theorised in constitutional reasoning and the stabilising purpose to which they should be applied. Rudolf Smend's "integration theory" sought to use values in constitutional reasoning to promote harmony and cohesion.[51] It posited the existence of an objectively existing system of values from which the constitution's legitimacy derived and that should be used for constitutional interpretation.[52] Even though Smend's theory and work never directly addressed the concrete problems attending the Republic,[53] it was attractive. It promised a comprehensive theory and method that held out the promise of unity and stability in an unstable time. Smend later stated his theory had been prompted by the political chaos of the "sickly constitutional state of the 1920s…".[54] Judicial review was similarly debated, especially after the Reichsgericht began to claim a power to review legislation for compatibility with constitutional norms.[55] Rather than reaching an institutionalised resolution, these debates were cut short after the constitutional framework collapsed in 1933.[56]

III 'STABILITY SEEKING' DECISIONS

A *The First German Federal Constitutional Court*

Literature elsewhere has explored the development of key fundamental rights principles in the context of West Germany's broader societal culture. A common narrative connects the success of the FCC in pioneering those

[50] Carl Schmitt, *Verfassungslehre* (Duncker & Humblot, 11th ed, 2017). Schmitt critiqued the Weimar Constitution for a lack of stability – see discussion in Jeffrey Seitzer, 'Carl Schmitt's Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis' in David Dyzenhaus (ed), *Law as Politics: Carl Schmit's Critique of Liberalism* 281, 287–93.

[51] Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 174–5.

[52] Paolo Ramadori, 'Grundrechte als Objektive Werte: Das Lüth-Urteil (1)' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 42–3; Arne Ruppert, 'Geschlossene Wertordnung? Zur Grundrechtstheorie Rudolf Smends' in Thomas Henne and Arne Riedlinger (eds), *Das Lüth-Urteil aus (Rechts-) Historischer Sicht: Die Konflikte um Veit Harlan und die Grundrechtsjudikaturs des Bundesverfassungsgerichts* (Berliner Wissenschafts-Verlag 2005) 327.

[53] Stefan Korioth, 'Rudolf Smend: Introduction' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis*, tr Belinda Cooper (University of California Press, 2000) 207, 212.

[54] Ibid 210.

[55] Caldwell (n 4) 153–5.

[56] Caldwell and Scheuerman (n 35) 155; Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland Band 3* (n 1) 316–25.

developments to West Germany's 'pre-democratic' culture in the wake of the second world war.[57] It profited from a vacuum of institutional authority, a distrust of parliaments and faith in expertise — all ideas that I explored earlier in chapter four. The condition in which Germany's legal professional institutions found themselves in the post-war era provide another explanation that complements that literature's narrative. Two legal professional institutional conditions in particular are relevant to understanding the reception and treatment of ideas from the Weimar Republic and their transformation into constitutional doctrine.

Firstly, the generation of legal thinkers that emerged after the war — academics, practitioners and the justices of the FCC — had been professionally socialised during the Weimar Republic alongside the collapse of faith in positivism.[58] Anti-positivist methods in the Weimar Republic 'sought stability' in the face of positivism's collapse. They provided answers to novel questions that positivist methods within the German Empire's established tradition of constitutional reasoning could not. Anti-positivist methods were therefore the instrument of choice for the post-war generation of legal professionals tasked with bringing stability to practices of constitutional reasoning and establishing a new tradition. Narratives that had supported a departure from positivist methods in the Weimar Republic were repurposed to explain how public law had been appropriated by the National Socialist regime. The complicity of the legal profession and judiciary under National Socialism was attributed to the purported neutrality of positivist methods — of lawyers and judges seamlessly applying norms without further regard to their legitimacy or authority.[59] It was common in the 1950s for members of the legal profession to lay the intellectual blame on public law 'positivists' for National Socialism's accession to power because positivists rejected normative questions.[60]

The first judges of the FCC had also been exposed to intellectual currents and experiences under National Socialism that affected their reception of Weimar ideas. The Court was composed primarily of those who had opposed, or been victims of, the National Socialist regime and had been in exile in other legal systems.[61] A smaller

[57] See, eg, Christoph Schönberger, 'Anmerkungen zu Kalrsruhe' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, 2011) 9, 44. I explored this in chapter four.

[58] Michael Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland. Band 4. Staats- und Verwaltungsrechtswissenschaft in West und Ost 1945-1990* (C.H Beck, 2012) 147. See also Jo Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford University Press, 2013) 69: "Post-war constitutional scholarship was not only incoherent, it was also predominantly anti-positive…"

[59] See Oliver Lepsius, *Die Gegensatzaufhebende Begriffsbildung: Methodenentwicklung in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus* (C.H. Beck, 1994); Dominik Rennert, 'Die Verdrängte Werttheorie und ihre Historisierung: Zu "Lüth" und den Eigenheiten bundesrepublikanischer Grundrechtstheorie' (2014) 53(1) *Der Staat* 31, 39.

[60] Thomas Darnstädt, *Verschlusssache Kalrsruhe. Die Internen Akten des Bundesverfassungsgerichts* (Piper Verlag GmbH, 2018) 148. Literature has since reflected on the affinity between legal methods applied under National Socialism and natural law methods. See, eg, Fabian Wittreck, *Nationalsozialistische Rechtslehre und Naturrecht: Affinität und Aversion* (Mohr Siebeck, 2008); Lepsius, *Die Gegensatzaufhebende Begriffsbildung: Methodenentwicklung in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus* (n 553). Oliver Lepsius for instance argues that the Weimar Republic's loss of legalist content and 'legal' categories meant the legal professional had no standards against which it could measure, or condemn, National Socialism's assumption of power: (n 59) 384.

[61] Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland. Band 4* (n 58) 153–4.

set of its justices again had survived National Socialism through the protection that their conservative and religious values had afforded.[62] This created a complex mix of experiences through which Weimar anti-positivist ideas would filter: a rejection of totalitarianism, a sceptical stance toward the worldview of "liberalism", a view that parliamentary democracy was inexperienced and a conservative, quasi-religious understanding of the role of marriage and family.[63]

Secondly, the establishment of the FCC in 1951 itself recalibrated the relationship between institutions within German legal professional culture. Unlike the Staatsgerichtshof and the Reichsgericht of the Weimar Republic, the competences of the FCC were clear even if the explicit expansion of those competences was controversial from a normative perspective amongst some public law scholars.[64] The FCC provided a centralised structure from which key 'stability seeking' decisions could address the crucial questions that the West German Republic faced. To a certain extent post-war societal and economic conditions were friendlier to public law questions and the stability of reasoning practices.[65] The critical problems of inflation, monetary reform and socialist influence within the legislature that had provoked methodological conflict within the Weimar Republic did not affect the post-war period so strongly. Many of the questions that also arose for the legal profession had been thrashed out during the Weimar period and treated generally by the Parliamentary Council, such as the role of judicial review. But the Court was required to resolve questions that were controversial within other legal professional institutions such as the treatment of former public servants — including judges — who had collaborated with National Socialism.[66] The relationship between the FCC and other courts was also uncertain — a question that the Court partly resolved through its self-appointment as a constitutional organ and partly through fundamental rights jurisprudence.[67]

It's worth noting that post-war German legal professional culture didn't adopt the FCC as its 'centre of gravity' overnight. Public law scholars continued to play a significant role in developing constitutional ideas that the Court adopted. That role even became stronger during the 1960s,[68] before public law scholarship was 'dethroned' in later decades.[69] But a centralised court can explain how a very particular approach to constitutional method originating in the Weimar Republic and popular in the 1950s — one allied with natural law — became adopted

[62] Ibid 154.

[63] Ibid.

[64] See, eg, Frieder Günther, 'Wer Beeinflussst Hier Wen? Die Westdeutsche Staatsrechtslehre und das Bundesverfassungsgericht während der 1950er und 1960er' in Robert Chr van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im Politischen System* (V.S Verlag für Sozialwissenschaften, 2006) 129, 130.

[65] See, eg, Gabriele Metzler, 'Stabilisierung, Normalisierung, Modernisierung: Die Bundesrepublik in den 1950er Jahren' 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-Wissenschaftsverlag, 2005) 25, 27–39.

[66] Günther, 'Wer Beeinflusst Hier Wen?' (n 64) 132; Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland. Band 4* (n 58) 147.

[67] I explored this idea earlier in chapter four.

[68] Günther, 'Wer Beeinflusst Hier Wen?' (n 64) 129–130.

[69] Schlink, 'Die Entthronung der Staatsrechtswissenschaft' (n 18). I explore this further below.

and orthodox long after the conditions that supported its popularity receded. At the time that the Court delivered its first foundational decisions on fundamental rights — Elfes and Lüth — public law scholars had largely coalesced around natural law methods.[70] Two 'camps' of theory had formed, consisting of those who subscribed to Smend's integration theory and a smaller group that formed around Schmitt's ideas.[71] The Smend school viewed the Basic Law as a vehicle for political and societal integration.[72] Its 'integration' method interpreted constitutional norms by drawing on considerations from sociology, ethics and historical conditions.[73] In its Weimar origins, Smend's 'integration doctrine' and 'values philosophy'' had tended towards anti-pluralism.[74] Smend had gone so far as to express occasional admiration for Italian fascism.[75] Having never supported the National Socialist administration, Smend was nonetheless free from taint in the post-war years.[76] The post-war public law scholars who adopted his ideas reinterpreted them in a "liberal, Western" light, influenced by "an American accent".[77] Catholic public law scholars also dominated the academy, loaning further support to the prominence of natural law.[78] The minority that organised around Carl Schmitt criticised the approach of the Smend school to 'values reasoning', arguing that it involved too many subjective judgments on the part of the judge which in turn undermined the predictability and stability of constitutional reasoning.[79]

B *The Elfes Decision (1957)*

[70] Günther, 'Wer Beeinflusst Hier Wen?' (n 64) 134.

[71] Günther, *Denken vom Staat her* (n 41) 93–121. For a more detailed description of other 'camps' within constitutional scholarship, see Michael Stolleis, 'Die Staatsrechtslehrer der Fünfziger Jahre' in Thomas Henne and Arne Riedlinger (eds), *Zur Historisierung der Rechtsprechung des Bundesverfassungsgerichts: Ein Programm und seine Folgen* (Berliner-Wissenschaftsverlag, 2005) 293.

[72] Günther, *Denken vom Staat her* (n 41) 159–191.

[73] See, eg, Rudolf Smend, 'Die Vereinigung der Deutschen Staatsrechtslehrer und der Richtungsstreit' in Ehmke Horst et al (eds), *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (Duncker & Humblot, 1973) 575. See also discussion in Rennert (n 59) 36.

[74] See Christoph Möllers, 'Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag, 2011) 281, 300.

[75] An early attempt by theorists after 1933 to use Smend's concepts to explain the Nazi state had notably failed. Smend never endorsed these attempts. Korioth, 'Rudolf Smend: Introduction' (n 53) 211.

[76] Rennert (n 59) 39.

[77] Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951 - 2001* (Oxford University Press, 2015) 59. See also Günther, *Denken vom Staat her* (n 41) 168.

[78] Günther, *Denken vom Staat her* (n 41) 192–3.

[79] Ibid 129.

The Federal Constitutional Court was influenced by the "natural law renaissance" and associated "liberation" from positivism that emerged in the early years of the new Republic.[80] In practical terms, this meant that it adopted the ideas of the Smend school that I explored above. It appealed to 'values' existing independently of a body of positive law created by a text or Court precedent. This approach to reasoning then translated into certain doctrinal consequences. In the Elfes decision[81] (1957) the Court expanded the scope of fundamental rights protection to all possible human activity; in the Lüth decision[82] (1958) it extended that protection to other spheres of law and private relationships. The two decisions should be read together.[83] From the perspective of the new Republic's legal professional culture, the greatest significance of both judgments lay in their consequences for the Court's institutional power. Those judgments — alongside the gradual development of the Court's proportionality doctrine — created the doctrinal basis for the Court's subsequent development. And once that doctrinal basis was established, the Court could appeal to its own institutionalised authority, rather than the values themselves.

A West German politician, Wilhelm Elfes, sought to renew his passport in 1953. He had been a vocal critic of early West German policies at events within and outside of Germany, particularly relating to defence and reunification policies. The passport office refused Elfes' application. It relied on a provision of the Passport Acts that required it to refuse the passport where there were facts justifying an assumption that the holder of the passport endangered national security. Elfes unsuccessfully challenged that refusal in the Düsseldorf administrative court and again in a superior administrative court in Münster. He ultimately lodged a complaint with the German Federal Constitutional Court, arguing that the refusal breached his right of freedom of movement protected by article 11 and a "general freedom of action" protected by article 2(1).

The Court found that article 11 did not protect a right to leave Germany. Article 11 relates expressly to movement "within the Federal area".[84] But it did accept Elfes' argument that article 2(1) encompassed the right to leave the country as part of "free development of personality" within article 2(1).[85] It nonetheless concluded that there was a legal foundation for restricting that right.[86] To this extent the decision was an odd one. It was not necessary for

[80] See, eg, Helmut Coing, *Die Obersten Grundsätze des Rechts: Ein Versuch zur Neubegründung des Naturrechts* (Lambert Schneider, 1947). Coing observed "the fact that jrusprudence has to free itself from positivism and turn back to the concept of law that is bound to the legal idea has become so self-evident today, that one almost hesitates to say it": at 1. [Daß die Rechtswissenschaft sich vom Positivismus befreien und wieder einer an die Rechtsidee gebundenen Auffassung vom Recht zuwenden müsese, ist heute eine Selbstverständlichkeit geworden, die man sich beinahe scheut auszusprechen.]

[81] *Elfes*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 253/56, 16 January 1957 reported in (1957) 6 BVerfGE 32.

[82] *Lüth*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198.

[83] Oliver Lepsius, 'Die Maßstabsetzende Gewalt' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine Kritische Bilanz Nach Sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag, 2011) 159, 182.

[84] *Elfes*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 253/56, 16 January 1957 reported in (1957) 6 BVerfGE 32, 35.

[85] Ibid 36.

[86] Ibid 43-4.

the Court to rule on the scope of article 2(1). Theodor Ritterspach, one of the first justices of the Court, proposed a more expansive reading. He would later explain that the Court had felt a responsibility at its beginning to lay foundations for subsequent constitutional developments.[87] Ritterspach persuaded the rest of the Senate to adopt the formulation of public law theorist Günter Dürig.[88] According to Dürig article 2(1) was the main freedom or "mother freedom" of the provisions that followed, [89] all of whjch built a closed system of values. Dürig's approach notably resembled Smend's theory in this regard. [90]

In taking an expansive reading, the Court settled an ongoing controversy within legal scholarship that had reached a high point toward the end of the 1950s.[91] The Parliamentary Council had debated whether that protection should apply to every single action — a 'catch all' provision (an "Auffanggrundrecht") for freedoms not specifically protected by other fundamental rights — or a right which only extended to 'core' freedoms related to the personality (the "Persönlichkeitskernthese").[92] Two early public lawyers, Hermann von Mangoldt and Kurt Georg Wenickes, had argued for the former, broader reading of the provision. Both had also been involved with advising the Parliamentary Council.[93] Other courts, including the Bundesgerichsthof, had expressed opinions that disagreed.[94] Dürig's reading was the broadest, interpreting article 2(1) as a more concrete expression of article 1 and the protection of human dignity.

On one view, the disagreement between these camps was superficial. The overall consensus was for an approach aligned with natural law methods or 'antipositivism'. The interpretation of article 2(1) should realise a system of values that the Basic Law incorporated. Faith in objectively existing values behind a constitution had been a unity ticket for many public law scholars during the Weimar Republic as well. Günter Dürig had explicitly argued that article 2(1), like the protection of human dignity in article 1, reflected a Christian philosophical tradition.[95] The narrower reading of article 2(1) that confined it to core aspects of human behaviour was also grounded in religious,

[87] Darnstädt (n 60) 147. See also Dieter Grimm, 'Theodor Ritterspach' (2012) 60(1) *Jahrbuch des öffentlichen Rechts* 351.

[88] Darnstädt (n 60) 149. Ritterspach's proposal was nonetheless partly modified to appease justices who opposed natural law ideas: at 152. The original draft judgment, now available as 60 years have passed since the decision, had proposed deciding the matter on the basis of freedom of movement and deciding in Elfes' favour. For a detailed discussion of this development see Dieter Grimm, *Verfassungsgerichtsbarkeit* (Suhrkamp, 2021) 212–27.

[89] Hannah Birkenkötter, 'Art. 2. Abs. 1 GG als Allgemeines Freiheitsrecht und Auffanggrundrecht: Das Elfes-Urteil' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien Zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 9, 21–2.

[90] Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland. Band 4* (n 58) 139. Dürig's concept of a closed system of values "behind" the text resembled that of Smend and integrated both Christian and natural law thought.

[91] See, eg, Birkenkötter (n 89) 11–24.

[92] This interpretation was championed by Hans Peters: ibid 17.

[93] Ibid 11–14.

[94] Ibid 24–5.

[95] Ibid 21; Stolleis, *Geschichte Des Öffentlichen Rechts in Deutschland. Band 4* (n 58) 138–9.

natural law explanations.[96] But the consequences that the Court derived from the 'values order' behind the constitution performed a more controversial function. The Court extended the protection of article 2(1) to interference from any public power.[97] This effectively expanded its jurisdiction to any decision or act in public law.[98] The Court did not need to reason in this way to resolve the case in front of it. Its behaviour and approach to reasoning contrasts with that of the Bundesgerichsthof — the Supreme Court in private law cases — which reasons to resolve the case in front of it.[99] Ritterspach later noted that the way in which the Court gave reasons was influenced by an awareness that it would be read and critiqued by constitutional scholars.[100] In this way, the Court's style of giving reasons was also seeking to bring scholarship practices – other legal professional institutions — into a supportive relationship.

C *The Lüth Decision (1958)*

The Court also relied on Smend's ideas in the Lüth decision. In certain respects the subject matter in the Lüth proceedings more directly struck a nerve with the concerns of the Federal Constitutional Court.[101] The decision concerned a challenge to an injunction applied against Erich Lüth, a German writer and film director. In 1950 Lüth had publicly called for a boycott of a new film released by Veit Harlan, a film director responsible for anti-Semitic propaganda under the National Socialist regime. Harlan and his producer had successfully obtained an injunction against Lüth in the Hamburg District Court to restrain Lüth from calling for the boycott. Lüth sought the assistance of SPD politician Adolf Arndt and his assistant Wilhelm Hennis — a former student of Rudolf Smend — to quash the Hamburg Court's judgment in the Federal Constitutional Court.

The Court delivered its judgment in 1958 after a delay of seven years.[102] Theodor Ritterspach again heavily influenced the doctrinal formulation of the decision, but this time as the justice responsible for first drafting the

[96] See Birkenkötter (n 89) 14–15; Hans-Ulrich Evers, 'Review: Zur Auslegung von Art. 2 Abs. I des Grundgesetzes, insbesondere zur Persönlichkeitskerntheorie' (1965) 90(1) *Archiv des öffentlichen Rechts* 88.

[97] *Elfes*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 253/56, 16 January 1957 reported in (1957) 6 BVerfGE 32, 41.

[98] Birkenkötter (n 89) 28–9.

[99] Darnstädt (n 60) 135–6.

[100] Theodor Ritterspach, 'Erinnerungen an die Anfänge des Bundesverfassungsgericht: Festschrift für Ernst Benda zum 70. Geburtstag' in Eckart Klein (ed), *Grundrechte, Soziale Ordnung und Verfassungsgerichtsbarkeit : Festschrift für Ernst Benda zum 70. Geburtstag* (C. F. Müller) 201, 207.

[101] See Thomas Henne, '„Von 0 Auf Lüth in 6 ½ Jahren" Zu den prägenden Faktoren der Grundsatzentscheidung' 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-Wissenschaftsverlag, 2005) 197.

[102] Collings (n 77).

judgment.[103] The Lüth decision was responsible for three doctrinal consequences. Firstly, the Court stated that the Basic Law's fundamental rights provisions established an 'objective order of values' to which all state power is subject. To this end, the Court adopted Hennis' formulation of Smend's values theory. Hennis had explicitly relied on Smend's work in his submissions because of the weight this would carry with the Court, socialised as it had been in the Weimar Republic. Hennis nonetheless modified certain ideas to give them a more clearly liberal bent.[104]

Secondly, the Court expanded the scope of the system of values to private law norms, establishing the 'horizontal' or 'Drittwirkung' application of rights. Constitutional rights therefore apply in private disputes between individual citizens. This idea itself had not emerged during the Weimar Republic though it again can be connected with Smend's integration theory.[105] The consensus in the Weimar Republic was that rights applied negatively against the state.[106] Smend nonetheless suggested that fundamental rights influence the relationship between private individuals and could influence the interpretation of private law norms.[107] These ideas were taken up in the post-war period, with Hans-Carl Nipperdey arguing that they directly applied to private law provisions. Nipperdey was influenced by Smend's work and anchored his argument to the particular wording of article 1. Article 1(2) reflects the German people's acknowledge of fundamental rights. Nipperdey argued this reflected their binding nature on that people as private citizens. Similarly, article 1(3) provides that basic rights also bind the judiciary. Accordingly, this binds the judiciary when adjudicating on private law disputes. Nipperdey's ideas began to influence the development of labour law in the Federal Labour Court.[108] Public law scholars were sceptical and expressed the concern that this could restrict the autonomy of private citizens.[109] Dürig, whose ideas had influenced the Elfes decision, similarly argued that the objective system of values applied to private law. Unlike Nipperdey, however, Dürig argued that application was indirect. This interpretation was more liberal, carving out

[103] See, eg, Paolo Ramadori, 'Grundrechte als Objektive Werte: Das Lüth-Urteil (1)' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 60.

[104] Darnstädt (n 60) 206–7. See also Henne (n 101) 141.

[105] See, eg, Andreas Kulick, 'Drittwirkung der Grundrechte: Das Lüth-Urteil (2)' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 85–8.

[106] Ibid 79–80.

[107] Christian A Djeffal, 'Ausstrahlungs- Und Wechselwirkung Der Grundrechte: Das Lüth-Urteil (3)' in Dieter Grimm (ed), *Vorbereiter — Nachbereiter? Studien zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 99, 106–7.

[108] Kulick (n 105) 80–1.

[109] Ibid 89–90.

a space for private interactions from the sphere of state influence.[110] The Federal Constitutional Court ultimately adopted this interpretation.[111]

The indirect nature of that influence leads to the final key doctrinal consequences of the Lüth decision. The objective order of values has a 'radiating' and 'reciprocal' effect that extends to how ambiguous private law provisions are interpreted. This is particularly the case for 'general clauses' — private law norms invoking concepts such as 'accepted principles of morality' that import public interest considerations into private legal relations.[112] This doctrinal development can be seen as moderating the consequences of the horizontal application of rights, which would otherwise extend to all private law disputes. Instead, fundamental rights 'radiate' in a way that influences the interpretation of private law norms.[113]

Taken together, the Federal Constitutional Court found that the lower court should have determined that the private law norm was constitutionally affected, and to assess whether the call for a boycott had violated 'accepted principles of morality' in light of the constitutional value of freedom of expression. This involved balancing between Harlan's and the producer's economic interest, as protected by the civil code provision, and Lüth's freedom of expression guaranteed by the Basic Law[114] — both of which shape one another reciprocally and both of which must be exercised proportionately. In the particular circumstances, the Court determined that Lüth's freedom of expression outweighed Harlan and his producer's reputational and financial interests.

D *Proportionality Analysis*

Proportionality analysis as the Court now practices it tests for the legitimacy, the suitability, the necessity and proportionality 'in the narrow sense' of a restriction of a right. Unlike the doctrinal developments that the Lüth and Elfes decisions initiated, proportionality analysis does not trace to a single judgment.[115] Nonetheless, its development occurred during the critical juncture that followed the establishment of the Court and also reflect a 'stability seeking decision'. Proportionality reasoning provided a means through which other key fundamental rights developments could become workable at scale, an idea I explore further below.

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[110] Ibid 84–5.

[111] Relevant literature from public law scholars was discussed extensively in the written material justices used to decide the *Lüth* decision, though little of this literature was cited in the final judgment. See Ernst-Wolfgang Böckenförde, 'Grundrechte als Grundsatznormen' (1990) 55 *Der Staat* 1, 5; Djeffal (n 107) 109.

[112] *Lüth*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198, 206.

[113] Ibid 207.

[114] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 5.

[115] Peter Staubach, 'Das Verhältnismäßigkeitsprinzip' in Dieter Grimm (ed), *Vorbereiter - Nachbereiter? Studien Zum Verhältnis von Verfassungsrechtsprechung und Verfassungsrechtswissenschaft* (Mohr Siebeck, 2019) 131, 131.

Aspects of the analysis as it is now applied developed discretely in FCC judgments of the 1950s. It was only later that those individual elements were united in a structured test and justified in terms of the Basic Law's text. Proportionality had long been accepted in administrative law, which provided the Court with access to an extensive body of jurisprudence developed by the Prussian administrative courts.[116] The Prussian version was confined to police law and only considered the suitability and necessity of a measure. The key premise for the third, 'balancing' stage of modern proportionality analysis — that the interests of the state and individual can both overlap and in theory rank equally — was absent in the nineteenth century.[117] Public law theory renewed its interest in proportionality during the post-war period with the renaissance of natural law.[118] It provided the Court with a means through which to negotiate the relationship between the legislature and the rights catalogue that bound it. The Court needed to find a means of reviewing the legislature's restriction of rights, in a context where restrictions were also authorised.[119] In the first half of the decade the Court used various terms — "appropriateness", "necessity",[120] "adequacy" and "proportionality" — as synonyms.[121] In the *Lüth* decision the Court referred to the "relationship [proportion] between aims and means".[122] As explored above, balancing was also crucial to the outcome of that decision.

The *Pharmacies* decision later that year applied the test of suitability, necessity and proportionality in the narrow sense to a refusal to grant permission to open a pharmacy under the Bavarian Pharmacies Act.[123] The restrictions were aimed at ensuring nearby pharmacies remained financially viable by restricting competition, in turn protecting pharmacies as an 'institution' and ensuring that medication was provided to the public in an 'orderly' way.[124] In analysing whether relevant regulations proportionality restricted the applicant's right to freedom of occupation in article 12(1), the Court found that the regulations did not pursue the least restrictive means. It also found that the significant impact that the regulations benefit that the regulations conferred for the community interest ("Gemeinschaftsgut"). The decision marked the first date in which the Court relied on strict proportionality or 'balancing' in its decision, even though it did not employ this terminology as such. It also introduced the idea that proportionality analysis may be 'tiered': ie, that the extent to which, and how, a restriction

[116] Ibid.

[117] Ibid 144.

[118] Ibid 146–7.

[119] Ibid 136.

[120] I have translated both "Notwendigkeit" and "Erforderlichkeit" as "necessity". Both terms were used: ibid 136.

[121] Staubach (n 115) 135.

[122] *Lüth*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198, 212. I have translated "Verhältnis" here as "relationship', though it can also mean "proportion".

[123] *Pharmacies*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in 7 BVerfGE 377.

[124] Ibid 414-15.

impacted on a right varies the degree of justification that will be required.[125] These ideas were gradually refined and extended to other fundamental rights in subsequent decisions, with proportionality analysis reaching its contemporary form in the early 1970s.[126]

As in the *Lüth* and *Elfes* decisions, the Court in the *Pharmacies* decision approached reasoning and method in a distinctive, 'maximalist' way.[127] This differed significantly from the reasoning and structure of judgments delivered in other courts. The bulk of the judgment is devoted to statements that extend beyond the facts in front of the Court, indicating the Court's intention to "lay foundations" for the Court's future direction, to borrow Ritterspach's expression.[128] And yet to a far greater degree than the doctrine introduced in the *Lüth* and *Elfes* decisions, proportionality analysis developed gradually. Its structure was assembled slowly over many decisions that turned on their facts.[129] Freedom of profession in particular provided a catalyst for proportionality analysis to develop because of its proximity to the important right of free development of the personality and professional regulation associated with the state's post-war economic politics.[130] The 'maximalist' statements and reasoning that the Court employed in early decisions indicate that it was grappling with the question of how the legislature could be expressly authorised to restrict rights without rendering the binding nature of fundamental rights, and therefore the Court's role, redundant. The early Court was alive to the need to demarcate its activity in this space from that of the legislature. In the *Pharmacies* decision it explicitly addressed the argument that a court would not be competent to assess which means the legislature should employ as it lacks access to relevant expertise and knowledge.[131] It justifies its examination of necessity and strict proportionality on the basis that rights bind the legislature. It must therefore be possible for the Court to supervise how the legislature restricts rights in a principled way.[132]

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[125] The Court described this in terms of 'levels' of impact on freedom of profession that in turn alter how necessity is analysed: ibid 444. In the *Pharmacies* decision the Court found that freedom of profession entailed two components, namely freedom of choice in profession and freedom of practice in profession. Where freedom of choice — the more important 'level' of the freedom — is restricted, the Court will scrutinise the necessity of the measure to a greater degree. See also Thorsten Kingreen and Ralf Poscher, *Grundrechte Staatsrecht II* (C. F. Müller, 34th ed, 2018) 269. Other doctrinal rules developed over time that are specific to other fundamental rights.

[126] See, eg, Staubach (n 115) 142. Peter Staubach argues that the third, strict proportionality stage neared completion in a 1971 judgment that also concerned freedom of profession: Bundesverfassungsgericht [German Federal Constitutional Court] 1 BvR 52/66, 16 March 1971 reported in 30 BVerfGE 292.

[127] I explored this idea, which Oliver Lepsius describes a "thinking in standards" and Michaela Hailbronner as "judicial maximalism", in chapters three and four. See part III(B), 'Doctrine, Dogmatik, Method' of chapter three and part IV(B), 'Implications for Constitutional Method and Institutional Authority', of chapter four.

[128] Darnstädt (n 60) 147.

[129] See Peter Staubach's argument in Staubach (n 115) 143.

[130] Ibid.

[131] See, eg, the Court's reasoning in *Pharmacies*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in 7 BVerfGE 377, 409-10.

[132] See ibid 410.

Unlike the doctrines developed in the *Elfes* and *Lüth* decisions, proportionality analysis did not reflect a "planned strategy to extend judicial competencies".[133] And yet it served a crucial function in grounding the doctrines that other key fundamental rights introduced and ensuring that they were institutionally 'workable'. As I explore below, those developments worked in tandem to anchor and stabilise practices of reasoning and create an experience of choice in legal actors applying fundamental rights.

IV EXPLAINING 'STABILITY SEEKING' DECISIONS

A *Centralising Legal Professional Authority*

At the heart of the Weimar Republic's legal professional crisis was a lack of stability in its constitutional reasoning practices. That instability was partly driven by the pace of political and societal change that ran parallel to the new constitution. Questions arose for public law that were urgent and novel and it was difficult for legal professional institutions to respond to them in a united, coherent way. Positivist insistence on a hard separation of legal and extra-legal considerations became less persuasive. Anti-positivist reasoning that insisted on the existence of an extra-textual, complete and coherent system of values that could guide constitutional reasoning became an attractive alternative. It promised both a stability and comprehensiveness that positivism and the status quo no longer provided. But those anti-positivist methods were also unable to produce the same experience of constraint of choice. Too many perspectives and methods vied for supremacy and no single school could command support across the legal professional community.

In the 'stability seeking' decisions that I explored above the early FCC also relied upon natural law, 'anti-positivist' methods of constitutional reasoning. And yet the doctrines that it introduced in Lüth and Elfes successfully established a basis for a legalist approach to reasoning over time in a way that anti-positivist arguments in the Weimar Republic did not. This raises the question: why were the Court's fundamental rights developments in its early years successful — able to endure and acquire their own authority — when similar arguments in the Weimar Republic were not?

The answer lies in how the newly established FCC secured a monopoly on guiding post-war constitutional reasoning. I explore further below how the Court was then able to profit from tendencies in other legal professional institutions — especially legal education and training — in a way that could reinforce its authority. The Court channelled the post-war 'natural law moment' to entrench doctrines that asserted the Court's authority over other courts to interpret that natural law. This 'stability seeking' decision appears in the Court's reasoning in the Elfes and Lüth decisions. After Elfes, every act of state power — legislative, administrative or otherwise — that could affect an individual can form the basis of a complaint to the Court. The open-textured 'catch all' right protected in article 2(1) has provided the doctrinal path for the Court to address societal and technological change. From a right to informational self-determination developed in response to data ownership[134] to a right against the state

[133] Staubach (n 115) 143.

[134] *Census*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 209, 15 December 1983 reported in (1983) 65 BVerfGE 1.

placing a disproportionate burden of climate action on future generations,[135] article 2(1) has since provided a vehicle for the Court to address matters not explicitly captured within the wording of the Basic Law.

After *Lüth*, similarly, the framework that the *Elfes* doctrine established was extended to all other areas of law. The two decisions working together expand the procedural opportunities for acts of both the state and within civil society to come within the scope of the Court. Oliver Lepsius, for instance, described these decisions as emancipating the Court's authority to make decisions from an exhaustively regulated subject-matter.[136] It also brought the authority of other superior courts under the FCC.[137] The consequences of these moves reflect in the Court's current workload. As I explored in chapter five, the vast majority of complaints that the Court received in 2019 were brought in relation to decisions of other courts.[138]

The natural law moment on which the Court acted in the *Elfes* and *Lüth* decisions gradually receded and legalist approaches and assumptions re-emerged. Over time more and more doctrinal consequences were derived from the ideas introduced in Elfes and Lüth.[139] Alongside these developments, the language of "values" began to be replaced by that of "principles".[140] Constitutional scholarship had begun to refer to individual "value decisions" instead of an "objective order of values."[141] After the 1970s in particular, the Court relied less upon values argumentation.[142] Dominik Rennert, for instance, describes this as a process of "secularisation".[143] The explanation for this development lies with the way that West German legal professional institutions interacted. The conditions on which legalism relies— sufficient stability in, and legal professional community acceptance of, practices of reasoning — had re-established. That legal professional culture accepted the ideas in Elfes and Lüth as fundaments because the Court could refer to its previous decisions and because the nature of its other professional institutions supported such acceptance. The Court cites itself far more than it cites the text of the Basic Law.[144] Features that I explored in earlier chapters, such as the practice of the Court citing previous decisions

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[135] *Climate Protection*, Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 2656/18, 24 March 2021 reported in (2021) 157 BVerfGE 30.

[136] Oliver Lepsius, 'Die Maßstabsetzende Gewalt' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag, 2011) 159, 194–6.

[137] Henne (n 101) 204–5.

[138] See also Matthias Jestaedt, 'Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist' in Christoph Schönberger et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht.* (Suhrkamp, 2011) 77.

[139] Rennert (n 59) 49.

[140] Ramadori (n 103) 70.

[141] Rennert (n 59) 50.

[142] Ramadori (n 103) 70.

[143] Rennert (n 59) 49.

[144] Collings (n 77) 302.

without dates or facts, reinforced the appearance of an ahistorical authority in that practice. I explore the idea that German legal professional institutions were particularly receptive to the Court's new reasoning practices further below.

Proportionality analysis assisted in the centralisation of legal professional authority. It stabilised the doctrinal consequences of the Court's decisions in Elfes and Lüth. Adherents of the Schmitt school of thought such as Ernst Forsthoff and Ernst-Wolfgang Böckenförde had critiqued the Court's introduction of values theory.[145] They argued it would erode the legal determinacy of norms, where interpretation would instead be governed by the caprice of the 'values of the day' ("Positivismus des Tageswertungen").[146] That this extended to private law conflicts — and all areas of law — rendered such an approach all the more unstable and "tyrannical".[147] Proportionality analysis offered a response to that indeterminacy because it carefully separated maximalist statements of value from application to concrete facts. The structure of the Court's judgments and approach to method provides that separation. After outlining the facts and dealing with standing, its fundamental rights decisions begin their reasons with a dedicated section of abstract, generalisable statements of principle — what Oliver Lepsius described as "thinking in standards". Where common law judgments focus on facts and distinguishing reasoning from previous sets of facts resolved by courts, the German FCC decontextualises judgments and statements of principle from facts.[148] A second section then deals with 'subsumption' — the process of measuring concrete facts against those value statements by using the proportionality framework.

This has a stabilising effect on practices of reasoning and the cultural beliefs and narratives that support them for two reasons. Firstly, it creates a stronger impression of a separation between legal principles and judgments on concrete facts that may be potentially 'political'. It quarantines concrete conflicts from the function of the Court in stating principles. Those statements of principle therefore appear more technical, abstract, ahistorical and unassailable. Proportionality analysis becomes a 'node' between legal arguments and concrete problems that allows the former to be applied to the latter without risk of contamination.[149] At the same time, the structure of that proportionality analysis creates an "impression of substantive coherence" between individual cases.[150] Secondly, the separation of those statements of principle from their application to the facts through proportionality

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[145] Rennert (n 59) 45–6.

[146] Ernst-Wolfgang Böckenförde, 'Grundrechtstheorie und Grundrechtsinterpretation' (1974) 34 *Neue Juristische Wochenschrift* 1529. For a detailed discussion see Rennert (n 59) 45–6.

[147] Later Schmitt described this approach in terms of a "tyranny of values": Carl Schmitt, *Die Tyrannei der Werte* (Duncker & Humblot, 3rd ed, 2011). See also Frieder Günther, 'Ein Jahrzent der Rückbesinnung. Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration in den fünfziger Jahren' 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-Wissenschaftsverlag, 2005) 301, 319.

[148] Lepsius, 'Die Maßstabsetzende Gewalt' (n 136) 200–202.

[149] See Oliver Lepsius' argument in ibid 182–213.

[150] Ibid 205.

analysis means that the reasoning structure can be replicated at scale. If fundamental rights can apply to potentially all conflicts in all areas of law, the potential volume of constitutional litigation increases significantly. By separating statements of principle from their application to the facts in proportionality analysis, a higher volume of decisions can be made — the bulk of these by assistants rather than FCC justices themselves — because the abstract statements of value do not need to adapt and evolve to those facts.[151]

B *'Seeking Stability' through Professional Socialisation*

1 Education and Training

The education and scholarship practices of West German legal professional institutions were also receptive to the Court's approach to method in the Lüth and Elfes decisions. This assisted in the stabilising of the new Republic's legal professional institutions and the extent to which they could coordinate in producing practices of reasoning and reproducing legalist belief systems that centred the authority of the Court. In an earlier chapter I described key features through which German legal education introduces new lawyers to method, "doing legal knowledge"[152] and applying law as a practical technique. To summarise again briefly, that education involves a sharp division between theoretical doctrinal education at university, examination in the two state exams on concrete problems,[153] and practical training before admission as a full lawyer. The Court's practice of dividing statements of principle from their application to the facts was able to profit from these tendencies in German legal education. German legal education is directed toward producing a practitioner who can absorb and apply standards set by a higher, centralised authority to concrete facts. It is receptive to a centralised authority or a 'centre of gravity' for the production of knowledge such as the FCC. Examination rewards the technical application of principles to facts. In this way that education constantly presupposes and affirms the authority of the Court to set principles in the way that it does.

The manner in which proportionality analysis is taught to German law students illustrates this phenomenon. Jacco Bomhoff describes the particular process of teaching proportionality in Germany as one through which the German constitutional-legal order is "homogenized, facilitating the socialization of students into a role of junior partner in the project of its realization".[154] Bomhoff points to the repetition of problem questions required to prepare for the state examination through 'Repetitorium' — commercial programs in which students preparing for that exam can enrol. While not compulsory, these programs are representative of the kind of preparation and activity in which all lawyers must engage to pass the state examination. A similar mode of instruction characterises

[151] Ibid.

[152] Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53(3) Buffalo Law Review 973, 976; Jacco Bomhoff, 'Making Legal Knowledge Work: Practising Proportionality in the German Repetitorium' (2023) 32(1) *Social & Legal Studies* 28, 29.

[153] I described the process of these exams in an earlier chapter. The second examination, subsequent to compulsory practical training, is particularly "mechanical".

[154] Bomhoff (n 152) 30.

tutorials (Arbeitsgemeinschaften) and free programs at university (Universitätsrepetitorium). As I explored in chapter four, these programs supplement the highly theoretical mode of instructing law students at university. They provide a 'bridge' from that theory, which tends to be extremely abstract, to concrete cases. The Court's structure of separating statements of principle from application to facts through proportionality reasoning can be seen in light of that educational structure. Through repetition in preparing for the state exam, students are socialised in not only the "formal, disciplinary, and aesthetic standards"[155] required to perform proportionality, but also in constitutional method as an "instrument of worldmaking".[156] In the case studies on which examination is based junior members of the legal professional community are presented with practical scenarios in which "proportionality works".[157] Bomhoff observes that in these problem questions prospective lawyers "encounter a world seemingly devoid of tragic trade-offs, and full of apparent conflicts that turn out to be 'solvable' through the careful calibration and 'mutual optimization' of proportionality reasoning."[158] The examination itself is directed toward producing a solution rather than an argument in favour of a party or a scholarly critique of the law.[159] This mode of teaching and preparation for examination requirements — regardless of whether it takes place within a Repetitorium or in private study — presents a world in which a certain type of social or political problem can be reduced to a schema, and 'solved'. The core textbooks used to teach German law students fundamental rights doctrine borrowed this schema from private law.[160]

This mode of educating and training incoming members of the legal profession in practices of constitutional reasoning supports the role that the FCC assumed in its Elfes and Lüth decisions. It allows for cultural beliefs about that role to be easily reproduced. German legal education and training assumes the authority of the Court to set principles and 'standards' as a given, and directs itself to the application of those standards as a 'trade-like' exercise. Students are examined on their ability to master "standardized techniques that can be applied across large swathes of material".[161] Equipped with the justifications for such a system that university based theoretical education and scholarship supplies — a function to which I turn below — practically oriented examination and training supports the Court's claims regarding the technical, 'legal' nature of fundamental rights adjudication. After the state examination, qualified lawyers have been have socialised into a professional worldview in which subjecting a potentially polycentric, complex problem to legal analysis is "feasible".[162] They then participate in

[155] Ibid 29.

[156] Ibid 31.

[157] Ibid 28.

[158] Ibid 30.

[159] Ibid 33.

[160] Ibid 34. Bomhoff notes that Schlink and Pieroth's seminal textbook was the first to systematically introduce problem cases and diagrams for resolving fundamental rights ' problems' and offer a 'clear conceptual and practical "grid" for proportionality review".

[161] Ibid 35.

[162] Ibid 34.

that profession and other legal professional institutions in way that reproduces the logic and patterns of the Court's reasoning — what Bomhoff describes as a process of "homogenization of the German constitutional legal order".[163]

Working in this way, education and examination practices transfer and entrench cultural beliefs and narratives that the FCC relied upon in its early fundamental rights jurisprudence. Those practices are receptive to a centralised and hierarchical formal institutional authority such as the FCC. German legal education practices also ensure that FCC fundamental rights developments are replicable at scale. In turn, the centralised structure of the FCC provides clear guidance and a single agenda for those education and examination practices. Working together in this way, education practices and the Court stabilise each other as institutions.

2 *Scholarship Practices*

German legal scholarship practices and knowledge institutions also played a key role in entrenching and supporting the consequences of the FCC's early fundamental rights decisions and reproducing beliefs and narratives that are necessary for the FCC's continued authority. I explored above how scholarship practices sought to fill the vacuum left by the collapse of the positivist consensus in the Weimar Republic. The newly established Court superseded scholars in that task. It assumed the role of key 'steering' institution in practices of constitutional reasoning, setting the agenda for other legal professional institutions. The Court's reasoning in Lüth and Elfes decisions demonstrate how the early Court relied on similar anti-positivist methods to that relied upon by Weimar scholarship. Unlike that scholarship, however, the Court could anchor those methods to formal institutional authority — its jurisdiction to resolve disputes. It could rely on an authority in its decisions that scholarship could not, and in turn produce a stability in reasoning practices that narrowed the space for scholarship to provide that function. As I explored in earlier chapters, stability and consistency in practices of constitutional reasoning create the conditions necessary for legalist methods to crystallise. Legal professional institutions, interacting in a stable and supportive way, coordinate to produce an experience of constraint of choice upon participants within a legal professional community.

Constitutional scholarship practices in West Germany assumed a supportive function over time in part because of the consequences early FCC fundamental rights decisions themselves set in motion. As I explored above, public law scholars had expressed conflicting views regarding the establishment of the FCC and its breadth of competences. Concerns were raised regarding the capacity of the FCC to differentiate between 'political' and 'legal' questions.[164] In 1950 a majority in the Association of Public Law Scholars proposed that the Court restrict its power by utilising US Supreme Court ideas such as the political question doctrine and judicial self-restraint. The Court disregarded that majority. And as public scholars realised that the Court's acquisition of institutional

[163] Ibid.

[164] Günther, 'Wer Beeinflusst Hier Wen?' (n 64) 130–1.

power was inevitable, they began to assume a less critical tone in their dialogue with the Court.[165] The Court's views on certain matters diverged from the dominant view amongst state law scholars, especially with respect to fundamental rights and the law of political parties. Yet as the Court handed down decisions in this area — Elfes and Lüth prominent as clear examples — state law scholars followed suite.[166] The Court strengthened the role of fundamental rights and political parties.[167] Critical voices that continued to oppose such as adherents of the Schmitt school receded into a minority. That Schmitt's character had been tainted through National Socialist involvement assisted in this decline in influence.[168]

In terms of my theory, early conflicts between the Court and scholarship practices with respect to the role of the Court reflect the experience of a critical juncture in practices of reasoning. Absent stable practices of reasoning, West Germany's early legal professional culture sought to negotiate and decide on mechanisms that could allow the legal professional community to experience constraint of choice in constitutional reasoning. That experience of constraint had eroded in the Weimar Republic in part because of the pace at which reasoning needed to respond to political and societal change, and in part because the Republic's legal professional institutional complex lacked clear and decisive mechanisms to resolve disagreement and steer it through those changes. A strong, centralised Federal Constitutional Court provided a structure that could adapt practices of reasoning to novel political and societal problems and provide clear direction to other institutions. Other institutions such as the academy and scholarship practices — whose freedom and innovation in Weimar was connected with its lack of legal professional stability — then altered their posture toward the Court. Critique of the Court did not disappear entirely. A new generation of public law scholars emerged during the 1960s who criticised the Court's approach to values reasoning, especially as they were exposed to ideas and education in the United States.[169] But as a general trend, scholarship accepted the early developments of the Court as fundaments and directed critique merely toward the details and consequences of such fundaments so that they would continue to unfold coherently.[170] This stabilised those developments. Scholarship assisted in refining and 'formalising' that reasoning, erasing the historical circumstances that motivated its development and providing it with new, ahistorical justifications. As

[165] Ibid.

[166] Ibid 134.

[167] Ibid 135–6.

[168] Rennert (n 59) 46.

[169] Günther, 'Wer Beeinflusst Hier Wen?' (n 64) 135–139. Carl Schmitt's student Ernst-Wolfgang Böckenförde emerged as a particular critic: Rennert (n 59) 52–3. Rennert also identifies the effect of exposure to ideas elsewhere — including the common law method — in the 'historical' critique of the Court's early developments by scholars such as Oliver Lepsius and Matthias Jestaedt: ibid, 54-59. See also Collings (n 77).

[170] Rennert (n 59) 52. The final 'balancing' stage of proportionality analysis, and attempts to reimagine the objective order of values as a model of traditional, defensive rights, remain two of the few fundaments that attract criticism: at 52; Bernhard Schlink, *Abwägung im Verfassungsrecht* (Duncker & Humblot, 1976).

an illustration, Robert Alexy's theory of fundamental rights supplied existing practices of reasoning with a justification that didn't depend on the early values theory that had animated the Court's early decisions.[171]

In 1989 Bernard Schlink described the contemporary role of German scholars in terms of "constitutional court positivism".[172] This critique reflects on the gradual change in scholarship practices that followed the establishment of the Court. In Schlink's description, public law scholars perform a function in relation to the Federal Constitutional Court — exposition and systematisation — that they once did to norms and texts when positivism dominated as a constitutional method during the German Empire. Just as positivist methods in scholarship sought to channel the will of the legislator, minimising the role of value judgments or critique, so too does more recent constitutional scholarship focus on channelling the will of the Constitutional Court.[173] Its focus is on the system and literal meaning of the Court's reasoning, which corresponds with a narrower space for argumentation and academic critique.[174] As I explored in more detail in chapter four, scholarship practices perform an influential function in German legal professional culture and on the Court. Scholarship carries the burden of producing and synthesising doctrine (Dogmatik). But that influence is confined to doctrinal refinement and 'smoothing over' the effects of an agenda that is set by the Court. Only recently have some scholars begun to reflect on the historical circumstances that propelled early developments in fundamental rights.[175]

V SUMMARY

In earlier chapters I described how the authority of ideas in German legal professional culture is not formally connected with precedent, but rather, acceptance and establishment of an idea in a professional interpretive community. In that community, the Court sets the tone for what is authoritative and accepted — it 'sets standards'[176] — with its decisions therefore performing a similar function to that of precedent. The Court's early fundamental rights decisions, coupled with the design of the Court and its appointment processes, set in motion the new relationship between the Court, education and scholarship practices. This connects with my argument in earlier chapters on professional cultural institutions. The prospect of serving upon the Constitutional Court also shapes the career trajectories and allocation of status within the German legal professional community, further incentivising the doctrinal work that dominates German constitutional scholarship.

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[171] Robert Alexy, *Theorie der Grundrechte* (Suhrkamp Verlag, 1st ed, 1986); Rennert (n 59) 51.

[172] Schlink, 'Die Entthronung Der Staatsrechtswissenschaft' (n 18) 168.

[173] Ibid 169.

[174] Bernhard Schlink, 'Die Entthronung Der Staatsrechtswissenschaft' (n 18) 168.

[175] See, eg, Christoph Schönberger et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, 2011); Thomas Henne and Arne Riedlinger, 'Zur Historisierung der Rechtsprechung des Bundesverfassungsgerichts — Ein Programm und seine Folgen' 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-Wissenschaftsverlag, 2005) 1.

[176] Lepsius, 'Die Maßstabsetzende Gewalt' (n 136).

My analysis of the Federal Constitutional Court's early fundamental rights decisions, and their consequences for German practices of constitutional reasoning over time, supports the argument in my earlier chapters in two ways. Firstly, that analysis demonstrates that legal professional culture — how legal professional institutions work and interact with each other — matters. Intellectual conflicts that predated the introduction of the Basic Law coloured how fundamental rights provisions were interpreted in the Court's early years. Legal professional institutions in the new Republic carried those conflicts with them. The judges who assumed positions in the new Court had been socialised during the Weimar Republic and inherited its anti-positivist currents of thought. They also inherited the Weimar Republic's aspirations to 'maximalist' constitutional methods that could provide total, and therefore stable, responses to political and societal instability. This led the new Court to endorse methods that understood values in an extra-textual, natural law sense. The Court's inherited preferences also make sense in terms of Weimar Republic legal professional cultural problems. The Weimar attraction to natural law methods flowed from how Weimar legal professional institutions interacted. Natural law methods emerged from the conflict in constitutional scholarship practices that ensued when positivist methods were discredited.

Secondly, the Court's early fundamental rights decisions illustrate how the interaction between legal professional institutions contributes to practices of reasoning stabilising as informal institutions themselves. Practices of constitutional reasoning become stable over time when certain conditions exist. Some of those conditions connect with circumstances outside legal professional institutions. The pace at which the Weimar Republic's legal professional culture was required to adapt constitutional reasoning practices to novel political, economic and societal crises placed those practices under significant pressure. In historical institutionalist terms, those crises subjected practices of constitutional reasoning to 'exogenous shocks', making it more difficult for legal professional disagreement to resolve as crises settled and receded. Societal and political conditions in the post-war West German Republic were more stable, at least when compared to the pre-war era. And yet, the failure of any one approach to constitutional method to achieve ascendancy and crystallise as a tradition also flowed from dysfunctional interactions within, and between, Weimar Republic legal professional institutions. Scholarship practices and a diffuse court system competed in their approaches to method, with no institutional mechanism able to resolve those disagreements.

Against that background, the new Federal Constitutional Court's early fundamental rights decisions sought to produce stability. They entrenched the Court's jurisdiction over an almost universal range of potential societal conflicts, including conflicts with dimensions in private law. Even though the Court could not lean into an institutionalised tradition of reasoning to legitimise those decisions, it could draw on the 'natural law moment' in which it found itself to entrench an expanded jurisdiction that then gave rise to a new stability. German legal education's existing approach to method — the separation of abstract principles from concrete application — was receptive to the Court's expansion of its jurisdiction. Over time, resistance in constitutional scholarship also receded as the Court created a new relationship between scholarship practices and the Court's development of doctrine. A stable institutional complex emerged from the Elfes and Lüth decisions that allowed the Court to steer practices of reasoning over novel political and societal terrain without disturbing the veneer of traditionality. That combination of stability and agility, however, depended on the Court remaining German legal professional culture's 'centre of gravity'. For this reason the processes of Europeanisation to which I turn in the next chapter

have produced a destabilising event — a critical juncture — in a way that other societal and political shocks have not.

CHAPTER SEVEN: EUROPEAN INTEGRATION AND PROFESSIONAL CULTURAL INSTABILITY

I INTRODUCTION

In this chapter I consider how the process of European integration threatened the stability of German constitutional reasoning by disrupting the legal professional cultural conditions on which that stability rested. It challenged the inward orientation of German legal professional culture by introducing sources for ideas and constitutional argument whose authority did not clearly sit within Germany's existing legal professional institutional landscape. To respond to the exogenous shock of European integration, the Court engaged in further 'stability seeking' reasoning. That reasoning developed a number of doctrinal principles that sought to reaffirm the inward orientation of German constitutional reasoning and maintain how institutional hierarchy and the experience of 'system' work in German legal professional culture.

While the Court's European 'stability seeking' decisions succeeded to a certain extent in 'shoring up' cultural beliefs and narratives important for German constitutional method, they remain a source of ongoing professional cultural conflict. In this chapter I argue that European integration revealed the limits of German legalism and its dependency on a particular institutional hierarchy and monopoly. Pluralist sources of law disrupted that monopoly and the conflict between institutions that resulted could not be resolved through reasoning that the legal professional community could experience as sufficiently constrained by legal materials alone.

II INTROVERSION AND THE EARLY EUROPEAN PROJECT

West Germany's legal professional cultural institutions reorganised within the critical juncture spanning the Weimar Republic and the post-war founding of the Court. Institutions elsewhere experienced similar 'exogenous shocks'. The European project emerged from the shock surrounding the second world war. At first its development ran parallel to development of legal professional culture in Germany. In the immediate post-war period German public law was preoccupied with immediate and urgent problems.[1] It devoted limited attention to the significance of the European project.[2] The centralised institutional structure that West German legal professional culture developed makes sense in that context. The Federal Constitutional Court became the ultimate authority to determine questions on fundamental rights and expanded that capacity to all areas of societal activity. These early decisions were the Court's 'stability seeking' attempts that established its function and authority, as I argued in the previous chapter. Reacting to Weimar instability and its lack of legal professional institutional coordination, the Court positioned itself in a way that enabled it to adapt to novel problems that might arise within a changing society without appearing to encroach on the 'political' sphere. But that position didn't account for supranational

[1] Katharina Mangold, *Gemeinschaftsrecht und Deutsches Recht: Die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (Mohr Siebeck, 2011) 188–9.

[2] Michael Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland. Band 4. Staats- und Verwaltungsrechtswissenschaft in West und Ost 1945-1990* (C.H Beck, 2012) 606.

structures and institutions that were beginning to develop in parallel. Those developments affected German legal culture and practices of reasoning relatively late.[3]

Additional factors limited the European question's relevance for West Germany's early legal professional culture. With the exception of those prominent lawyers who had been forced into exile under National Socialism, the generation of lawyers that emerged in the early 1950s had experienced limited opportunities to travel abroad and learn languages during the Weimar Republic.[4] Inflation, global economic crises and the restrictions of National Socialism had limited their professional horizons.[5] This contributed to the introversion that reflects in the legal professional institutional organisation that I explored in the previous chapter. A more fundamental explanation arises regarding professional socialisation. Michael Stolleis suggests that the nature of the European question in its early days would have also been outside the professional sensibilities of German lawyers. As the supremacy of European Union law was not yet established, it did not yet have a direct effect. Because of that unclear status, German lawyers would not have allocated them into a hierarchy. Even as the natural law renaissance swept through Weimar and shaped the post-war cultural approach to articulating values, methodological fundaments persisted.[6] The focus remained on bringing norms that were binding within a comprehensive, exhaustive system.[7] Questions regarding transnational structures that did not yet bind were not a priority.[8]

The idea for a "pan-European union" had emerged during and following to the second world war, gaining support in Germany amongst both social democrats and conservatives.[9] In the aftermath of the war the idea held an additional appeal because such supranational structures were untainted by association with National Socialism[10] and would bind West Germany more closely to the West.[11] Within Germany they also held out the prospect of national rehabilitation.[12] When drafting the Basic Law, the Parliamentary Council proposed what became article 24, permitting the Federation to pass laws transferring sovereign powers to supranational institutions.[13] This was

[3] Mangold (n 1) 2.
[4] Stolleis (n 2) 607.

[5] Ibid 607–8.

[6] Ibid 608.

[7] For a further discussion on this tendency see chapter 3.

[8] See, eg, Mangold (n 1) 188–9.

[9] See, eg, Wilfried Loth, 'Die Deutschen und das Projekt der Europäischen Einigung' in Wolfgang J Mommsen (ed), *Der Lange Weg Nach Europa: Historischer Betrachtungen aus genewärtiger Sicht* (edition q, 1992) 39.

[10] Mangold (n 1) 188.

[11] Loth (n 9) 46. See also Markus Bermanseder, *Die Europäische Idee im Parlamentarischen Rat* (Duncker & Humblot, 1990).

[12] Mangold (n 1) 36.

[13] Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany] art 24(1). A later amendment permits the states to transfer their powers to geographically proximate institutions to the extent that they are competent to exercise such powers and have the consent of the Federation: art 24(1a).

drafted with a view to a future "process of European cooperation".[14] The Basic Law's preamble reflected similar aspirations for Germany to become an "equal partner in a united Europe".[15]

'Europeanisation' initially proceeded slowly. In 1951 a small number of European jurisdictions, including Germany, concluded the Treaty of Paris to establish the European Coal and Steel Community.[16] The Schuman plan aimed to promote security and peace in Europe by bringing the coal and steel industries, necessary for war material, under a common European control.[17] That treaty also established a court to adjudicate on that common structure.[18] The 1957 Treaties of Rome led to economic cooperation in other economic spheres and, a year later, a European Parliament. They also restyled the Court as the European Court of Justice. As early as this period the European court of justice began to develop key principles such as the direct application of community law in member states,[19] though this would not achieve its full form until 1963.[20]

III 'STABILITY SEEKING' DECISIONS

A *Reasoning with Rights: The Solange Decisions (1974 & 1986)*

The 1960s witnessed the continued proliferation of European 'secondary law' — regulations, directives and decisions by adjudicating bodies. This correlated with an increase in German legal professional attention to the European question. Katharina Mangold's study notes that scholarship and literature treating European topics increased dramatically during this decade. That literature tended to focus on the relationship between European community and German national law, turning away from its treatment as an international law topic.[21] A prominent

[14] Dieter Grimm, Mattias Wendel and Tobias Reinbacher, 'European Constitutionalism and the German Basic Law' in Anneli Albi and Sami Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports* (Springer, 2019) 407, 410; Karl-Peter Sommermann, 'Offene Staatlichkeit — Deutschland' in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *Handbuch Ius Publicim Europaeum, Band 2: Offene Staatlichkeit - Wissenschaft vom Verfassungsrecht* (C. F. Müller, 2018) 3.

[15] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] preamble.

[16] Given extensive literature elsewhere on the establishment of the European Union, I limit my discussion to that relevant to my argument on domestic legal professional culture. For a more detailed discussion and periodisation of the history of the European Union see JHH Weiler, 'The Transformation of Europe' (1991) 100(8) *The Yale Law Journal* 2403.

[17] Mangold (n 1) 34–5.

[18] Ibid 91–3.

[19] See discussion in Mangold (n 1) 43.

[20] See historical account in Weiler, 'The Transformation of Europe' (n 16) 2413. The direct application of community law was established in *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (C-26/62) [1963] ECR 1, 1. *Flaminio Costa v ENEL* (C-6/64) ECR 585 established the supremacy of community law.

[21] Mangold (n 1) 192–3.

topic in scholarship connected with the relationship between European community and German constitutional law, with fundamental rights of particular interest.[22]

Secondary law emerging during this period included regulations under the Common Agricultural Policy permitting the export of cereals only under a licence that would expire. The relevant law provided that the deposit payable when a party applied for the export licence would be forfeited should the export not be completed before the licence's expiry. Internationale Handelsgesellschaft, a German import-export company, delivered a shipment of maize after the expiry of its licence. The relevant authority then declared its deposit forfeit. Internationale Handelsgesellschaft challenged the regime providing for the deposit and its forfeiture in the Frankfurt Administrative Court. It argued that the relevant policy breached fundamental rights connected with freedom of action and property. The Administrative Court considered that the policy providing for forfeiture of the deposit was a disproportionate restriction on relevant rights as the objective of the regulations could have been achieved by less burdensome means. To avoid the uncertainty that would arise from a conflict in interpretation, the Administrative Court referred the matter to the European Court of Justice for an opinion on the matter.[23] The ECJ found that the provisions were valid under its own legal regime and stated that recourse to national legal rules or principles to determine validity would undermine the uniformity and efficacy of community law. It did, however, assess whether the relevant policy breached "analogous" rights guarantees in European Union law, based on the traditions of members states. It concluded that it did not. This forced the Frankfurt Administrative Court to dismiss Internationale Handelgesellschaft's challenge. The Court did express doubt as to whether the relevant European community policy was compatible with the German Basic law and referred the question to the German Federal Constitutional Court.[24]

This led to the Federal Constitutional Court's *Solange I* judgment.[25] In *Solange I* the Court held that it was competent to review European community law to determine compatibility with German fundamental rights, unless and until ("so long as") the Union had a binding fundamental rights catalogue enacted by a parliament and providing equivalent ("adäquat") protection to that provided by German fundamental rights. It noted that it was only necessary to rule on the relationship between German fundamental rights and secondary community law. It left the relationship between primary law and community law, and secondary law and German constitutional law other than fundamental rights, open.[26] On the facts before it the Court concluded that the European export policy providing for forfeiture of a deposit did not breach German fundamental rights of trade and occupation, measured

[22] Ibid 195.

[23] A summary of these proceedings is available in the relevant European Court of Justice judgment: *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (C-11/70) [1970] ECR 114.

[24] Verwaltungsgericht Frankfurt am Main [Frankfurt am Main Administrative Court] II/2-E 228/69, 24 November 1971.

[25] *Solange I*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271.

[26] Ibid 277.

against principles already developed by the Court.[27] Moreover, the Court adopted and explicitly endorsed the reasoning of the European Court of Justice with respect to the regime's proportionality.[28]

There are marked parallels between the Court's reasoning in *Solange I* and what I described as early 'stability seeking' reasoning in the previous chapter. As in the *Elfes* decision, it was not necessary for the Court to reason in the way that it did to conclude as it did in finding the European framework valid. As in its early fundamental rights decisions, the Court in *Solange I* appeared more concerned with developing doctrine in a way that preserved its authority than resolving the factual dispute before it. The reasoning in the judgment is prospective and maximalist, with an eye to developing a comprehensive system in which anticipated problems can be resolved. More of the judgment is devoted to explaining the nature of community law in terms of its system than to actual analysis of the relevant licencing regime and its proportionality. The Court's explanation of community law becomes an exercise in 'reasoning through' the relationship between community and German constitutional law, from which all its other reasons flow. And as in its earlier fundamental rights 'stability seeking' judgments, rights become the vehicle through which the Court can define and preserve the hierarchy of German legal professional institutions. The Court begins by explaining community and German constitutional law as two separate and independent systems.[29] It then claims that the ability of the Federation in article 24 to transfer sovereign power to supranational institutions "cannot be taken literally".[30] Article 24 must be interpreted in light of the Basic Law as a whole, which means powers cannot be transferred that would amend the Basic Law's "basic structure" that forms the "basis of its identity".[31] Fundamental rights form a core part of this.[32] The Court also noted that European community then lacked a democratically legitimate parliament elected through general elections. This would echo the democratic argument appearing in later judgments — a 'stability seeking' decision I explore further below.

The Court's reasoning in *Solange I* preserves the appearance of a coherent relationship between two perfect systems. In the Court's description, neither community nor German constitutional law is invalid or incoherent. Ideas that the Court develops — the 'basic structure' and 'constitutional identity' of the Basic Law — instead provide a means of managing the relationship between two complete systems. This maintains the institutional position that the Court established for itself in its early fundamental rights positions — through which it stabilised cultural beliefs and narratives more generally — without depriving either European Union or German constitutional law of the qualities that German lawyers identify with 'law' and legal institutions. Law still forms part of a complete system that the German lawyer can systematise without conflicts, rather than degrading as a product of entangled, incomplete and competing institutional processes. The Court retains jurisdiction of the core vehicle — fundamental rights — through which it can claim authority over the broad range of societal conflicts

[27] Ibid 289-90.

[28] Ibid 290.

[29] Ibid 277-89.

[30] Ibid 279-80.

[31] Ibid 279-80.

[32] Ibid 280-1.

that can be characterised as rights disputes. After *Solange I*, that range was extended to the growing body of European secondary law.

Solange I nonetheless reveals the beginnings of a fracture in German legal professional institutions into which subsequent legal professional cultural conflicts would unfold. Three justices — Rupp, Hirsch and Wand — issued a dissenting opinion concluding that secondary law could not be scrutinised under the standards of the Basic Law. Dissents had only recently become available as a practice in the Court four years prior.[33] The dissenting opinion concluded that the community legal framework was autonomous and independent of national legal orders. It also stated that both legal systems possessed fundamental rights and a system for enforcing them, referring to recent judgments of the European Court of Justice that were developing these principles.[34] It similarly argued that article 24 required that acts of sovereignty by supranational institutions be recognised in Germany. This precluded scrutinising those acts under national systems. Finally, the dissenting opinion drew attention to the technical requirements of the constitutional provision under which decisions of lower courts can be challenged in the FCC.[35] It stated that this provision could only apply to questions regarding the constitutionality of German laws.[36] The dissenting therefore concluded that the Court lacked the competence to measure the validity of community law against the standards of the Basic Law.

It is significant that the Court's first attempt[37] at settling the relationship between German constitutional and European community law was so divisive. The majority of the Court consisted of five judges, while three joined in the dissenting opinion. This 'split' was evident in other German legal professional institutions. It received an overwhelmingly critical reception.[38] Justin Collings states that the academic reaction to *Solange I* was the most

[33] For a more detailed discussion see chapter four.

[34] Dissenting opinion of Dr. Rupp, Hirsch and Wand: *Solange I*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271, 292-5.

[35] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 100(1).

[36] Dissenting opinion of Dr. Rupp, Hirsch and Wand: *Solange I*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271, 300-302 . Other authors similarly described this aspect of the majority's reasoning as a contradiction: see, eg, Hans Peter Ipsen, 'BVerfG versus EuGH Re „Grundrechte" zum Beschluß des Zweiten Senats des Bundesverfassungsgerichts vom 29. Mai 1974' (1975) 10 *Europarecht* 1.

[37] An earlier encounter connected with a 1967 decision in the Finance Court of Rheinland-Pfalz that had criticised a lack of German judicial control over European integration, expressing concerns regarding democracy and separation of powers. The Federal Constitutional Court rejected the arguments of the Finance Court in a 1967 decision: Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 29/63, 5 July 1967, reported in (1967) 22 BVerfGE 134. Ulrich Haltern suggests that the Court waited to assess arguments from academic and other sources regarding how to frame the relationship between community and German constitutional law: Ulrich Haltern, *Europarecht: Dogmatik im Kontext. Band II: Rule of Law. Verbunddogmatik. Grundrechte.* (Mohr Siebeck, 3rd ed, 2017) 442.

[38] Roland Lhotta and Jörn Ketelhut, 'Bundesverfassungsgericht Und Europäische Integration' in Robert Chr van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht Im Politischen System* (V.S. Verlag für Sozialwissenschaften, 2006) 465, 471.

critical in decades.[39] Some authors regarded the reasoning of the majority as a "direct attack on the supranational supremacy and legitimacy" of the European community.[40] Others argued that the majority approached its reasoning with a particular outcome in mind and the extent to which that drove the doctrinal reasoning was unclear.[41] Though commentary on the decision was dominated by a small number of scholarly actors,[42] the division within that scholarship reflects the structural ambiguity that European integration presented to German legal professional culture. On the one hand, community law's explicit claim to supremacy could translate literally into German legal cultural terms. Those claims translated into the system and hierarchy in which German lawyers are trained and therefore appealed to an existing professional understanding. Translated in that way, however, community law displaced the position of the German Federal Constitutional Court as the coordinator of that system.

In relying on fundamental rights to justify its jurisdiction over community law in certain circumstances, the Court invoked the memory of the 'natural law' moment that carried its first stability seeking decisions. Because of the events I described in the previous chapter, fundamental rights occupy a special space within German constitutional architecture and in justifying the logic of its institutions. That space is extensive in scope, but can remain coherent and be applied by the legal profession in practice because only one formal institution has authority over that space. The continued development of fundamental rights within community law, then, presented certain challenges for the stability seeking decision in *Solange I*. Fundamental rights had already begun to feature within the frameworks created by the ECJ at the time *Solange I* had been decided.[43] The Court was required to address that challenge nearly a decade later in *Solange II,*[44] a decision that addressed whether an import licence had been validly refused under community regulations on import and export of canned mushrooms. Wünsche Gesellschaft had challenged the refusal in the administrative courts, arguing that the common market had not been oversupplied by canned mushrooms for some time. The dispute was referred to the ECJ for an opinion. The ECJ considered whether the regulations under which the licence was refused exceeded the relevant authority's discretion and concluded that they did not.[45] Wünsche Gesellschaft then challenged the regulations within the German administrative court system again, arguing amongst other things that the regulations as interpreted by the ECJ breached fundamental rights and should be referred to the FCC for review according to the standards in *Solange I.* When ultimately considering this question, the FCC affirmed its authority to scrutinise community law according to the standards

[39] Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951 - 2001* (Oxford University Press, 2015) 147.

[40] See summary in Haltern (n 37) 448–9. For a similar view see Heribert Golson, 'Zu Bundesverfassungsgericht 'Solange'-Beschluß' (1974) 1 *Europäische Grundrechte-Zeitschrift* 18.

[41] See summary in Mangold (n 1) 208.

[42] Ibid 206–7.

[43] See, eg, *Nold v European Commission* (C-7/73 [1974] ECR 491.

[44] *Solange II*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvR 197/83, 22 October 1986 reported in (1986) 73 BVerfGE 339.

[45] *Wünsche Handelsgesellschaft GmbH & Co v Federal Republic of Germany* (C-69/85) [1986] ECR 114.

established in *Solange I*. But it concluded that it would not exercise that scrutiny as there had been sufficient developments within community law connected with fundamental rights. The FCC stated that it would no longer scrutinise secondary community law provided that ("142udgmen") the European Community and the ECJ in particular "generally guaranteed" the effective protection of fundamental rights against relevant EEC exercises of power.[46]

The Court's conclusion in *Solange II* makes sense if the reasoning in *Solange I* is taken at face value. In *Solange I* the Court insisted that it would review secondary law against German constitutional standards because of insufficient protection of fundamental rights in European community law. As that deficiency had been remedied in *Solange II*, the conditions for the Court to exercise its jurisdiction had fallen away. On a cursory reading it appears that the Court is conceding ground to the European system. Community law had not enacted the formal rights catalogue expected by the FCC in *Solange I*. It had merely continued to develop. German commentary also perceived the *Solange II* decision as more European Union "friendly".[47] It attracted praise within German legal professional culture where *Solange I* had attracted criticism.[48]

If *Solange I* is seen as 'seeking stability' by shoring up the structure of German legal professional institutional authority, the reasoning in *Solange II* becomes more complex. The wording of the Court's conditions for supervising integration are revealing: "Provided that the European communities, and in particular the jurisprudence of the ECJ, generally guarantees effective protection of fundamental rights against community exercises of power, in a way that can be regarded as essentially equivalent *to that required by the Basic Law*, and generally protects the *essential content* of fundamental rights, the Court will no longer exercise *its jurisdiction over the application of secondary community law* that provides the legal basis for behaviour of German courts and authorities within the sovereignty of the… Republic and will no longer measure that law against the standards of the Basic Law's fundamental rights…" (emphasis added).[49] The Court in *Solange II* concedes nothing to the European community in terms of the legal institutional structure and hierarchy that it asserted in *Solange I*. It merely tinkers with the division of labour within that hierarchy, relegating the function of deciding in 'everyday cases' to the European system. In cases where that European system doesn't provide "effective" protection in a way that is "essentially equivalent" to that required by the Basic Law — especially with respect to the "essential" content of fundamental rights — the Court may step in. And the structure of its reasoning preserves its authority to decide which cases those are. Parallels emerge here to the Court's early fundamental rights stability seeking decisions such as *Lüth* and mirror the logic of the Court's operations that I explored in chapter five. In practical terms, the circumstances in which the Court will exercise its jurisdiction are few. But the nature of those

[46] *Solange II*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvR 197/83, 22 October 1986 reported in 73 BVerfGE 339, 384.

[47] Haltern (n 37) 453.

[48] Collings (n 39) 206–7.

[49] *Solange II*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvR 197/83, 22 October 1986 reported in 73 BVerfGE 339, 387.

circumstances confer ultimate authority on the Court over a particular type of contentious value judgment. Those value judgments, like those I explored in the previous chapter, provide the Court with a framework to resolve potentially divisive and destabilising disagreements within the legal professional community.

The two *Solange* judgments established a dialogue between the FCC and ECJ and the terms on which they would speak. They stabilised that dialogue by bringing it into a hierarchy and clarifying its division of labour. Lower courts were required to defer to community law as the FCC required those courts to first refer doubts regarding the validity of community law to the ECJ for an opinion. Lower courts would then be required to apply European Union law, leading to a greater respect and understanding for its authority.[50] But authority over potentially destabilising value judgments remained with the FCC as the coordinating institution within German legal professional culture. Similarly, authority for that cultural reception of European principles and ideas lay with the FCC. In interacting with European ideas, practices of education and scholarship, would need to take their direction from the national Court.

B *Reasoning with Democracy: The Maastricht Decision (1993)*

In the background of the Court's engagement with community law, European integration proceeded apace. This coincided with accelerated developments within German legal professional institutions. Mangold's study marks the eighties as a turning point in the German legal profession's engagement with European integration.[51] The previous decade had witnessed the gradual introduction of European Union law as an elective in German legal education, with some lower level judges excepted to be familiar with its concepts.[52] This accelerated in the 1980s. Scholarly activity in particular changed radically from 1988 onward, with an explosion in texts and conferences exploring the relationship between European and national law.[53] Judgments of the ECJ began to be regarded as more important.[54] Alongside the development of European Union institutions and law during this period, German legal professional culture was experiencing other 'shocks' — reunification the most notable of these. Reunification prompted a movement within Germany for greater European integration, aligning with broader European trends.[55] In 1992 European integration culminated in revisions to the Treaty of Rome with the aim of establishing a single market[56] and the Treaty of Maastricht.[57] The latter transformed the European Economic

[50] See argument of Haltern (n 37) 454.

[51] Mangold (n 1) 214.

[52] Ibid 261–76.

[53] Ibid 221–30.

[54] Ibid 227–8.

[55] Collings (n 39) 276–277.

[56] Weiler, 'The Transformation of Europe' (n 16) 2453–2454.

[57] *Treaty on European Union*, opened for signature 7 February 1992 [2009] OJ C 191/1 (entered into force 1 November 1993) ('*Treaty of Maastricht*')

Community into the European Union, laid the basis for introducing a single currency and a shared European citizenship. This was greatly supported by Germany's political leadership.[58] In December 1992 supermajorities amended the Basic Law to introduce the article 23 'Europe article', which provided sophisticated mechanisms for transferring German national competencies to the European Union, subject to certain conditions.[59] An amendment to article 28 also allowed EU citizens to vote in local council elections. These amendments paved the way for an overwhelming majority in the Bundestag and a unanimous Bundesrat to approve legislation agreeing to the Treaty of Maastricht shortly afterward.[60]

If the Court's stance since the *Solange* decisions was directed towards stabilising its legal institutions and shoring up its supervisory jurisdiction through fundamental rights, the Treaty of Maastricht and the new article 23 posed certain challenges. On the one hand, article 23 explicitly subordinated European development to the Basic Law eternity clause.[61] In doing so it expressly incorporated the Court's conditions in *Solange II.* The new provision also made German participation in the Union conditional on the principle of subsidiarity,[62] which was also provided in the Maastricht Treaty.[63] On the other hand, the new provision and the Treaty of Maastricht that it anticipated significantly expanded the scope of European competencies. This in turn whittled away the space over which the Court's jurisdiction could extend. More fundamentally, the Treaty and article 23 challenged ideas of 'the state' in a way that upset established tenets in German legal professional culture. To a more radical degree than fundamental rights, the state has constituted an organising principle for German practices of constitutional reasoning.[64] As I explored in the previous chapter, the Court's engagement with fundamental rights flowed from a certain conception of the state. Even with their caveats and concessions, article 23 and the Treaty of Maastricht threatened the institutional authority of the Court because it eroded core cultural concepts — like the state — that kept that legal professional institutional structure introverted and intact.[65] Unsurprisingly, justices of the FCC

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[58] See, eg, Collings (n 39) 277.

[59] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 23.

[60] For a procedural history see Joachim Wieland, 'Germany in the European Union: The Maastricht Decision of the Bundesverfassungsgericht' (1994) 5 *European Journal of International Law* 259, 259.

[61] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 23(1).

[62] Ibid.

[63] *Treaty of Maastricht* (n 57) art 5(1).

[64] Christoph Möllers, *Staat als Argument* (Mohr Siebeck, 2nd ed, 2011); Christoph Möllers, *Der Vermisste Leviathan: Staatstheorie in der Bundesrepublik* (Suhrkamp, 2008); Frieder Günther, *Denken vom Staat her: Die Bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949 - 1970* (Oldenbourg Wissenschaftsverlag, 2004).

[65] The German preoccupation with the effect of European integration on the status of 'the state' is evident in extensive literature. See, eg, Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa: Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie* (Suhrkamp, 1999); Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp, 2003); Dieter Grimm, *Die Zukunft der Verfassung II: Auswirkungen von Europäisierung und Globalisierung* (Suhrkamp, 2012); Armin von Bogdandy, *Strukturwandel des Öffentlichen Rechts: Entstehung und Demokratisierung der Europäischen Gesellschaft* (Suhrkamp, 2022).

raised extra-curial concerns regarding the status of the European Union before a formal challenge to Germany's accession to the Treaty was brought.[66] Public law scholars also voiced concerns. Hans Heinrich Rupp's critique, for instance, drew attention to the the effect of the Treaty on the basic ideas of the sovereignty, citizenship and constitutional structure in the Basic Law.[67]

A group of German voters[68] brought a constitutional complaint against both the Federal legislation assenting to the Treaty of Maastricht and the constitutional amendment that introduced the Europe article. One of the complainants, Manfred Brunner, argued that the accession to the Treaty violated multiple rights, including rights to human dignity, free development of the personality, rights to form associations and political parties, freedoms of trade and profession, and property rights.[69] Brunner argued that these rights were violated because assent to the Treaty conferred core powers ordinarily exercised by the national state on the European institutions. Even where those European structures to provide the same quality of rights protection, Brunner argued that the relinquishment of German state control over that process amounted to a breach. Brunner, as well as the other complainants, also argued that the Treaty and constitutional amendment giving rise to it breached article 38, which provides for the principles governing election to the Bundestag, and the entrenchment of the democracy principle (article 20) through the eternity clause (article 79).

The Court accepted Brunner's argument based on article 38, even as it rejected the remaining complaints. And as in the *Solange* and *Elfes* decisions, the Court again reasoned with an eye to anticipated problems rather than those directly before it. The Court found the legislation assenting to the Treaty to be constitutionally compatible, but stated that article 38 gave rise to a "right" to elect members of the German Bundestag.[70] That right in turn gives expression to the democracy principle in article 20, which is protected through the eternity clause. These principles limit the scope of the new article 23.[71] The Court stated that, in practical terms, article 38 could be violated where the Bundestag no longer retains tasks and powers of a "substantial weight".[72] The powers that the Bundestag

[66] See, eg, Wieland (n 60) 259.

[67] Hans Heinrich Rupp, 'Muß das Volk über den Vertrag von Maastricht Entscheiden?' (1993) 46(38) *Neue Juristische Wochenschrift* 38; Collings (n 39) 277.

[68] This included four Members of the European Parliament who were part of the Greens parliamentary group and Manfred Brunner, a former senior official in the European Commission. For a contextual background see Wieland (n 731) 260.

[69] These arguments were only raised by Brunner: *Maastricht*, Bundesverfassungsgericht [Germany Federal Constitutional Court], 2 BvR 2134, 12 October 1993 reported in (1993) 89 BVerfGE 155, 165-6.

[70] Ibid 171-2. "Art. 38 Abs. 1 und 2 GG gewährleistet den wahlberechtigten Deutschen das subjektive Recht, an der Wahl der Abgeordneten des Deutschen Bundestages teilzunehmen." [Article 38(1) and (2) of the Basic Law guarantee to Germans eligible to vote the subject right of participating in the election of representatives of the German Bundestag.]

[71] Ibid.

[72] Ibid 185-6.

transfers to European institutions must also be sufficiently determinate.[73] The Treaty of Maastricht and article 23 had not yet violated those principles as such. The reasoning of the Court, however, acquired the authority for itself to review the Bundestag transfer of competencies to European institutions. It also denied to European institutions and organs the authority to themselves define and decide the limits of European competencies.[74]

The Court's description of article 38 as a right was necessary to bring it within the Court's jurisdiction for review.[75] But its reasoning in the *Maastricht* decision was also distinct from the rights-based approach in the Court's earlier stability seeking decisions. In the Court's earlier stability seeking decisions it could authoritatively frame societal or political conflicts in the language of rights conflicts, assimilating those problems within an existing framework buttressed by the flexibility of natural law origins. In the *Maastricht* decision the Court instead relied on that rights framing to stabilise established legal concepts — the nature of the state and of democracy — whose meaning was beginning to change in response to European integration. Its reasoning therefore moves beyond rights-based reasoning alone and extends to a theory of democracy in the European context. The Court locates the legitimacy for European governance in the parliaments of member states. It also concludes that the European Union can never acquire the quality of a state.[76]

Maastricht is therefore a 'stability seeking' decision of a different kind, responding to a different kind of exogenous pressure on German legal professional culture. More than just a challenge to formal institutional authority, the next steps of integration threatened concepts that structured German practices of constitutional reasoning, destabilising legal professional institutions and practices of reasoning from the inside. Even though the Court retained the jurisdiction and authority for rights review that it had acquired in the *Solange* decisions, the processes that the Maastricht Treaty established challenged concepts of democracy and the state that could take away the Court's command of those concepts. This concern with predictability and stability reflects in the Court's language: transfers of competence to European institutions must be sufficiently precise;[77] the Treaty does not lead to an "uncontrollable, unpredictable process" leading to a monetary union without further supervision of the Court.[78]

[73] Ibid 187: "Art. 38 GG wird demnach verletzt, wenn ein Gesetz, das die deutsche Rechtsordnung für die unmittelbare Geltung und Anwendung von Recht der — supranationalen — Europäischen Gemeinschaften öffnet, die zur Wahrnehmung übertragenen Rechte und das beabsichtigte Integrationsprogramm nicht hinreichend bestimmbar festlegt" [Article 38 is breached when legislation allows the law of supranational institutions to apply directly in Germany without sufficiently determining which community laws and intended integration program will apply.]

[74] Ibid 192.

[75] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] 93(1) no 4a.

[76] *Maastricht* (n 69) 182-8.

[77] Ibid 191-2.

[78] Ibid 203-4.

The Court's eye to stability results, however, in a degree of contradiction in its description of democracy. On the one hand, the Court calls for a greater degree of transparency, representation and democratic responsiveness from the European Parliament.[79] On the other, it ultimately emphasises the role of national parliaments and defends a restrictive, conservative meaning of democracy. Its reasoning frames further processes of European integration toward more democracy and transparency in the way of a threat, requiring the control of members states.[80] This tension within the Maastricht judgment, coupled with the Court's fashioning of a "right" from article 38, resulted in a controversial reception within German legal professional culture.[81] Joseph Weiler's critique seized on this tension within the judgment.[82] Weiler reflected on the deeper "constitutional ethos and sensibilities" reflected in the Court's reasoning,[83] especially its regressive understanding of democratic authority.[84] Weiler, like other commentators, particularly remarked on the Court's reference to statehood servicing peoples of a 'relative homogeneity'.[85] He argued that the Court had failed to rethink concepts of democracy, polity and membership in the new context of Europeanisation, "looking backwards" instead to the "tired old ideas of an ethno-culturally-homogenous Volk" as the basis for democratic authority and legitimacy.[86] Weiler also emphasised the association of those concepts with German nationalism.

Weiler's critique encapsulates why European integration was so destabilising to German legal professional culture. The Court's early stabilising period profited from two professional cultural tendencies — introversion and anti-nationalism — that emerged in the immediate post-war context. European integration brought those tendencies into conflict in a way that German legal professional culture could not resolve on the terms it had established as authoritative during those early post-war years. Moreover, shoring up the stability of German legal professional concepts for internal German purposes — emphasising the authority of the Court and the legitimising role of nationally defined populations for that authority — came at the expense of stability, system and clarity at the European level. This would prove unsatisfactory for those German lawyers focussed on systematising and explaining the emerging European legal system. Manfred Zuleeg, a former German justice at the ECJ, described

[79] Ibid 184-5.

[80] Ibid.

[81] See, eg, Franz C Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' (2011) 9(3–4) I*nternational Journal of Constitutional Law* 757.

[82] JHH Weiler, *The State 'Über Alles': Demos, Telos and the German Maastricht Decision* (European University Institute, 1995).

[83] Ibid 3.

[84] Ibid 5.

[85] *Maastricht* (n 69) 185-6. The Court described the state as giving legal expression to that which intellectually (geistig), socially and political binds its people, referencing an early essay from Hermann Heller on political democracy and social homogeneity:"Die Staaten bedürfen hinreichend bedeutsamer eigener Aufgabenfelder, auf denen sich das jeweilige Staatsvolk in einem von ihm legitimierten und gesteuerten Prozeß politischer Willensbildung entfalten und artikulieren kann, um so dem, was es – relative homogen – geistig, sozial und politische verbindet… rechtlichen Ausdruck zu geben".

[86] Weiler, *The State 'Über Alles': Demos, Telos and the German Maastricht Decision* (n 82) 5.

the *Maastricht* decision as an encroachment on the "unity of community law".[87] I explore why this was a problem for German legal professional culture more fully further below.

C *Arguing 'Identity': The Lisbon Decision (2009)*

In the *Maastricht* decision the Court sought to stabilise the meaning of core concepts in German legal reasoning. It did so by reasoning from a particular conception of democracy. That reasoning, however, set it on a potential collision course with continued European integration. And that movement toward greater integration accelerated inexorably. In 2007 the Treaty of Lisbon proposed a number of reforms to existing treaties. The Lisbon Treaty proposed an increase in Union competences, particularly on the part of the European Council and European Parliament. It also expanded the European Parliament's powers. The Lisbon Treaty additionally made the Charter of Fundamental Rights legally binding, effectively expanding the competence of the ECJ. And it provided the Union with legal personality allowing it to enter into international agreements. Expanded competences allowed the European Union to develop a shared security policy and diplomatic bodies. [88] Put simply, the Lisbon Treaty caused the European Union to look more like a "traditional state" that it had previously.[89] The Bundestag again passed legislation agreeing to the Treaty with a significant majority, also passing a law establishing the process through which the Bundestag and Bundesrat were to engage with European integration. Additionally, the Bundestag proposed amending parts of the Basic Law — including article 23 — to allow the latter legislation to take effect.

The Federal Constitutional Court's 2009 *Lisbon* judgment [90] forced the Court to provide the details for the account of democracy it proposed in its earlier *Maastricht* decision. Members of certain parliamentary groups brought 'Organstreit' proceedings[91] against the Bundestag to challenge the package of legislation. Other complainants joined them lodging constitutional complaints.[92] The complainants referred to the Court's reasoning in *Maastricht*, arguing that the legislation assenting to the Lisbon Treaty and accompanying legislation violated the right to vote established in article 38. They argued that the extent of competences that were transferred to the Union in the Lisbon Treaty breached that right to vote, because that transfer removed powers of the Bundestag from voters'

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[87] Manfred Zuleeg, 'Die Rolle der Rechtsprechenden Gewalt in der Europäischen Integration' (1994) 49(1) *JuristenZeitung* 1, 3.

[88] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ 306/1 (entered into force 1 December 2009) ('*Lisbon Treaty*').

[89] Collings (n 39) 293; Armin Steinbach, 'The Lisbon Judgment of the German Federal Constitutional Court: New Guidance on the Limits of European Integration?' 11(4) *German Law Journal* 367, 368.

[90] *Lisbon*, Bundesverfassungsgericht [German Constitutional Court], 2 BvE 2, 5/08, 30 June 2009 reported in (2009) 123 BVerfGE 267.

[91] 'Organstreit' — constitutional organ conflict — proceedings allow federal organs or fractions of Federal parliament to bring proceedings against other organs where they disagree on rights and duties arising under the Basic Law.

[92] *Lisbon* (n 90).

sphere of influence. Appealing to the Court's reasoning in *Maastricht,* one plaintiff also argued that the assent to the Treaty and accompanying legislation breached the democracy principle in article 20 that was anchored through the article 79 eternity clause.[93] They argued a breach of the democracy principle not only because the package of legislation removed Bundestag competences but also because of a lack of democratic legitimation on the part of the European Union. The complainant argued that the move to majority voting broke the "chain of legitimation" from national parliaments to the European Council.[94] Other complaints focussed on the changes to European institutions and election processes that the Lisbon Treaty initiated.

The Court found that the Treaty itself was compatible with the Basic Law, but concluded that the legislation establishing processes for the Bundestag and Bundesrat to engage with the Union was invalid. It found that the latter legislation didn't require sufficient participation of the Bundestag and Bundesrat in European lawmaking and treaty amendment processes. The Court therefore stipulated areas that required greater involvement of the Bundestag and Bundesrat.[95] And despite its conclusion that the Treaty was compatible with the Basic Law in its present form, the bulk of its judgment was directed toward a discussion of the Treaty and further limits of integration. In this way it followed the prospective, maximalist logic of earlier stability seeking decisions. The Court concluded that the right to vote it had identified in article 38 in the Maastricht decision was equal to that in its fundamental rights catalogue.[96] It also connected that right with human dignity, inflecting its democracy theory with the fundamental rights framing that had carried many of its earlier stability seeking decisions.[97]

The Court additionally introduced a new framework of 'identity review' to scrutinise further integration. 'Identity review' builds on the Court's earlier ideas in *Maastricht,* where it had reasoned from the constitutional features protected by the eternity clause. From this logic the Court claimed authority to review further steps towards integration to ensure that these did not alienate the 'identity of the constitution' that cannot be transferred or integrated.[98] Like courts in other jurisdictions, the court relies on 'identity' arguments to protect legal professional institutions — in this instance, the Court's formal authority — from international processes that affect the introversion necessary for those institutions to retain their structure.[99] The Court also listed areas of political activity in which the national parliament must retain its autonomy to act.[100] Were the Union and supranational

[93] Ibid 305.

[94] Ibid 306-6.

[95] Ibid 434-6.

[96] Ibid 340.

[97] Ibid 341.

[98] Ibid 350.

[99] See, eg, Christoph Schönberger, 'Anmerkungen zu Kalrsruhe' in Matthias Jestaedt et al (eds), *Das Entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, 2011) 9, 62. Schönberger argues constitutional identity emerged as a backlash to processes of globalisation.

[100] Ibid 357-8.

institutions to become the main actor in those political spaces, behaving "analogously to a state", this would result in "structural democracy deficit" that would breach both the constitutional provisions structuring European integration and the eternity clause.[101]

In terms of the *Lisbon* decision's character as a stability seeking decision, the judgment length is revealing. That length reflects the work the judgment is doing to broker compromises between competing aims, each appealing to legal professional sensibilities and with supporting 'camps'. As in *Maastricht*, the article 23 amendment and processes of European integration more generally sat in tension with introversion and control that the Court was seeking to establish over concept of democracy and the state. And having committed to that restrictive concept of the state in earlier stability seeking decisions, the Court had relatively limited space to move in the face of further integration. And because it could not say anything new, it needed to confine itself to the details of an existing position and how compromise could be achieved. Joseph Weiler described the *Lisbon* outcome as unsurprising, affirming the Lisbon Treaty "with some (arguably trivial) tinkering with internal German procedures."[102] Several scholars remarked on the length of the judgment and its lack of coherence. Christoph Schönberger traced the impression of incoherence to its "excessive length" and "meandering text".[103] Franz Mayer's critique noted that the judgment could be read from multiple perspectives, reflecting pro-integration and Eurosceptic voices, as well as various theories of democracy.[104] The *Lisbon* judgment "can be integrated into entirely different narratives."[105] Institutional features that ordinarily aim to support institutional coherence — the practice of unanimous judgments that I explored in chapter five — produced a lack of coherence in *Lisbon* in brokering too many compromises.[106] It was less possible to see the judgment as a clear institutional position than as the product of individuals with competing orientations.[107]

In attempting to resolve the tension between competing positions, the *Lisbon* judgment could not completely satisfy any. Legal professional disagreement regarding the correct role of the Court in supervising continued processes of integration remained unresolved. Joseph Weiler described the reaction as predictable as the judgment

[101] Ibid 364-5.

[102] JHH Weiler, 'The "Lisbon Urteil" and the Fast Food Culture' (2009) 20(3) *European Journal of International Law* 505, 505.

[103] Christoph Schönberger, 'Die Europäische Union zwischen „Demokratiedefizit" und Bundestaatsverbot: Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48(4) *Der Staat* 535, 535.

[104] Mayer (n 81).

[105] Ibid 776.

[106] The judgment was delivered unanimously by seven justices. An eight justice did not join but did not issue a dissenting judgment: Ibid 772.

[107] See, eg, Weiler, 'The "Lisbon Urteil" and the Fast Food Culture' (n 102).

itself.[108] "[P]olitical and ideological sensibilities determined the assessment of the judgment."[109] Other critics noted the lack of precedent behind the Court's extensive interpretation of the eternity clause and its discussion of constitutional identity.[110] They also drew attention to the Court's strained engagement with the article allowing further European integration.[111] Unlike earlier stability seeking decisions, the *Lisbon* judgment also emerged in the digital age of 'fast scholarship'. It was also released with an English language translation. On one view, this reflects the Court engaging with a new institutional context in how legal knowledge is produced and critiqued. While the Court could not resolve the instability within German legal professional culture that European integration had provoked, it could appeal to other forms of authority in a new digital, transnational context.

IV EXPLAINING 'STABILITY SEEKING' DECISIONS

A *Institutional Authority*

In the previous chapter I explored early decisions of the Federal Constitutional Court that allowed an extraordinary range of societal disputes to be framed as fundamental rights disputes. The flexibility of those early doctrines could plug any 'gaps' in existing practices of reasoning. But those doctrines could only be deployed in a stable and consistent way because of how different institutions and practices for producing knowledge interact in German legal professional culture. It relied on a central authority — the Federal Constitutional Court — and a clear hierarchy in which other cultural institutions of knowledge building, legal education and training continued to look inward. Over time argumentative frameworks became less openly value-laden and reflective of the logic of natural law, and became more self-referential as the Court's authority consolidated. "Constitutional Court positivism" — the exposition and systematisation of statements of the FCC — replaced natural law in producing knowledge. Put simply, the Court's early fundamental rights decisions linked the Court's formal authority with the flexibility of the fundamental rights argumentation framework. But it also confined fundamental rights to the Court's formal authority. This made beliefs and narratives viable that were necessary for legalist reasoning

European integration threatened the stability of those beliefs and narratives. It decoupled the language of fundamental rights from a single institutional authority. The FCC lost its "monopoly jurisdiction".[112] The European Court of Justice emerged as a second institution whose claim to authority over fundamental rights arguments resembled that of the FCC. Its claims appeared similar to those already accepted as authoritative in German legal professional culture. The FCC's reasoning in its *Solange* judgments partially responded to this problem. It repositioned German fundamental rights — and therefore the fundamental rights argumentative

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[108] Ibid.

[109] Ibid 505.

[110] Schönberger, 'Anmerkungen zum Lissabon-Urteil' (n 103) 536. See also Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court Says "Ja Zu Deutschland"' (2009) 10(8) *German Law Journal* 1241.

[111] Halberstam and Möllers (n 110).

[112] Collings (n 39) 287.

framework tied to the FCC's authority — at the top of the institutional hierarchy. As European integration produced more sophisticated rights protections and jurisprudence, the authority of that hierarchy was continually threatened. It required the Court to lean into other argumentative frameworks — built around democracy and 'identity' — where its claims to monopoly jurisdiction were also threatened. Without a single institutional authority — the FCC or the ECJ — fundamental rights reasoning again became 'political'.[113] The conditions on which its idealised relationship between legal and political forms of argument rested, fell away. But the 'political' cast that arguments could now acquire was not because of a relationship to the legislature alone, but rather, because of a competitive relationship between legal structures and courts. Accusations of 'judicial activism' had been rare in German legal professional culture prior to European integration. These began to appear as a charge levelled at the ECJ, in turn justifying the continued control of European integration by national courts.[114]

The German scholarly reaction to the ECJ's 2005 *Mangold* decision[115] reflects this problem. Labour reforms in Germany in the middle of the 1990s exempted employees older than 52 from a limit on the amount of time that employees could be retained on short term contracts. The purpose of these reforms was to encourage employment opportunities for older workers.[116] Mangold, a 56 year old German citizen, argued that the exemption breached a 2000 European directive that established a framework for combatting age discrimination in employment law. The ECJ ultimately found that the relevant German labour provision breached a "general principle of Community law" regarding non-discrimination on grounds of age.[117] It identified the source of that principle in "various international instruments and in the constitutional traditions common to the Member states".[118] This was significant. The ECJ's jurisprudence had held that directives did not apply directly in member states, but rather, required implementation. Germany's deadline for implementing the relevant directive had not yet passed.[119] In finding that a more general principle existed that the relevant directive merely reflected, the ECJ bypassed these

[113] See, eg, Mayer (n 81) 774. "…the German Constitutional Court in recent years has been criticized for increasingly becoming a political player… it is definitely possible to read the Lisbon judgment as an attempt to defend the national Constitutional Courts; power against any encroachments from the European level."

[114] See, eg, Collings (n 39) 292. Collings claims that the ECJ "is a far more activist tribunal than any national constitutional court in Europe, including the German Federal Constitutional Court. Against the activism of the ECJ, the governments of Europe's member states are almost utterly defenceless. National constitutional courts represent the only available counterweight." Dieter Grimm further justifies control in national courts because of a lack of opportunities at the European level to correct "jurisprudence that has got out of hand": Grimm, *Die Zukunft Der Verfassung II* (n 65) 180. ["Ferner fallen auf der europäischen Ebene Korrekturmöglichkeiten gegenüber einer ausufernden Rechtsprechung aus, die im nationalen Rahmen bestehen und genutzt werden."]

[115] *Werner Mangold v Rüdiger Helm* (C-144/04) [2005] ECR 9981 ('*Mangold*').

[116] Ulrich Haltern, 'Eine Lanze für Mangold' in Ulrich Haltern and Andreas Bergmann (eds), *Der EuGH in der Kritik* (Mohr Siebeck, 2012) 25, 27.

[117] *Mangold* (n 115), 10039-10040 [74].

[118] Ibid 10040 [75].

[119] Haltern (n 116) 27.

obstacles. It also provoked significant controversy — a "scandal" — in the German legal professional community.[120] Some scholars considered the decision to be ultra vires.[121]

The ECJ's reasoning in *Mangold* was not so remarkable when compared to that of early fundamental rights cases. Its reasoning appeals to 'general principles' and it 'discovers' a new right. Like early German FCC decisions, the reasoning in *Mangold* was brief because it was unable to pull upon an established body of doctrinal standards. But unlike the fundamental rights decisions of the early FCC, *Mangold* did not enjoy the same professional cultural acceptance. German fundamental rights argumentation frameworks had already 'formalised'. German legal professional institutions were at a later stage of their evolution. Sophisticated methodological practices could rely on established institutions — courts, knowledge building practices, scholarship — for their authority. In contrast to those practices, the reasoning in *Mangold* appeared brief and "abrupt".[122] One commentator charged the ECJ with "inventing principles, that it can then cite as a justification for later decisions".[123] And yet, the ECJ could make claims with the imprimatur of institutional authority, given the primacy of European principles of fundamental rights.

Because the ECJ can appeal to beliefs regarding institutional authority, the FCC's attempts to 'seek stability' in response to European integration have not been able to entirely 'win over' the German legal profession. The role of the German Federal Court in supervising European integration remains a contested, controversial space.[124] As I argued in my analyses of the *Maastricht* and *Lisbon* decisions, these 'stability seeking' decisions contradicted European institutions' claims to authority. And those claims could be couched in a language to which German legal professional culture was receptive. They resonated with professional cultural values in which German lawyers were socialised — the importance of respecting institutional hierarchy; that systems of norms must be coherent and perfect. For those whose professional attention and specialisation focussed on European Union law, the FCC's stability seeking decisions compromised core legal professional values. As I explored earlier, European Union law had become a legitimate space within German legal professional institutions, with legal education and scholarship raising the expectation of hierarchy and system.

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[120] Ibid 38.

[121] Ibid; Lüder Gerken et al, *„Mangold"als Ausbrechender Rechtsakt* (sellier. european law publishers, 2009).The Federal Constitutional Court reviewed the underlying principles of the ECJ's *Mangold* decision in the aftermath of its Lisbon judgment. These were ultimately upheld: *Honeywell*, Bundesverfassungsgericht [German Federal Constitutional Court] 2 BvR 2661/06, decision of 6 July 2010, reported in 126 BVerfGE 286.

[122] Haltern (n 116) 46.

[123] Roman Herzog and Lüder Gerken, 'Roman Herzog: Stoppt den Europäischen Gerichtshof!', *Frankfurter Allgemeine Zeitung* (Frankfurt am Main, 7 September 2008) 8. See also Gerken et al (n 121).

[124] Particularly controversial examples have connected with European monetary reforms, especially in response to European financial crises. See, eg, *European Stability Mechanism*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvR 1390/12, 18 March 2014 reported in (2014) 135 BVerfGE 317; *European Public Sector Purchase Program*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvR 859/15, 5 May 2020 reported in (2020) 154 BVerfGE 17.

B *Conceptual Stability and System*

In the previous chapter I demonstrated how the FCC fused its formal institutional authority with a particular framework for arguments — fundamental rights. The idea of fundamental rights that the Court adopted endorsed a particular theory of the state that had developed in the Weimar Republic. As that chapter also explored, professional disagreement in the Weimar Republic had anchored itself in a certain set of concepts with 'the state' at their centre. The 'state' is the "central constitutional complex" in German thought,[125] even as the use of the term has gradually been replaced with that of the 'constitution' in German public law thinking.[126] One explanation for the power of 'the state' in the German legal imagination connects with the value that German legal professional culture places upon system — an idea I have explored in earlier chapters regarding the German approach to education and method. The idea of a unified 'state' is necessary for law to exist as a coherent system. Even as the language of 'the state' has been replaced by that of 'the constitution', the function that concept performs in organising German public law reasoning remains the same.

European integration — especially after the Treaties of Maastricht and Lisbon — introduced legal pluralism. Sources of legal authority then applied within Germany that did not originate in the state or a single constitution[127] and could not be explained in such terms.[128] This blurred the conceptual framework that allowed members of the German legal profession to reason in terms of system. And as I argued in previous chapters, other legal professional institutions rely upon that assumption of system in public law reasoning. Public law scholarship aims to systematise the standards that the Court sets, legal education teaches students to reason deductively from that system, legal practitioners then apply it at scale. The difficulty of bringing plural legal sources into a system manifested particularly in administrative law — the reality of constitutional law 'on the ground'. The 1993 meeting of the Association of Public Law Scholars reflected on the increasingly unwieldy body of national and European administrative regulations whose relationship to each other was unclear, leading to uncertainty in application.[129] Conflict persisted as to how those different sources of law could be assimilated into a unified system.[130]

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[125] See reference of Mayer (n 81) 773. For a discussion of the tension that Europran integration posed to the German idea of 'the state' see Jo Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford University Press, 2013) 99-136.

[126] Schönberger, 'Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (n 103) 60.

[127] See, eg, Dieter Grimm's description in Dieter Grimm, *Die Zukunft Der Verfassung II* (n 65) 83–4.

[128] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 99) 60.

[129] Udo Di Fabio, 'Staatsrechtslehrertagung 1993' (1994) 49(1) *JuristenZeitung* 30, 32; Manfred Zuleeg and Hans-Werner Rengeling, *Deutsches und Europäisches Verwaltungsrecht: Wechselseitige Einwirkungen. Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Mainz vom. 6. Bis 9. Oktober 1993*, vol 53 (Walter de Gruyter, 1994).

[130] Udo Di Fabio, 'Staatsrechtslehrertagung 1993' (1994) 49(1) *JuristenZeitung* 30, 32; Zuleeg and Rengeling (n 129).

The *Maastricht* and *Lisbon* decisions sought to address the problem of system in two ways. Like the earlier *Solange* decisions, *Maastricht* and *Lisbon* assert the authority of the Court to set the standards for that system. But they also sought to settle the meaning of concepts — like that of the state and sovereignty — that provide the framework for legal sources to be brought within a system that the Court controls. These judgments carve out areas of government activity that cannot be transferred to a supranational structure. This ensures that 'the state' continues to exist in a unified form that is susceptible to the Court's control and direction. But the response to those judgments that I earlier explored reflect that the Court could no longer fully control the meaning of those concepts. On the one hand that was a practical matter. Ordinary courts were required to apply European and international law in a way that did not automatically implicate the Basic Law.[131] The legal professional community was needing to grapple with public law problems in which the Court was no longer the authoritative centre. And as a related trend, German legal professional culture was experiencing law untethered from a central state or constitution.[132] Where courts, practitioners and scholars sought to systematise and integrate different sources of law, the FCC was no longer the natural guide.

The Court's attempt to settle the meaning of democracy in Maastricht and Lisbon encountered resistance for a similar reason. As I explored in chapter five, the FCC had been a 'midwife' for the Republic's transition to a liberal democracy in its early years.[133] It established itself in a pre-democratic culture that allowed it to shape a theory of democracy authoritatively within its legal professional culture. But at the time of the Maastricht and Lisbon decisions, German democracy had become more established and its meaning had become more complex with globalisation. Legal education and training had internationalised, scholarship was influenced by transnational networks and a new generation of lawyers and scholars were more open to plural sources of law and legitimacy.[134] Within that new context the Court's restrictive reading of democracy — as one necessarily tied to the nation state and nationally constituted public — was not persuasive and out of step with evolving professional cultural beliefs.

V SUMMARY

In the previous chapter I argued that German 'legalism' developed through certain decisions made by the Federal Constitutional Court in its early years. Those 'stability seeking' decisions expanded the range of potential conflicts that could be framed as fundamental rights disputes. They also introduced a certain division of labour to constitutional reasoning. That division of labour positioned the centralised Court as the 'standard setting' power from which lower level decisions about how those standards should be applied in practical cases could be made at scale. Other institutions — scholarship, legal training and education — oriented toward the Court in that role.

[131] Schönberger, 'Anmerkungen zu Kalrsruhe' (n 99) 61–2.

[132] See, eg, Murkens (n 125) 112-36.

[133] Schönberger, 'Anmerkungen zu Karlsruhe' (n 99) 44.

[134] See, eg, Murkens' discussion of how German public law scholars developed "new constitutional law terms" to create new spaces of "discourse and argumentation": (n 125) 114-15.

That legalism, however, rested on certain conditions whose limits European integration exposed. Firstly, the Court needed to maintain a monopoly over the power to set standards. In practical terms, this meant an exclusive authority to interpret fundamental rights — the bulk of the Court's caseload. Fundamental rights present a sufficiently capacious framework for argument that can offer answers to novel economic and societal problems. Certain conceptual frameworks from which the Court derives its standards, such as that of 'the state' or 'unified constitution', must remain stable for fundamental rights reasoning to retain a legalist quality.

For this reason the Court's decisions regarding successive challenges to European integration 'sought stability'. These decisions reflect attempts by the Court to maintain the conditions that allow members of the German legal professional community to experience constitutional reasoning as sufficiently constrained by materials and value judgments that are technical in nature. Initially this required the Court to appoint itself at the top of a hierarchy of institutions adjudicating on fundamental rights. But as European institutions developed more sophisticated sources of law and frameworks for fundamental rights arguments, the FCC's position became less credible. Its reasoning in the *Solange I* and *II* judgments could therefore not avoid the cast of a 'political' judgment — one that did not necessarily follow from purely 'legal' considerations.

By the time the Court delivered its *Maastricht* and *Lisbon* judgments, it could not avoid intractable professional cultural conflict ensuing from its decisions. Within the frameworks that organise authority in German legal professional culture, a variety of approaches in *Maastricht* and *Lisbon* could have been plausible. In these decisions the Court relied upon arguments of 'identity', democracy and legitimacy that asserted the primacy of nationally defined publics. But this was not completely persuasive. Internationalisation in education, as well as the experience of participation in a European community itself, meant that the Court was no longer an authority on the meaning of democracy as it had been when the Republic first established. Alternative institutions had now become authoritative within Germany, disrupting the institutional introversion and hierarchy that existed prior to European integration. This meant, however, that a 'politics' emerged again in constitutional argument that assertions by the FCC could no longer resolve.

CHAPTER EIGHT: FEDERALISM AND THE EARLY AUSTRALIAN HIGH COURT

I INTRODUCTION

In this chapter I explore the legal professional conditions that gave rise to post-federation Australian legalism. A popular narrative explains Australian legalism in terms of the nature of the Australian *Constitution*'s text. That text is described as a "prosaic" document expressed in "lawyer's language".[1] Its interpretation tends to be considered "less politically contentious" because it lacks a bill of rights[2] and therefore does not involve courts in the "broad questions of political philosophy that other constitutional courts have so often had to resolve."[3] Underlying this narrative is an assumption that, because the *Constitution* does not concern itself with socially contentious political questions, there is less scope for professional disagreement regarding method. It is therefore easier to present a constitutional argument as 'legalist' or not.

In this chapter I argue that Australian legalism did not emerge as a 'given' because of the nature of the *Constitution*, but because of how legal professional institutions — their structure and cultural inheritance — responded to certain interpretive challenges after federation. The Australian post-federation legal profession initially struggled to settle on interpretive methods for a written, federal constitution that altered political structures. It preserved, on the one hand, aspects of a legal professional culture and approach to interpreting legal instruments informed by British traditions and ideas. During this period "institutional visions for Australia" were unstable.[4] This led to the endorsement of 'textualism' as a constitutional method in the *Engineers' case*.[5] In adopting 'textualism' as an interpretive technique the Court sought to bring stability to constitutional interpretation by appealing to professional cultural practices and belief systems predating the introduction of the *Constitution*.

The approach to legalism that the *Engineers' case* established had limitations. While some of those limits were exposed through the continued evolution of the federation, others connected with the destabilising effect that a written constitution itself had on practices of reasoning within Australian legal professional culture over time. A written *Constitution* created a framework for constitutional argument, and novel kinds of constitutional questions,

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[1] Sir Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (The Federation Press, 2003) 8, 8; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions : A Comparative Study* (Oxford University Press, 2006) 106, 107. For a critique of this narrative see 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 ('The Small Brown Bird'). A more recent generation of scholars has questioned these earlier representations and narratives regarding the technical and 'prosaic' nature of the Australian Constitution. I examine that literature more fully in the next chapter. This chapter focusses instead on the connection between this earlier narratives and post-federation 'legalism'.

[2] See, eg, summary of literature in Goldsworthy (n 1) 113.

[3] Ibid.

[4] John M Williams, 'The Griffith Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 77, 77.

[5] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' case*').

in which a pre-federation legalism subscribing to a faith in 'plain meaning' and a denial of judicial choice became less plausible.

A second period of stability seeking decisions emerged in the period following the second world war that established a new kind of legalist reasoning, under the intellectual influence of Owen Dixon. One of the most notable of these stability seeking decisions — *Melbourne Corporation v Commonwealth*[6] ("*Melbourne Corporation*") — successfully grounded a more meaningful engagement with the commitments of provisions connected to federalism in existing legalist professional belief systems. I argue that the success of Dixon's legalism, which had an enduring professional cultural impact, involved separating some ideas in the *Constitution* — such as those connected with federalism and the separation of powers — from those to which the legal profession had attached a narrative of 'continuity' from the pre-constitutional order. This separation allowed the Court to engage in constitutional 'implications' derived from those provisions not connected with a continuity narrative, despite the rejection of implications from provisions connected with federalism in the *Engineers' case*.

I conclude by suggesting how features of Australian legal professional institutions that I discussed in previous chapters may have interacted with the development of post-federation Australian legalism. I also explore some of the institutional and cultural conditions on which those legalist practices of reasoning rested.

II LEGAL PROFESSIONAL CULTURE AT FEDERATION

A *Legalism at Federation*

The Australian colonies received both English law and English legal professional culture.[7] And while that culture was required to adapt to local conditions,[8] it largely carried its approach to legalism. That approach involved a relatively stable set of beliefs regarding the role of courts in interpreting legal instruments. Many of those beliefs reflected in the practices of statutory interpretation that had developed consistently with principles of parliamentary sovereignty. These principles carved out a maximum of space for the will of parliament. A V Dicey's 1885 account of parliamentary sovereignty provides a useful illustration of that logic.[9] In Dicey's account the legislative power of Parliament is unlimited.[10] The task of courts is to interpret the words of parliamentary enactments in order to give effect to the will of electors.[11] In such a system the concentration of power is linear rather than divided, with courts having "little or no role to play" beyond statutory interpretation and "those areas

[6] (1947) 74 CLR 31.

[7] Ian Holloway, 'Sir Francis Forbes and the Earliest Australian Public Law Cases' (2004) 22(2) *Law and History Review* 242, 211.

[8] Ibid.

[9] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1915).

[10] Ibid 4.

[11] Ibid 269.

of the common law left to them by Parliament."[12] This allows little space for courts to engage in the ideas or theories regarding constitutional structures.

The Australian *Constitution* mainly drew on ideas from two constitutional systems, but created a *Constitution* that fit neatly in neither tradition. It brought together federalist ideas taken from the United States constitution and ideas about representation taken in part from the British system of responsible government. These two traditions sit in potential tension in their vision of constitutionalism.[13] The US-American vision viewed government as "inherently dangerous" and proposed its containment through the diffusion of representative institutions,[14] in contrast to the premises of responsible government that I explored above. The Australian colonies adopted the US model of federalism because of pragmatism rather than fear. That followed from a recognition that "unified action in matters of common concern" offered benefits to the colonies accompanied by the nascent experience of nationhood.[15] The potential tension between federal ideas and responsible government seems to have escaped the attention of the framers.[16] A key reference point for those framers — Bryce's *American Commonwealth*[17] — had tended to present the American experience with the British slant of its author. It described judicial review as "involving a mechanical comparison of statutes with the words of the *Constitution*".[18]

The nature of a constitutional text presented a related problem for practices of reasoning around the time of Federation. To a far greater extent than a statute, a constitution reflects the "studied ambiguity" necessary to resolve compromises during constitutional drafting process.[19] Provisions may be phrased to secure support at referendum. The requirement that interstate trade be "absolutely free", for example, was also a political slogan to appease the New South Wales colony.[20] This would go on to become one of the most litigated provisions in the *Constitution*. Australia's federal constitution represented compromises and a departure from the status quo to a greater degree than the existing constitutions of the colonies. Questions regarding the federal balance were heavily

[12] Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 169.

[13] Ibid 164.

[14] Ibid 167.

[15] Ibid 167–168.

[16] Ibid 174.

[17] John Andrew La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 173. I described this in more detail in chapter five.

[18] Gageler (n 12) 174. Bryce did acknowledge the occasional influence of individual preference and public opinion upon judicial workings, though emphasised the professionalism that guided judicial reasoning: James Bryce, *The American Commonwealth*, vol 1 (Liberty Fund, 1995) 242–4.

[19] Williams (n 4) 86.

[20] JA La Nauze, '"A Little Bit of Lawyers" Language: The History of "Absolutely Free", 1890-1900' in AW Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 57; Williams (n 4) 87.

debated at framing, with participants representing a spectrum of federalist to nationalist sympathies.[21] Concessions were made to the smaller colonies — including the equal representation of states in the Senate — to ensure that the referendum for the *Constitution* passed. Those concessions and compromises were phrased in broad language so that the "plain and natural meaning of the words furnish little guidance to the constitutional decision-maker".[22] Most importantly, the *Constitution* introduced a new framework around which practices of reasoning needed to establish. This was inherently destabilising — a critical juncture — that disrupted existing approaches to interpreting texts as new kinds of constitutional argument became plausible.

B *Lawyer-Politicians and Early Federalism*

It was not immediately clear how Australian legal professional culture would adapt to a written constitution after Federation. The first High Court bench constituted in 1903 was occupied by "lawyer-politicians and federalists" who had participated in the constitutional drafting.[23] The 'Griffith Court' consisted of three justices — Griffith, Barton and O'Connor — all of whom "were intimately involved in the Federation movement and the first years of the Commonwealth."[24] Barton and O'Connor had been drafters, and had had intimate knowledge of the drafting process and the compromises that the framers had struck.[25] Disputes regarding federalism could be resolved by reference to the theories debated at framing and "unexpressed understandings of how the *Constitution* was intended to operate in practice".[26] Questions about which *legal* sources those justices should consult to resolve disagreement about the text did not play a role.

The original three justices were 'federalists', sharing a common approach to the interests of states and "the federal balance".[27] From 1906 they were joined by Justices Isaacs and Higgins, who tended to favour greater federal centralisation. Both of the latter judges had felt that the "democratic spirit" of the Constitution had been compromised by too many concessions to the smaller states at framing.[28] Higgins described it as a compact brought "by pedantry out of provincialism — a bill to perpetuate provincialism" and had actively campaigned

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[21] La Nauze (n 17).

[22] Gageler (n 12) 178.

[23] Sir Anthony Mason, 'Foreword' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) vi.

[24] Williams (n 4) 78.

[25] Ibid 79.

[26] Anne Twomey, 'The Knox Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 98, 98.

[27] Ibid 101–102.

[28] Williams (n 4) 82.

against the 1899 Bill.[29] Isaacs considered the American model of federalism to lack "nationalising force" and was reluctant to depart from "the known British structures", of the view that Australian society more closely resembled the British rather than the US-American.[30] This meant that, after 1906, there were effectively "two Courts"[31] — one composed of those with federalist sympathies and another that favoured greater centralisation in the interests of nation building. For the time being, however, the federalist judges retained a majority. During this period questions of interpretation and judicial technique continued to play little role, as the sitting justices tended to resolve the disputes before them based on their approach as framers to its underlying ideas and compromises. As John Williams argues, the Court during this period "provided the essential forum within which unresolved issues of the 1890s Conventions could once again be ventilated and concluded."[32] The Court also provided a degree of stability that contrasted with that of the Parliament, where conflicts regarding the national tariff policy continued to divide non-Labor political movements.

One of the first decisions regarding constitutional interpretation was delivered in 1904, at a time when the Court was exclusively composed of the three 'federalist' justices. In *D'Emden v Pedder* the Court first articulated what became known as the 'implied immunities' doctrine.[33] Tasmanian legislation provided for stamp duty to be paid on the receipt of money. A Commonwealth public servant challenged the liability to pay the stamp duty on their salary. The Court held that the legislation should be interpreted so as not to apply to federal officers' salaries. It concluded that when a State attempted to confer an authority on its legislature or executive that would "fetter, control, or interfere" with the "free exercise" of Commonwealth legislative or executive power, it would be invalid.[34] A further 1904 decision regarding constitutional interpretation established the "reserved powers doctrine", also known as the "doctrine of implied prohibitions". *Peterswald v Bartley* concerned a challenge to the validity of state legislation regulating brews' licence fees.[35] Section 90 of the *Constitution* conferred exclusive legislative power on the Commonwealth over excise duties and brewers' licence fees had often been referred to as a "duties of excise" in English and Australian state legislation.[36] The Court held that the relevant constitutional provisions conferring exclusive power on the Commonwealth should be construed narrowly so as to preserve the maximum sphere of legislative power possible for the states. It concluded that, were the decision of the lower

[29] Ibid.

[30] Ibid 81.

[31] Ibid 78.

[32] Ibid 77.

[33] (1904) 1 CLR 91.

[34] Ibid 111. See also Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929* (Melbourne University Press, 1956) 56. This doctrine was then extended in 1906 to provide the states with reciprocal immunity in *Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 ('*Railway Servants case'*).

[35] (1904) 1 CLR 497.

[36] Ibid 506; Sawer, *Australian Federal Politics and Law 1901-1929* (n 34) 57.

Court to apply, it would withdraw the power of the states to "regulate their internal affairs in connection with nearly all trades and businesses" which would be "contrary to the spirit of the Constitution".[37]

These two doctrines — that of 'implied immunities' and 'reserved powers' — involved reliance on principles that were 'necessarily implied' within the Constitution.[38] But to determine whether principles are necessarily implied requires value judgments regarding overarching ideas and commitments of the federal system. As Geoffrey Sawer notes, both doctrines "depend on the general political theory of Australian federalism entertained by the Court."[39] As I explore below, this approach to the authority of sources in interpreting legal instruments jarred with existing cultural beliefs. The reliance on a general theory or federalist vision sat in potential tension with the practice of statutory interpretation and legalism. It assumed a space for the Court to interpret the "spirit" of the Constitution "unless the plain words of its provisions compel" it otherwise.[40] But again, that tension was not yet forced to a surface because the first Court was able to negotiate its interpretive role as both framers and legal professionals. Both *D'Emden v Pedder* and *Peterswald v Bartley* also demonstrate extensive engagement with US-American precedent, reflecting other ideas connected with interpretation. In *D'Emden v Pedder* Griffith CJ emphasised the authority of a United States Supreme Court precedent regarding the relationship between "that great Republic and its constituent states".[41] The Court additionally concluded that, given the familiarity of the Constitution's framers with the United States Constitution, it was "not an unreasonable inference" that the Australian framers intended that "like provisions should receive like interpretation".[42] This approach reflected not only the positions of the justices as framers who had held a particular vision of federalism, but also as framers aware that the Constitution was a composite of compromises with a united, coherent vision yet to be articulated. In explaining why the Court did not refer to the convention debates, Barton J noted that the "speeches in the debate" could support "each side" of competing interpretations.[43]

After the Court expanded to five justices — including Isaacs and Higgins — tension between approaches to interpretation began to emerge.[44] Sir Frank Gavan Duffy replaced O'Connor in 1913 and Charles Powers and Sir

[37] (1904) 1 CLR 497, 507.

[38] See, eg, *D'Emden v Pedder* (1904) 1 CLR 91, 109: "…the provisions of the Constitution as to the exclusive authority of the Commonwealth Parliament ought to be read subject to this power of the States, whether regarded as a power expressly reserved, or as one impliedly reserved form the nature and necessity of the case."

[39] Sawer, *Australian Federal Politics and Law 1901-1929* (n 34) 57.

[40] *Peterswald v Bartley* (1904) 1 CLR 497, 507.

[41] (1904) 1 CLR 91, 111. That United States Supreme Court authority was *McCulloch v Maryland*, 17 US 316 (1819).

[42] (1904) 1 CLR 91, 113.

[43] *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 213; Williams (n 4) 88.

[44] Twomey (n 26) 102.

George Rich were added to the Court to bring its number to seven.[45] On the one hand, the new members of the Court had not been involved in the federation movement. Both Gavan Duffy and Rich were barristers drawn from the legal profession. They had not been involved in the constitutional conventions and had never been active in politics.[46] For these justices, constitutional reasoning was no longer the continuation of a discussion that had begun at the conventions. Their distance from constitutional drafting and the federation movement meant they needed to approach the constitutional text with a theory of interpretation that could sufficiently constraint other legal actors. Neither the implied immunities and nor the reserved powers doctrine met that requirement.[47] They required the Court to carve out spheres where both the Commonwealth and the states could be sovereign.[48] That task was difficult to negotiate by reference to legal materials alone without recourse to a theory of federalism that had been so heavily and recently contested during the convention debates. While the original three justices could discharge that task as framers, justices more removed from those debates — and steeped heavily in the culture of legalism that I explored above — would not have been able to experience 'constraint'.

III 'STABILITY SEEKING' DECISIONS

A *Legalism against Federalism: The Engineers' Case (1920)*

There are numerous explanations for why some justices disagreed with the approach of the early Griffith Court. An obvious narrative that I outlined above sees that friction in terms of competing visions of federalism embedded in the constitutional text at framing. Later justices — Higgins, Isaacs — did not share that vision. Justice Griffith's retirement and Justice Barton's death, both in 1919, marked an end to the early approach to federalism.[49] They were joined by Justices Knox, Rich and Starke — the "new legalists"[50] — with Justice Knox assuming the role of Chief Justice. Anne Twomey argues that Isaacs remained the defining judicial force on the Knox Court, uniting the "legalists and the nationalists".[51] Another narrative sometimes attributes influence to the First World War's effects on a nascent sense of nationhood and recognition that more centralised powers may be desirable. Justice Windeyer later described the change in interpretive approach as a "consequence of developments that had

[45] Albert Piddington was also appointed in 1913 as part of a 'court-packing' effort due to sympathies with the labour movement. He was forced into resignation after one month without ever hearing a case. Sawer, *Australian Federal Politics and Law 1901-1929* (n 34) 105–106.

[46] Williams (n 4) 82–83.

[47] Ibid 90; Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th ed, 2008) 4-5.

[48] Brendan Lim, 'Legitimacy' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 315, 325.

[49] Twomey (n 26) 98.

[50] Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 99.

[51] "It could arguably be described in reality as the Isaacs Court": Twomey (n 26) 101.

occurred outside the law courts" as well as the new legal perspectives within them.[52] Yet another account — popularised by political scientist Brian Galligan — sees the development of interpretive approaches during this period as a means of ensuring the Court's acceptance by political elites, particularly in light of Labor's influence in federal politics.[53]

In considering how legal professional culture and cultural institutions influence the development of legalism, these various accounts can be synthesised as a bundle of pressures that rendered existing practices of reasoning 'unstable'. Those existing practices relied upon a particular approach to reasoning incorporating a theory of federalism. They were sustainable when deployed by justices who had a theory because of their involvement in framing and literacy in federalist principles. But that approach to reasoning was difficult to replicate across legal professional institutions because it did not yet have an anchor in legal professional socialisation. The new members of the Court — Gavan Duffy, Powers and Rich — "lacked an ideological background"[54] and therefore "tended to apply ordinary English common law principles of interpretation in a more literal fashion" than their predecessors.[55] For these new justices, and the profession generally, the style of reasoning that earlier justices had deployed did not yet allow for sufficient differentiation between 'legal' or extra-legal arguments. And professional socialisation, connected with the professional beliefs that had prevailed at federation, had raised the expectation that the materials that guide 'legal' judgments would be relatively determinate. The tension between reasoning through federalist principles and pre-existing professional beliefs was clear in the Court's earliest cases. In a dissent, Justice Higgins — the advocate of "known British structures" during the convention debates — argued that the Court had "no right" to treat provisions as "containing what [the Court] conjecture[s], or may conjecture, to have been intended, by the Australian Convention, by the Australian voters, by the Australian delegates in London, by the British law officers, or by the Houses of British Parliament."[56] Instead, attention should be given to the "form of words" that was agreed to: "What is their meaning? They give a definite meaning as they stand."[57] Agreement on a common interpretive approach was all the more fraught because visions of federalism had been so contested during the conventions and in the first years of Parliament.

[52] *Victoria v Commonwealth* (1971) 122 CLR 353, 395 ('*Payroll Tax case*'); Mason (n 23) vii. Note that this account has also been disputed. Constitutional referendums at the time rejected attempts of the Commonwealth government to obtain more power, though conservative and national governments were successful at elections: Twomey (n 26) 99–100. See also Gageler (n 12) 181–2.

[53] Galligan (n 50); Brian Galligan, 'Legitimating Judicial Review: The Politics of Legalism' (1981) 5(8) *Journal of Australian Studies* 33.

[54] Twomey (n 26) 102.

[55] Sawer, *Australian Federal Politics and Law 1901-1929* (n 34) 106.

[56] *Baxter v Commissioner of Taxation (New South Wales)* (1907) 4 CLR 1087, 1169-70.

[57] Ibid 1170.

The 1920 *Engineers' case*[58] represents the Court's first attempt to 'seek stability'. Its reasoning provided the cornerstone around which legalist beliefs and narratives would stabilise.[59] It concerned the scope of Commonwealth power over conciliation and arbitration of industrial disputes spanning more than one state, an express legislative power in section 51(xxxv). A union of engineers — the Amalgamated Society of Engineers — represented members across multiple Australian states who argued that the Commonwealth award applied to their pay. The Commonwealth award was higher than that of the states. Most of the employers were private companies. Three employers, however, were state government departments in Western Australia. Those employers, with other states intervening, argued that the employers were state government instrumentalities and the principle of intergovernmental immunities applied to them.

Knox CJ, Isaacs, Rich and Starke JJ, with Higgins J agreeing in a separate judgment, found that the dispute did fall within the Commonwealth's legislative power.[60] As with the other stability seeking decisions that I have explored in this project, their reasoning extended far beyond that necessary to resolve the dispute before them. The outcome could have been reached on much narrower doctrinal grounds, given that the state employers were engaged in trading and therefore already outside the scope of the immunity.[61] The majority judgment opened with a critique of the existing doctrine and principles of interpretation, stating that "no clear principle" could account for them, that they were "sometimes at variance with the natural meaning of the text" and that some "rested on reasons not founded on the words of the Constitution".[62] It then proposed an alternative approach to interpretation more closely aligned with British principles of statutory interpretation. The majority then defined the role of the Court as "faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed."[63] In one place the judgment went so far as to refer to the Constitution as an "Act which we are considering".[64] It then referred to the British House of Commons debate that introduced the Imperial legislation enacting the Australian Constitution.[65] In this way the majority again approached constitutional interpretation as similar to statutory interpretation, finding the meaning of its words by exploring the parliamentary context — and the British context — in which it was passed. Where

[58] (1920) 28 CLR 129.

[59] See also Galligan (n 50) 96–102; Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018) 91–145.

[60] The author of this judgment is generally considered to be Isaac Isaacs: Twomey (n 26) 104.

[61] Keven Booker and Arthur Glass, 'The Engineers Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34, 35. An earlier authority had left open the question if whether state government entities could claim the immunity when 'trading': Ibid 37.

[62] *Engineers' case* (n 5) 141-2.

[63] Ibid 142.

[64] Ibid 147.

[65] *Commonwealth of Australia Constitution Act 1900* (UK) s 9.

the judgment did approach the text as a "national compact of the Australian people",[66] it did so as though ascertaining the will of the people were similar to ascertaining parliamentary intent. This approach is sometimes referred to as 'textualism' or 'literalism'.[67] The majority ultimately held that the state government employers were bound by the particular industrial laws enacted under section 51(xxxv) because no express terms in the *Constitution* exempted state employers from their operation.[68]

The *Engineers' case* reflects a conflict about the authority and organisation of legal materials that structure legal reasoning. That conflict has a legal professional cultural dimension. Legalist reasoning acquires its identity because of the professional cultural status of the material on which it relies. After federation, there was no clear guide as to which materials should support and constrain practices of reasoning and structure constitutional arguments. The early justices had relied on US-American materials and theories of federalism, introducing considerations with which the existing legal professional culture was not familiar. This led to a period of uncertainty, with those new practices of reasoning not yet fully absorbed by Australian legal professional culture. Its institutions — education, knowledge building, scholarship — were yet to fully metabolise and 'stabilise' that new approach. The *Engineers' case* aborted those nascent developments. It reorganised the status of 'legal' materials, elevating those precedents and values associated with the British and colonial Australian traditions. The judgment concluded that the Constitution resembled that of the United States "in its most superficial features" only.[69]

Other statements in the *Engineers' case* demonstrate its quality as 'stability seeking'. The majority judgment rejected the Court's earlier approach to federalism — the 'implied immunities' and 'reserved powers' doctrines — on the basis that those doctrines infer intention "by reference to outside circumstances, not of law or constitutional practice". It concluded that those constitutional implications were formed "on a vague, individual conception of the spirit of the compact" that is "not the result of interpreting any specific language" nor "referable to any recognized [sic] principle of the common law…"[70] The judgment's description of 'external' and 'internal' considerations bears the characteristics of legalist reasoning I explored in chapter two. It is a description that defines 'internal' considerations that are 'legal', stable and capable of producing consistent and determinate outcomes: those "settled rules of construction" and "judicial authorities which are part of our development, which have grown up beside our political system…" The Court is "bound to look" to British principles as "authoritative".[71] In turn, the Court rejects external or "outside" considerations — those theories of federalism drawn from the US-American experience or visions at framing — as vague and unstable, unable to "provide any

[66] *Engineers' case* (n 5) 160.

[67] Booker and Glass (n 61) 43.

[68] *Engineers' case* (n 5) 154.

[69] Ibid 147.

[70] Ibid 145.

[71] Ibid 148.

secure foundation" for government action and "inevitably lead[ing]… to divergencies and inconsistencies more and more pronounced as the decisions accumulate."[72] Principles should not be 'necessarily implied' from these 'external' considerations. Determining the "necessity" of an implication in this "political sense" is a practice of reasoning "incapable of consistent application."[73] This is because that necessity "must vary in relation to various powers and various States" as well as "various periods and circumstances".[74]

Significantly, the majority defended its rejection of the earlier Court's approach to interpreting federalism provisions because of the Constitution's incorporation of British principles of responsible government.[75] While the Australian Constitution's resemblance to the US-American Constitution was "superficial", it was "permeated through and through with the spirit of the greatest institution which exists in the Empire… the institution of responsible government." The Australian is a "Constitution modelled" on the British, "pregnant with the same spirit.."[76] As I explored above, the institution of responsible government had been associated with particular cultural beliefs about the judicial role prior to federation. Those beliefs allowed limited space — at least nominally — for courts to adjudicate on ideas and theories. The Court should instead defer to the will of the electors as reflected in Parliament's choices. Drawing British traditions of responsible government and US-American idea of federalism together in a constitutional document posed tensions. The provisions entrenching responsible government were spartan — the new Federation sought to continue aspects of the status quo — while those establishing federalism sought to effect a transformation. And both traditions, and intentions, were associated with different legal professional cultures, beliefs and narratives regarding the judicial role. In its doctrinal critique of 'necessary' implications, the majority judgment reflects a particular belief connected with pre-federation ideas of responsible government. In a "political sense" the "doctrine of 'necessity'… means the necessity of protection against the aggression of some outside and possibly hostile body…. It is based on distrust…[b]ut possible abuse of powers is not reason in British law for limiting the natural force of the language creating them."[77]

The approach that the majority set to entrench in the *Engineers' case* — that associated with the British tradition — was therefore not 'values neutral'. It applied an interpretive approach drawn from one tradition, with a particular set of values about the judicial role, to parts of the constitutional text drawn from another tradition. It rejected that implications could be drawn from an 'a priori concept of federalism',[78] but justified its selection of method through similar reference to the concept of responsible government. That preference for a particular kind

[72] Ibid 145.

[73] Ibid 150-1.

[74] Ibid 151.

[75] Ibid 147.

[76] Ibid.

[77] Ibid 15; Booker and Glass (n 61) 43.

[78] Geoffrey Sawer, *Australian Federal Politics and Law 1929-1949* (Melbourne University Press, 1963) 211.

of identity over another reflects in how other sources of meaning — the comments of Imperial Parliament, the idealised account of "every Constitution established within the Empire"[79] — are used to justify arguments organised around the principles of statutory interpretation. Those values could take the guise of neutrality because they appealed to established cultural beliefs that already infused legal education, training and knowledge building institutions. They could claim a relationship with stability in practices of reasoning that existed in living professional memory, even as the introduction of a federalist constitution had unsettled them. But applied on their own terms to a federal constitution, those values produced contradictions. They claimed to be legalist while supporting a nationalist agenda.[80] That agenda reflected in other decisions taken by the Knox Court that "progressively dismantled" federalism.[81] The Knox Court's decisions allowed the Commonwealth to make grants to the states to pursue policy aims, expanded the doctrines under which state legislation would be inconsistent with Commonwealth, and interpreted the freedom of interstate trade and commerce so as not to apply to the Commonwealth.[82] The approach to constitutional interpretation that the *Engineers' case* established claimed to be restrained by conservative legal professional values. This could compensate for the "enormous scope of judicial discretion"[83] that the new interpretive approach opened doctrinally.

This is not to say that the *Engineers' case* necessarily favoured a political 'status quo'. Anne Twomey notes that the decision was "extremely controversial in its day", attracting criticism from both political elites — state governments — as well as members of the legal profession. The South Australian Premier of the time described it as an attack on responsible government.[84] Media commentary raised concerns about High Court interpretive practices and noted that they went against the grain of recent unsuccessful referenda on transferring greater power to the Commonwealth.[85] Subsequent commentary has pursued more substantive critiques. Sawer considered it "one of the worst written and organized in Australian judicial history" with Zines noting that it is "loosely reasoned" and "written with more fervour than clarity".[86] The majority judgment explained the principle in *D'Emden v Pedder* in terms of section 109 inconsistency. This conclusion is doctrinally questionable.[87] Twomey has highlighted the judgment's internal contradictions. On the one hand it pursues a "strict legalistic technique of constitutional interpretation based on the text" while on the other reinterpreting the Constitution "to fit

[79] Ibid.

[80] Twomey (n 26) 105–6.

[81] Ibid 108.

[82] Ibid 108–11.

[83] Galligan (n 50) 104.

[84] Twomey (n 26) 104–105.

[85] Ibid 105.

[86] Booker and Glass (n 61) 36.

[87] *Engineers' case* (n 5) 156.

Australia's growing independence and a perceived need for greater national powers."[88] Justice Gavan Duffy's judgment, which dissented, similarly appealed to principles of statutory construction while reaching a different result.[89] In its adherence to post-Federation 'legalism', however, the *Engineers' case* could claim to run with the grain.

B *Rehabilitating Federalism: The Dixon Compact*

1 *Federalism after the Engineers' case*

Throughout this thesis, I've argued that the stability and success of a legalist method depends upon legal professional cultural conditions. A legal professional community must accept and recognise that method as 'legalist' — founded on materials and considerations themselves considered 'legal' sources capable of restraining and structuring judicial reasoning in a way that is relatively determinate. Despite the controversy that attached to the outcome of the *Engineers' case*, it invoked the historical appeal of legal professional values and beliefs that predated Federation. This allowed it to claim to be legalist notwithstanding a preference for the particular theory of the judicial role that I explored above. On its own terms, however, that method was unable to provide a reliable guide to judges. The faith in a capacity to interpret "plain and natural meaning" was "necessarily open to the same criticism as was employed in the *Engineers' case*".[90] This problem continued to be apparent in federal questions, especially as the federal system continued to evolve. As a consequence of the *Engineers' case* states attempted to appeal matters directly to the Privy Council where they were able. Owen Dixon — who was appointed in 1929 after Higgins' death — noted that this compromised the authority of the High Court, with the legal profession viewing the Privy Council as a greater source of stability.[91]

To some extent the limits of the legalist reasoning employed in the *Engineers' case* were exposed through the Court's institutional design features that I explored in chapter four. The availability of dissent, the value attached to individual judicial decision making and to a certain extent the common law method itself "reveals law as frequently contestable, drawing attention to the degree to which choice inheres in the judicial function."[92] The identity of appointees to the Court was at times contentious. Although Dixon replaced Higgins, the retirement of other members initially left vacancies on the Court unfilled. Controversially, a caucus and Acting Attorney General of the then Labor government appointed Justices Evatt and McTiernan to the vacancies against the wishes

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[88] Twomey (n 26) 105–106.

[89] *Engineers' case* (n 5) 171-7.

[90] Gageler (n 12) 178.

[91] Owen Dixon, *Jesting Pilate: And Other Papers and Addresses by the Rt Hon Sir Owen Dixon*, ed Susan Crennan and William Gummow (Federation Press, 3rd ed, 2019) 241; Twomey (n 26) 108.

[92] Andrew Lynch, 'Judicial Dissent and the Politics of the High Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 58, 59–60.

of the Prime Minister and Attorney-General.[93] These appointments were seen as an attempt to "pack" the Court, resulting it becoming "famously divided".[94] Justices Starke and Rich — the 'new legalists' who joined as the majority in the *Engineers' case* — continued to preside during the 1930s. Justice Latham became Chief Justice in 1935 and also endorsed a 'literalist' or textualist approach in constitutional interpretation.[95] Evatt and McTiernan introduced a counterweight to those justices, with at least the former willing to revisit earlier decisions to produce a more 'balanced' approach to federalism.[96] In reflecting on the *Engineers' case* in his scholarship, Evatt questioned its "entire rejection" of earlier federalist doctrines[97] and raised the possibility of implications.[98] While acknowledging the problems with those earlier doctrines, Evatt indicated a willingness to revisit the excesses of the *Engineers'* case. Presciently, he suggested that a doctrine of mutual immunity could be implied were its operation to be "far narrower" than that which had prevailed prior to the *Engineers' case*.[99] Evatt was able to lead a majority with other members of the Court to rehabilitate aspects of freedom of trade and commerce so that they were less inclined in favour of the Commonwealth.[100] Evatt and Dixon — albeit for different reasons — never fully accepted the reasoning of the *Engineers' case*.[101]

2 *Dixon's 'New Legalism'*

After 1929 the new "intellectual leader" of the Court was the self-professed 'legalist' Owen Dixon.[102] In chapter two I explored Dixon's writing as an example of the dependency of legalist claims on legal professional cultural conditions.[103] Part of Dixon's dominance in the Australian legal cultural imagination connects with the quantum

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[93] Tony Blackshield, 'The Isaacs Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 116, 139–140; Galligan (n 50) 106–108.

[94] Gabrielle Appleby, 'The Gavan Duffy Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 141, 142.

[95] See, eg, Fiona Wheeler, 'The Latham Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 159, 160.

[96] Galligan (n 50) 110–11.

[97] HV Evatt, 'Constitutional Interpretation in Australia' (1939) 3(1) *The University of Toronto Law Journal* 9.

[98] Ibid 10.

[99] Ibid 10–11.

[100] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30. See also Galligan (n 50) 110–11; Sawer, *Australian Federal Politics and Law 1929-1949* (n 78) 66–67.

[101] See Sawer, *Australian Federal Politics and Law 1929-1949* (n 78) 211.

[102] Blackshield (n 93) 119.

[103] See discussion in chapter two.

of his work. He served on the High Court for 35 years, as Chief Justice for twelve of those.[104] During that time he wrote in excess of 50 percent more judgments than the average justice's output, and often authored the judgments in which others joined.[105]

Dixon's legacy was also tied to his success in negotiating the defining professional cultural problems that had affected Australia since Federation. His 'signature' legalism reconciled — at least superficially — two features of Australian legal professional culture whose potential contradiction had affected constitutional questions since Federation. On the one hand Dixon shared an identification with the pre-federation professional cultural values that had infused the *Engineers' case*. His writings, which were prolific, described the Australian context as "British" with "federal institutions".[106] On the other hand, Dixon represented that part of the legal profession acutely aware of the limits of the approach to federal questions in the *Engineers' case*. Dixon himself had appeared on behalf of the states in an unsuccessful leave application to appeal the *Engineers' case* before the Privy Council.[107] In a 1943 address Dixon had noted the gradual transfer of the federal balance in favour of the Commonwealth, including through the defence power during the second world war.[108]

Dixon therefore brought two professional cultural concerns, apparently in tension, together. He endorsed the professional belief systems that were core conditions of Australian legalism and had been invoked and embedded in the *Engineers' case* to interpret the Constitution like simple legislation. At the same time he carved a space for a judicial role that in many respects departed from prevalent beliefs and narratives — one viewing the *Constitution* as a framework for arguments about more than the express meaning of words. He presented those two cultural concerns as compatible.

Dixon's 'new legalism' profited from professional cultural narratives connected with the *Constitution*'s founding moment. Those narratives separated those parts of the Constitution that had intended to establish 'novel' institutions such as federalism and separation of powers, from those that had intended to continue the status quo of representative and responsible government and 'English' ideas. Dixon's writings reflect a subscription to those narratives. In a notable 1955 address on method delivered at Yale, 'Concerning Judicial Method', Dixon grounded Australian constitutional identity in its deliberate rejection of fundamental rights. This provided a "striking difference… deep in legal thinking" between Australian and US-American practices of reasoning: "Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation…"[109] This commentary reflects the relationship between cultural beliefs and practices of

[104] Helen Irving, 'The Dixon Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 179, 179.

[105] Ibid 181.

[106] Dixon (n 91) 112.

[107] Philip Ayres, *Owen Dixon* (The Miegunyah Press, 2003) 32.

[108] See, eg, Dixon (n 91) 238–45.

[109] Ibid 113.

reasoning. For Dixon — and for Australian legal professional culture more generally — questions that would be framed as 'rights' disputes in other jurisdictions are not subject to judicial review in Australia. In this way Dixon defines Australia's constitutional identity in terms of what it is not. The Australian *Constitution* 'continues' and inherits a professional tradition that rejects American ideas. Dixon believed that Australian cases that applied the "common law to modern life" would produce no different a result were they decided in England.[110]

In those structures where the Australian *Constitution* 'broke with' or discontinued the pre-federation legal order, the US-American experience can be a source for Australian lessons and ideas. Dixon's writing repeatedly referred to the United States' federal system as a model for the Australian[111] — "a model which in many, but not in all, respects was imitated with fidelity."[112] His work also noted the influence of US-American ideas of separation of powers upon the design of the Australian *Constitution*.[113] This approach to 'separating' parts of the Australian *Constitution* thematically — areas reflecting 'continuity' from pre-federation and areas inspired by a 'controlled break' with that continuity — provides the basis of Dixon's new legalism. Dixon's address, 'On Judicial Method', can be read as a manifesto "disentangling"[114] the authority of legal sources for different parts of the *Constitution*. It 'carves out' those parts of US-American constitutional doctrine that cannot provide guidance — those that have "grown up under the Fourteenth Amendment and the Bill of Rights" — from those that can.[115] This process of 'disentanglement' is all the more important for Dixon's legalism because reference to both traditions — the British protection of rights through the common law and US-American constitutional ideas — organise legal arguments "as a matter of convention and tradition and as the source of canons of interpretation."[116] 'Legalist' forms of argument appeal to 'external' guides that can provide determinate standards. Because Australian practices of reasoning relied on appeals to foreign "conventions and tradition" to ground legalist beliefs, Dixon perceived a need to organise and structure those points of reference for different ideas the *Constitution*. That ordering allowed practices of reasoning to acquire a 'legalist' character. By categorising the 'correct' sources to which members of the profession can refer in interpreting the Constitution, it creates a distinction between 'legal' and 'extra-legal' forms of argument.

3 *Post-War Federalism: Melbourne Corporation v Commonwealth (1947)*

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[110] Ibid 112.

[111] See, eg, ibid 220–4.

[112] Ibid 232.

[113] Ibid 225.

[114] Ibid 115.

[115] Ibid 115–16.

[116] Ibid. Owen Dixon, 'Concerning Judicial Method' in Susan Crennan and William Gummow (eds), *Jesting Pilate: And Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019) 112, 115–16.

A new Labor federal government under the leadership of John Curtin was elected in 1941, at the height of the second world war. The Curtin government was able to successfully rely upon its express power to legislate with respect to defence[117] and the wartime context to centralise control over taxation,[118] banking and industry,[119] and control prices for goods and services.[120] These measures, and the "dire national peril and lack of preparation" in which Australia found itself after Japan's entry into the war in 1941, placed significant pressure on the federal constitutional framework.[121] As seen elsewhere in this thesis, novel circumstances lead to novel constitutional questions that can expose the limits of legalist reasoning. The wartime context pushed the legalist reasoning claimed in the *Engineers' case* — one which led to expanded scope of Commonwealth power — to an extreme. Very few wartime regulations were invalidated,[122] with the Court relying on the expanded scope of the defence power in wartime to explain its decisions. Privately, members of the Court expressed concern about the Allies' position in the early stages of the war and the consequences of defeat for Australia.[123] Galligan argues that the reasoning in some of these cases reflected the "extremes to which judges were prepared to go in a time of national crisis" as well as the "absurdities to which a legalistic jurisprudence can lead."[124] During this period, argues Galligan, the Australian governance effectively operated as a "unitary" rather than a federal system.[125]

The wartime context and the 'purposive' character of the defence power — one requiring the Court to consider the purpose of a legislative power to determine its scope — permitted legalist arguments that eschewed a more robust, expressly theoretical engagement with the ideas embedded in federal provisions. During the post-war reconstruction, however, the Court was required to once more grapple with the limitations of its existing approach to federalism as established in the *Engineers' case*. The Labor government under the leadership of Ben Chifley sought to legislate aspects of its popular wartime administration on a more permanent basis. One of its most controversial policy measures was an attempt to shift ownership of all private banks to the publicly owned

[117] *Australian Constitution* s 51(vi).

[118] *South Australia v Commonwealth* (1942) 65 CLR 373 ('First Uniform Tax case'). While the decision only relied upon the defence power in a "minor" way, it is "inexplicable outside the war setting": Galligan (n 50) 130–1. See also Cheryl Saunders, 'The Uniform Income Tax Cases' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 62, 68.

[119] Galligan (n 50) 122–4.

[120] Wheeler (n 95) 162.

[121] Galligan (n 50) 120.

[122] Geoffrey Sawer, 'The Defence Power of the Commonwealth in Time of War' (1946) 20 *Australian Law Journal* 295. Some members of the Court raised objections in dissent, such as Justice Starke: see Galligan (n 50) 126–30.

[123] Wheeler (n 95) 164. In *Dawson v Commonwealth* Justice Rich drew attention to the problems a federal system experienced in circumstances such as war where national resources must be exclusively directed to survival. In such cases it can't survive "unless it submits itself for the time being to what is in effect a dictatorship with power to do anything which can contribute to its defence": (1946) 73 CLR 157, 177. See also Galligan (n 50) 127.

[124] Galligan (n 50) 127.

[125] Ibid 130.

Commonwealth Bank and prevent private banks from trading. This was successfully challenged in a series of cases brought by state governments and private banks.[126]

One of these cases, *Melbourne Corporation*, involved a challenge to a provision that prohibited private banks from conducting banking business on behalf of state governments or their authorities without the consent of the Commonwealth Treasurer.[127] That provision effectively required state governments to bank with the central Commonwealth Bank. The Corporation of Melbourne City Council challenged the provision. A majority of the Court — five justices — found that the provision to be invalid, though they differed in their reasons. McTiernan J dissented, referring to the reasoning in the *Engineers' case*.[128] Of the judgments invalidating the provision, Justice Dixon's judgment has endured as the principle on which federal power can be limited.[129] Justice Dixon concluded that a constitutional implication — a method discredited in the *Engineers' case* — provided an unwritten limitation on express federal power, prohibiting the Commonwealth from passing legislation that singles out a state government or state governments, or places "special burdens" on them.[130] In this instance, section 48 was invalid as it denied to states banking facilities available to others.[131]

Like the *Engineers' case*, the outcome in a *Melbourne Corporation* can be read as part of the "political cleavage of the era" — in this case, "socialism versus free enterprise".[132] As earlier explained in my methodology, my argument does not depend upon accurately identifying societal or political influences upon judicial reasoning. A complementary — or alternative — explanation exists at the level of legal professional culture. For reasons explored above, the approach to legalist reasoning established in the *Engineers' case* sat in tension with federal ideas established in the text. The 'plain meaning' of that text — an idea adopted from British professional belief systems about legal sources — did not provide a standard from which the legal profession could extract determinate outcomes. The limitations of that standard were all the more acute in a post-war context when expanded Commonwealth power had 'snapped back', leaving the Court in a vacuum where it needed to find stable and reliable guides to the meaning of federalism provisions.

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[126] *Melbourne Corporation* (1947) 74 CLR 31; Bank of New South Wales v Commonwealth (1948) 76 CLR 1.

[127] Banking Act 1945 (Cth) s 48.

[128] *Melbourne Corporation* (1947) 74 CLR 31, 88-9: "It is obvious from the language of s. 51(xiii) that it includes power to make laws affecting the States."

[129] See, eg, Cheryl Saunders, 'Melbourne Corporation Case (1947)' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) <https://www.oxfordreference.com/display/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-271?rskey=XR1pXK&result=272&print>.NB – page number in print version

[130] *Melbourne Corporation* (1947) 74 CLR 31, 81-2.

[131] Ibid 84 (Dixon J).

[132] Wheeler (n 95) 167.

Melbourne Corporation 'seeks stability' within that context of vacuum. Justice Dixon's judgment reflects what I described above as his 'new legalism' — one which allowed for a greater degree of engagement with some, but not all, ideas and provisions of the *Constitution*. This 'stabilised' legal professional cultural conditions by introducing a more comprehensive and determinate set of principles that could resolve federal controversies, in circumstances where the existing approach to literal meaning was no longer persuasive. *Melbourne Corporation* bears other hallmarks of 'stability seeking'. It addresses the classification of materials as 'legal' and determinate, or otherwise, directly referring to the treatment of materials in the *Engineers' case*. For Dixon, that a consideration may be considered 'political' rather than legal does not disqualify it as a 'legalist' source, provided it is "compelling".[133]

The approach to constitutional implication that Justice Dixon revived in *Melbourne Corporation* is more explicit in an earlier 1947 decision.[134] In *Essendon v Criterion Theatres* the Court had to consider whether a Victorian local council could charge the Commonwealth a levy for land that it had used temporarily during the war.[135] The Court found that it could not, but split in its reasons. Justice Dixon's judgment concluded that the *Constitution* did not permit the state to "tax that kind of action of the Commonwealth".[136] It distinguished between the very narrow basis of its reasoning — an immunity of executive action from taxation — and the earlier implied immunity of instrumentalities of government. But the judgment also rehabilitated US-American materials, noting that the doctrine had been abandoned in the United States. It then discussed treatment of intergovernmental immunities in the United States.[137] Finally, it concluded that the Commonwealth was immune from state taxation when exercising Commonwealth functions as "a necessary consequence of the system of government established by the Constitution".[138]

Justice Dixon's judgment also flagged the revival of implications. It noted that the state would not have sought to tax the Commonwealth were it not "for misapprehensions which obtain concerning the effect of the Engineers' Case." One of those "misapprehensions" is that "the Constitution implies nothing; that it means nothing that it does not say in express words."[139] Not allowing implications in interpretation "would defeat the intention of any instrument, but of all instruments a written constitution seems to be the last to which it could be applied."[140]

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[133] *Melbourne Corporation* (n 6) 82.

[134] See, eg, Sawer, *Australian Federal Politics and Law 1929-1949* (n 78) 211.

[135] *Melbourne Corporation* (n 6).

[136] Ibid 18.

[137] Ibid 18-19.

[138] Ibid 22.

[139] Ibid.

[140] Ibid 23.

Taken together, these statements reflect the approach to legalism that Justice Dixon introduced through stability seeking decisions and extra-curial commentary. He appealed to existing 'legalist' beliefs regarding the nature of legal sources — that they are determine and can be interpreted without recourse to 'extra-legal' value judgments — while carving out space for judicially derived principles, such as implications found by the Court, connecting with a controlled class of constitutional provisions. His reasoning rehabilitated US-American constitutional experiences as a legal source. That authority, however, was confined to the class of constitutional provisions that broke with the 'continuity' narrative that I explore further below.

IV EXPLAINING 'STABILITY SEEKING' DECISIONS

A *Institutional Design and Dissent*

Like the other developments I have explored in this thesis, post-federation Australian legalism emerged within a particular institutional context. The High Court's design and the availability of dissent are key components of that context. In an earlier chapter I described how processes of deliberation and dissent in the system that Australia inherited accommodate the contestability of law.[141] The requirement that all justices sit to hear constitutional matters, the determination of an outcome through a majority, and the value placed on dissent as an example of judicial independence reflect that more than one outcome is possible when the Court applies established forms of argument to the facts before them. The common law method itself wields authority through the facts on which a judicial outcome is reached. It is open to members of the legal professional community and future justices to contest the core principle that animated the outcome. Through this the common law method recognises that law is contestable and that different principles underlying a legal outcome may be available. That contestability, and the imperfection of the law, is balanced by deferring and distributing authority over the principle underlying the concrete outcome to arguments made by other members of the legal professional community.

These features of institutional design and qualities inherent to the common law sit in potential tension with core assumptions of legalism. Those features assume that practices of reasoning, applied by justices, are inherently imperfect means of settling the law. Law is a constant process of development. A core assumption of legalist reasoning, however, is that there is an external standard of correctness and that standard can produce relatively determinate legal outcomes. As I explored above, Australian legal history has experienced moments where judicial appointments were contentious and where more than one approach to method — including between justices who identified as legalist — was professionally defensible. Legalist beliefs and narratives nonetheless persist in Australian legal professional culture because they are successfully embedded through other cultural institutions. Those beliefs provide the structure for members of the legal profession to organise arguments that selectively engage with decisions of superior courts. This contrasts to German legalist arguments, whose associated beliefs and narratives are more closely connected to the formal authority of the FCC because it provides unanimous decisions and explicit principles.

[141] See also Lynch (n 92) 58.

That the beliefs supporting Australian legalist reasoning aren't connected with the unanimous statements of a centralised court has drawbacks. Unlike beliefs connected with a single formal institution, Australian legalism relies on beliefs that are diffuse and less easily directed to new circumstances. This reflected in the experience of Australian legalism post-federation. Prior to Federation, the legal professional culture of the various colonies shared British cultural beliefs about the interpretation of legal instruments. When a new written constitution containing federal ideas was introduced, Australian professional cultural beliefs faced difficulties adapting. The *Constitution* resulted from compromises between various interests, framed in open-textured language. Existing beliefs informing legalist approaches that limited the judicial role to interpreting the 'plain' or literal meaning of the constitutional text provided limited guidance to a new court seeking to excavate the text's core ideas and apply them to a new kind of dispute. But without beliefs and narratives that could ground the Court's reasoning practices, the new Court lacked a cultural anchor that could justify its reasoning within the professional community and counteract the potential instability caused by its design and method.

B *Seeking Stability through Professional Socialisation*

1 *The Continuity Narrative*

Several of the High Court's early decisions on federalism grapple with the cultural disruption that a new written constitution introduced to practices of reasoning. Following the introduction of a new Constitution, interpretive methods such as constitutional implication and sources for cultural authority, such as US-American case law, had not yet established a firm footing in professional culture and remained unstable. The Court in the *Engineers' case* then returned Australian legal professional culture to the ostensible stability of pre-federation cultural beliefs. This included a belief that disagreements about constitutional meaning can be resolved by reference to a 'literal' — or determinate — meaning.

Even as the *Engineers' case* produced an outcome that was controversial, the reasoning it employed to reach that outcome appealed at a professional cultural level. That reasoning resonated with a narrative of 'continuity' that the Australian legal profession attached to the *Constitution*. Earlier in this chapter I explained how the framers had drawn on ideas taken mainly from the British and US-American experience. A decision was made to not include an American style equal protection clause — a suggestion in Inglis Clark's draft — in part to preserve the flexibility of state legislatures to exclude non-British migrant workers from other parts of the Empire.[142] A professional cultural narrative attached to the introduction of the *Constitution* that cast it as continuing political traditions and the structure of representation in place prior to federation. This 'continuity narrative' reflects in claims that Australian constitutional structures continue the British tradition of parliamentary sovereignty.[143] As seen above, the reasoning in the *Engineers' case* affirmed the continuity narrative, minimising the relevance of

[142] See, eg, John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42(1) *Australian Journal of Politics & History* 10; Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (2007) 25 *Federal Law Review* 295.

[143] For a critical appraisal of this claim see, eg, Ryan Goss, 'What Do Australian Talk About When They Talk About "Parliamentary Sovereignty"' [2022] (1) *Public Law* 55.

US-American experiences and ideas notwithstanding their significance during the drafting of relevant constitutional provisions.

The cultural disruption that a written, federal *Constitution* caused, however, could not be fully stabilised by relying on the beliefs that had made pre-federation legalist reasoning workable. In the *Engineers' case*, for instance, a method of reasoning that conformed with the continuity narrative and minimised the role of judicial choices produced an outcome that failed to give effect to federal ideas embedded within the Constitution. And while the reasoning in the *Engineers' case* upheld a narrative of continuity at the level of method, it produced outcomes that significantly broke with the status quo and the protection of state interests secured during framing.

By separating those parts of the *Constitution* that drew on US-American ideas from those to which the 'continuity narrative' attached, Justice Dixon could rehabilitate judicial engagement with federal ideas without unsettling core legalist beliefs. His extra-curial writing emphasise that Australian practices of reasoning continue British traditions and the role of the judiciary with respect to responsible government. Australian constitutional identity is also defined by its explicit rejection of a bill of rights. In noting these features Dixon affirms key beliefs that err in favour of legislative deference and trust of the political process. In a finite number of instances — provisions connected with federalism and separation of powers[144] — practices of reasoning can depart from that minimalist judicial role. Because those instances are enumerated, it controls the risk that 'creativity' — and instability — may affect other areas of constitutional reasoning.

2 *Constitutional Implications*

The changing treatment of constitutional implications over the course of stability seeking decisions reflects a process of evolution in Australian legal professional culture. To understand this, it's worth briefly exploring the nature of implication as a constitutional method. Using the implication in *Melbourne Corporation* as an illustration, Cheryl Saunders and Adrienne Stone describe the structure of the argument as "reasoning from specific provisions (for instance those provisions preserving the colonies as States after federation), to a more general principle (namely a prohibition on interference with 'essential State functions'), to a more specific set of rules (such as those that govern federal regulation of State employees)."[145] The nature of this method involves degrees of abstraction away from the meaning and application of individual provisions viewed in isolation. Ros Dixon and Gabrielle Appleby draw attention to the role of constitutional implication as a means of resolving

[144] The 1956 *Boilermakers' case*, which implied principles from the separation of federal legislative, executive and judicial power into three chapters in the Constitution, is another example of an implication introduce by the Dixon Court: *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers' case'*).

[145] Cheryl Saunders and Adrienne Stone, 'Constitutional Reasoning in the High Court of Australia' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 36, 54–5.

disputes through "inferences from text and structure", where those disputes could not be resolved through the direct application of provisions.[146]

On the one hand, recognising a constitutional implication and applying it to resolve a constitutional disagreement necessarily involves a greater degree of judicial discretion than the resolution of disagreement through direct application of a provision. The steps of abstraction within the implication — first to identify and articulate the general principle and then to derive specific rules from that principle — each involve judgment and choice that cannot be entirely guided by the express textual meaning.[147] This sits in a certain amount of tension with the beliefs I have described as associated with Australian legalism and its rejection of 'judicial law making'. Constitutional implication introduces an unwritten principle into the Constitution and raises it to the status of those that are written. That implied principle also acquires a life that goes beyond the factual dispute directly before the Court. Justices who identify as legalist have been at pains to deny the element of judicial choice inherent in the method of constitutional implication. Justice Windeyer for instance insisted that the "avowed task" of the judiciary is "simply the revealing or uncovering of implications that are already there".[148]

On the other hand, a constitutional implication is a method that 'seeks stability': it stabilises the meaning of a particular textual provision in a way that promotes predictability and determinacy. It establishes a principle from which more precise rules can be derived,. Dixon's rehabilitation of constitutional implication as a legalist method should be seen in this light. The implied immunity of instrumentalities doctrine had provided a brake on the extreme tilt of the federal balance in favour of the Commonwealth — a tilt which the *Engineers' case* had initiated through its insistence that the *Constitution* be interpreted as an ordinary statute. Dixon's revised approach provided a clear and replicable standard for constitutional arguments going forward.

V SUMMARY

At the time that Australia federated, legalist practices of reasoning relied on inherited beliefs and narratives regarding the interpretation of legal instruments. This legalism was adapted to the values of parliamentary supremacy and deference to the will of the legislator. Federation introduced a written constitution to which that legalism was ill adapted. This problem was not immediately apparent after federation as the first justices were also constitutional framers. As new justices joined the Court, however, deep disagreements developed regarding both the federal vision of the *Constitution* and the professional methods that should be used in its interpretation.

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[146] Rosalind Dixon and Gabrielle Appleby, 'Constitutional Implications in Australia: Explaining the Structure — Rights Dualism' in Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 343, 346.

[147] See Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24(3) *Melbourne University Law Review* 645; Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24.

[148] *Victoria v Commonwealth* (1971) 122 CLR 353, 402.

Prior to the 1920 *Engineers' case* the High Court developed a number of doctrines that carved out spheres where both the Commonwealth and states could be sovereign. These doctrines were not grounded in a clear method that could be consistently applied by future courts. In the *Engineers' case* a newly constituted Court sought to revive pre-federation practices of interpretation by treating the *Constitution* in a similar way to a statute and espousing fidelity to the 'literal' meaning of its text. Although the outcome of this decision was controversial, the reasoning in the decision could successfully appeal to the latent legalist beliefs that persisted in the profession's living memory. That revived legalism relied upon certain conditions. This included a cultural narrative that insisted the *Constitution* largely continued political structures and professional practices that had been inherited from the British tradition. In refusing to acknowledge the novelty of a written, federal *Constitution* for practices of argument, the revived legalism — sometimes referred to as 'textualism' — failed to provide a reliable guide for the resolution of disputes about federalism. It led to dissatisfaction amongst the states and a federal balance skewed too extremely in favour of the Commonwealth.

The Federal Labor government's post-war reconstruction program placed even greater pressure upon federal provisions in the *Constitution*. Justice Dixon — first as a member of the Court and then as Chief Justice — was responsible for driving a series of 'stability seeking' decisions that rehabilitated implication as a method of resolving disagreement about constitutional meaning. Implication involved the extrapolation from discrete provisions of the *Constitution* to broader ideas, introducing greater complexity — and reasoning steps — into judicial argument. Dixon was able to reconcile that method with legalist beliefs by applying it to those provisions to be used sparingly and consistently with other legalist beliefs — including the continuity narrative.

CHAPTER NINE: REPRESENTATIVE DEMOCRACY AND PROFESSIONAL CULTURAL INSTABILITY

I INTRODUCTION

In the previous chapter I described the professional cultural conditions that supported the rise of Australian legalism. I explained the High Court's approach in the *Engineers' case* as an attempt to settle uncertainty regarding how the new *Constitution* should be interpreted by appealing to pre-federation legalism and its associated professional cultural beliefs. That 'stability seeking' decision, however, failed to provide a reliable guide for the resolution of federal questions. The limits of the version of legalism in the *Engineers' case* became apparent over time, until doctrinal developments led by the Dixon Court could reconcile legalist practices of reasoning with a more meaningful engagement with provisions related to federalism. It did so by reviving constitutional implication: a method of extrapolating principles from discrete constitutional provisions, and then deriving further rules from those principles.

That reconciliation rested on certain professional cultural conditions. Implications protecting state government institutions from discrimination[1] — and other implications connected with separation of powers[2] — connected with those provisions of the *Constitution* to which the 'continuity narrative' was not so strongly attached. That narrative, appealed to in the *Engineers' case,* was a professional belief that Australian constitutional structures continued British traditions, and particularly those connected with institutional roles. The 'continuity narrative' anchored and stabilised post-federation legalism, providing members of the legal profession with a reference point to navigate the uncertainty of a new constitution. Dixon's legalism divided those parts of the *Constitution* more clearly influenced by US-American ideas from those believed to 'continue' British practices, leaving the 'continuity' narrative intact. Its success relied on that continued separation.

In 1992 the Mason Court handed down a series of decisions that relied on constitutional implication to find a 'freedom of political communication'. In doing so, it relied on the method of implication in a way that broke with the 'continuity narrative'. In this chapter I explore how the implied freedom decisions — including their subsequent development in *Lange v Australian Broadcasting Corporation*[3] ('*Lange*') — 'sought stability'. These decisions sought to introduce a principled means of engaging with the provisions of the *Constitution* that entrench representative institutions, in circumstances where legalist practices of reasoning offered inadequate guidance. In this chapter I argue that the implied freedom of political communication decisions responded to an instability mediated through professional cultural processes. On the one hand Australian democracy — its scale, operation and processes — had evolved considerably since the *Constitution* was introduced, raising novel questions about the meaning of provisions connected with representative government. This placed pressure on the 'continuity' narrative. At the same time the Australian legal profession experienced its own cultural evolution — mediated

[1] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*').

[2] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers' case*')

[3] (1997) 189 CLR 520.

through legal education and transnational exposure — which threatened the stability of legalist beliefs from within. This increased professional cultural receptivity to arguments that engaged with provisions connected with representative government in a new way.

I begin by explaining the constitutional provisions that entrench representative government and explore professional narratives that have attached to these. I argue that these professional narratives connect with beliefs, expressed or otherwise, that the *Constitution* continues the British tradition of parliamentary sovereignty and acquires identity in part through 'rights exceptionalism' — what it is not. Drawing on my earlier description of legalism, I argue that these beliefs provided a supplementary guide for constitutional interpretation that anchored Australian legalism in the aftermath of federation. I then explore how the changing experience of representative democracy placed increasing pressure on the sustainability of the 'continuity' narrative to guide the interpretation of sections establishing representative government.

I then describe the implied freedom of political communication decisions — *Australian Capital Television Pty Ltd v Commonwealth*[4] ('*ACTV*') and *Nationwide News v Wills*[5] ('*Nationwide News'*) — as 'stability seeking'. I demonstrate how these decisions sought to 'stabilise' arguments as to how to interpret provisions entrenching representative government in the *Constitution* by breaking with the 'continuity narrative', which was no longer a self-evident interpretive guide. Despite attempting to create a new stability, these decisions were themselves destabilising. That they conflicted with the continuity narrative and legalist beliefs that persisted in segments of Australian legal professional culture led to the outcome in *Lange*. While *Lange* attempted to square the182udgmed freedom with a more 'legalist' justification, the inherent limitations of that justification led the *Lange* decision to become a further source of instability.

II REPRESENTATIVE DEMOCRACY AND LEGAL PROFESSIONAL CULTURAL BELIEFS

A *Constitutional Text and Professional Narratives*

The Australian constitutional convention debates reflect a complex mix of views on representative democracy amongst delegates.[6] As early as 1891 delegates noted that a federal constitution would be incompatible with parliamentary sovereignty. John Cockburn, a South Australian delegate and federalist, observed that the "very essence" of a federal constitution "is rigidity". It would not "preserve those advantages" available "under an elastic constitution": "…when we embark on federation we throw parliamentary sovereignty overboard. Parliament is

[4] (1992) 177 CLR 106.

[5] (1992) 177 CLR 1.

[6] See, eg, JA La Nauze, '"A Little Bit of Lawyers" Language: The History of "Absolutely Free", 1890-1900' in AW Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 57. Haig Patapan described the discussion as "confused": Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25(2) *Federal Law Review* 211, 231.

no longer supreme."[7] During the later 1898 debates, John Gordon opposed a proposal to constitutionally prescribe the 'reasonableness' of railway rates because of his preference to leave "as much... to parliamentary sovereignty as possible, consistent with the proper adjustment of the Constitution…"[8] Relevant for present purposes, a similar mixture of views was expressed with regard to a bill of rights. As I explored in the previous chapter, Inglis Clark's proposed inclusion of an US-American style equal protection clause was defeated. John Williams' historical account of the convention debates notes that a majority of the framers voted against the protection of citizen's rights primarily because of "issues of race and discrimination" rather than any other reason.[9] Those framers who voted against the clause wished to preserve the flexibility of state legislatures to restrict the employment and trading activities of "coloured persons who have become British subjects".[10]

The constitutional text on which the framers ultimately settled was achieved through contest between different views on representative government and different views on federalism. And as with those federal structures that I explored in the previous chapter, the legal entrenchment of representative structures in a written document was inherently destabilising. The *Constitution* created a new framework for constitutional argument and debates about meaning that could stand independently of any particular method or professional beliefs. In this context, the narrative that the *Constitution* largely 'continued' British traditions provided a means of interpreting and navigating that constitutional framework. That narrative provided a supplementary source for constitutional interpretation and meaning that made core assumptions in Australian legalism — the determinacy of the written text and the denial of judicial choice — workable.

Two professional narratives regarding these aspects of Australia's founding constitutional moment are key to understanding the destabilising dimension of the implied freedom of political communication. One belief emerged that the new *Constitution* entrenched the principle of parliamentary sovereignty: an unwritten principle governing constitutional arrangements in the United Kingdom, from which further principles could be derived.[11] As Ryan Goss notes, this belief inflects both Australian constitutional scholarship and judicial commentary. Prominent Australian constitutional scholar Leslie Zines, for instance, assumes it in his work.[12]

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[7] *Official Report of the National Australasian Convention Debates*, Sydney, 10 March 1891, 198 (John Cockburn): "Our parliaments at present are not only legislative, but constituent bodies. They have not only the power of legislation, but the power of amending constitutions. That must disappear under the abolition of parliamentary sovereignty. No parliament under federation can be a constituent body; it will cease to have the power of changing its constitution at its own will." Cockburn repeated these views in 1897, noting that "[h]owever much we may admire the Government of England as a pattern, it is altogether foreign to the genius of Federation. It is carried on under a Parliamentary sovereignty, which is absolutely opposed to the whole spirit of Federation."

[8] *Official Record of the Debates of the Australasian Federal Convention, Third Session*, Melbourne, 23 February 1898, 1381.

[9] John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42(1) *Australian Journal of Politics & History* 10, 18.

[10] *Official Record of the Debates of the Australasian Federal Convention* (n 8) 8 February 1898, 665; ibid 13.

[11] See, eg, Ryan Goss, 'What Do Australian Talk About When They Talk About "Parliamentary Sovereignty"' [2022] (1) *Public Law* 55.

[12] See, eg,Leslie Zines, *The High Court and the Constitution* (Butterworths, 3rd ed, 1992) 337; Goss (n 11) 63.

A second important narrative connects with the deliberate omission of fundamental rights in the *Constitution*. This narrative casts the fact that an equal protection clause was explicitly debated and rejected at framing as part of a positive Australian constitutional identity.[13] A common tendency of this narrative is to recast that decision as a faith in the democratic process — assuming this faith in turn permeates the *Constitution* — downplaying the dimension of racial exclusion.[14] Jeffrey Goldsworthy, for instance, claims that the framers "deemed it not only unnecessary but also unwise… to fetter parliaments with such limitations. …given the progress of liberal ideas under British institutions, a democratic political system was considered the best possible guarantor of liberties."[15] Owen Dixon — who I argued in the previous chapter partially reworked the 'continuity narrative' — stated that the framers "were not prepared to place fetters upon legislative action, except and in so far as it might be necessary" for distributing power between the Commonwealth and the states. He stated that the "history of [the framers'] country had not taught them the need of provisions directed to control of the legislature itself."[16] These narratives provided the Australian legal profession with a means of understanding provisions entrenching constitutional government and rendered legalist assumptions of textual determinacy more workable.

B *Evolution*

By the time Anthony Mason was appointed Chief Justice in 1987, the structure of representative democracy and the conditions in which members of Parliament were 'chosen' had changed considerably since federation. Political parties — barely mentioned during the convention debates — had become the major vehicle through which policy choices were corralled into electoral platforms and presented as political choices.[17] Systems of mass communication had radically altered the medium and I in which ideas competed for popular support and political choices formed. Australia's population had more than quadrupled in size. These changes brought complexity to the meaning of 'choice' in elections, the nature of political power in structuring 'choice', and therefore the requirement that Parliament be 'directly chosen' by electors.

Previous courts — and Australian legal professional culture more generally — had begun to grapple with the questions these structural shifts raised, particularly from the mid-1970s. After 1975 Justice Murphy — a

[13] See, eg, Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24, 26.

[14] For a description of racial exclusion as a professional narrative in its own right see Dylan Lino, 'The Australian Constitution as Symbol' (2020) 48(4) *Federal Law Review* 543, 553–555.

[15] Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9, 25.

[16] Owen Dixon, *Jesting Pilate: And Other Papers and Addresses by the Rt Hon Sir Owen Dixon*, ed Susan Crennan and William Gummow (Federation Press, 3rd ed, 2019) 221.

[17] See, eg, Anika Gauja, 'Australian Political Parties: Evolution and Adaption' in Jenny M Lewis and Anne Tiernan (eds), *The Oxford Handbook of Australian Politics* (Oxford University Press, 2022) 131.

"controversial" appointment[18] — began to introduce references to "silent constitutional principles… not mentioned in the *Constitution*"[19] that were consistent with "the democratic theme of the *Constitution*."[20] These principles included freedom of speech and communication and freedom of movement.[21] In *Miller v TCN Channel Nine Pty Ltd*[22] for instance Murphy J concluded that an "implied constitutional guarantee" extended to an "implied freedom of communication."[23] Justice Murphy referred to Justice Dixon's endorsement of implication as a method. Unlike the *Melbourne Corporation* implication, however, Murphy J did not refer to any specific provisions from which that implication arose. The judgment stated instead that "[s]uch freedoms are fundamental to a democratic society" and were "a necessary corollary of the concept of the Commonwealth of Australia."[24] Interestingly, Justice Mason — who would later preside over the Court finding the implied freedom and attract an accusation of judicial activism — dismissed Justice Murphy's position that "a new set of freedoms which include a guarantee of freedom of communication" were to be "implied in the *Constitution*": "It is sufficient to say that I cannot find any basis for implying a new s. 92A into the *Constitution*."[25] Justice Murphy's views failed to gain support amongst his fellow justices.

A new Federal Labor government sought to challenge the validity of electoral boundaries that had suited its predecessor.[26] In 1975 a consolidated set of challenges was brought to the division of federal electoral boundaries. Plaintiffs in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*[27] ('*McKinlay*') relied on the wording of section 24 — the requirement that the House of Representatives be "composed of members directly chosen by the people of the Commonwealth" — to argue that each electorate should contain an equal number of voters when a state was divided into electorates. A majority of the Court — then presided over by 'legalist' Chief Justice

[18] Brian Galligan, 'The Barwick Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 201, 209.

[19] *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 108 ('*Australian Building Construction Federation*'); George Williams, 'Lionel Murphy and Democracy and Rights' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (The Federation Press, 1997) 50, 58.

[20] *Australian Building Construction Federation* (n 19); Williams (n 19) 59.

[21] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556; Williams (n 19) 59.

[22] (1986) 161 CLR 556.

[23] Ibid 556.

[24] Ibid 582.

[25] Ibid 579.

[26] See, eg, Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 233–234.

[27] (1975) 135 CLR 1.

Barwick[28] — rejected the plaintiffs' argument that section 24 required "equality". Some justices did, however, conclude that the words "chosen by a people" imposed constitutional requirements that could be breached through an electoral redistribution in certain circumstances.

Relevant for present purposes, many of the judgments in *McKinlay* show justices beginning to grapple with the limits of legalist beliefs — and especially their reliance on the 'continuity' narrative to secure textual determinacy — when interpreting provisions connected with representative democracy. In an appeal similar to that made in the *Engineers' case*, Chief Justice Barwick stated that the *Constitution* was an "Act of the Imperial Parliament" and "stability in constitutional law" required that the Court "read the language of the *Constitution* itself". In this instance, however, there was "ambiguity" and "lack of certainty", requiring a turn to "the history of the colonies, particularly in the period of and immediately preceding the development of the Constitution".[29] Chief Justice Barwick noted that "[a]dult suffrage was unknown in the majority of the colonies of Australia", "women were not then franchised" in some of the states and some of the states imposed a property requirement before voting.[30] Barwick CJ concluded that "directly chosen by the people" was "merely emphatic" of the fact the members should be elected directly as opposed to through an electoral college and that this should take place through "popular election": "It is not an indirect reference to any particular theory of government."[31]

Justices Gibbs, McTiernan and Jacobs, Stephen and Mason all rejected the plaintiffs' argument in separate judgments, with Murphy J dissenting. Justice Stephen highlighted other provisions of the *Constitution* as "explicit indications" that it "in no way pretended to any perfect embodiment of some particular model of democratic principles."[32] Justice Mason rejected the argument but was more prepared to recognise that the "system of democratic representative government" in the *Constitution* had a particular identity. That identity, however, did not extend to "equality in the value of the vote" as this was "a comparatively modern development."[33] Regardless of these differences in reasoning the judgments in *McKinlay* — including that of Chief Justice Barwick — were required to acknowledge that provisions connected with elections entailed commitments that could not be interpreted solely through the 'plain' meaning of the text. Even where Chief Justice Barwick sought to invoke the 'continuity narrative', stating that there was "no antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of government",[34] this necessarily engaged with the history of Australian representative democracy in a way that no longer assumed it as self-evidently British. In this way *McKinlay*

[28] Brian Galligan argues that Chief Justice Barwick "persisted with an extreme rationale of legalism when it was going out of judicial fashion…": Galligan, 'The Barwick Court' (n 19) 201.

[29] *McKinlay* (n 27) 17.

[30] Ibid 17.

[31] Ibid 21.

[32] Ibid 58.

[33] Ibid 62.

[34] Ibid 23.

demonstrates how the evolution of Australian democracy increasingly prompted questions that required justices to revisit legalist assumptions regarding representative democracy's constitutional dimensions.[35]

Developments in the 1980s placed further pressure on the 'continuity' narrative in Australian legal professional culture, inviting its re-examination. In March 1986 the *Australia Acts* finally severed formal legal ties between Australia and the United Kingdom.[36] Independence from the United Kingdom had proceeded incrementally throughout the twentieth century, notwithstanding the enactment of the 1900 *Constitution*. Even after federation "the Commonwealth and the States were still bound by British laws of paramount force" and could "still have their own laws disallowed by the sovereign on the advice of British ministers…"[37] As Anne Twomey notes, there had been no "definitive act creating an independent nation."[38] The incremental nature of the independence process meant that Australian legal professional culture lacked a ready vocabulary to describe the distinctive Australian process of acquiring independence. Independence elsewhere had occurred suddenly. The *Australia Acts* removed any ambiguity. Their passage attracted attention to questions of the *Constitution*'s authority. An influential article later in 1986 argued that explanations for the *Constitution*'s binding authority may have changed over time.[39] Geoffrey Lindell's article concluded that the "present political and social reality" of the *Constitution*'s authority in popular sovereignty "need not involve any major changes to the judicial interpretation of the *Constitution*". The article did, however, reflect the more general professional cultural sense of 'break' in narratives attaching to the *Constitution* and a shift to alternative narratives that constitution making elsewhere made available.

A recognition that Australian constitutional democracy had evolved since federation runs through the writing of Chief Justice Mason, whose influence on the implied freedom I explore below. An address shortly after the passage of the *Australia Acts* considered its significance for "[f]uture directions in Australian law."[40] It concluded that since the legislation "severed the residual constitutional links between Australia and the United Kingdom, we are, as we have never truly been before, the masters of our own legal destiny."[41] This opened the space for the

[35] Similar commentary regarding freedom of speech that anticipated the implied freedom decisions is evident in 1988. In *Davis v Commonwealth* the Court was required to consider whether legislation restricting the use of certain symbols and words without the consent of an established authority fell outside the scope of the nationhood power. As the nationhood power is a purposive power, the Court was required to consider whether the intrusion into the plaintiff's freedom of speech was disproportionate to the ends of the legislation. In doing so, the Court alluded to the value of "freedom of speech" but did not anchor its discussion in specific constitutional provisions or an explicit constitutional doctrine: (1988) 166 CLR 79.

[36] *Australia Act 1986* (Cth); *Australia Act 1986* (UK).

[37] Anne Twomey, 'Independence' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 96, 105.

[38] Ibid 96.

[39] GJ Lindell, 'Why Is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29.

[40] Sir Anthony Mason, 'Future Directions in Australian Law' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 11.

[41] Ibid 11.

"[d]evelopment of a distinct Australian law."[42] Mason's address also treated aspects of the 'continuity' narrative and professional beliefs connected with parliamentary sovereignty. It suggested that parliamentary sovereignty was not a static doctrine, but rather one way of thinking about democratic processes that was in flux: "Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will."[43] In other addresses Justice Mason suggested the "doctrine of parliamentary sovereignty" was in 'decline'.[44] Justice Mason's writing notes the emergence of theories of popular sovereignty to explain the authority of the *Constitution,* which he also describes as the "political sovereignty of the people."[45] That the activity of Parliament must be subject to some kind of authority higher than itself means it is possible for parliamentary activity and changes in how democratic 'choice' is exercised — some of the features I explored above — to be repugnant to that higher authority. Justice Mason was aware of those trends and the pressure that they placed on democratic structures. In a speech in 2005, after his retirement, he noted that "the high standards of what was liberal constitutionalism are in decline in Australia and elsewhere."[46] The speech referred to the "disregard for truth" in politics and recent instances where information had been repressed and misrepresented, "despite the fact that… the effectiveness of the electoral choices which we make depends upon the totality and the accuracy of the information we are given."[47]

III 'STABILITY SEEKING' DECISIONS

A *The Early Implied Freedom Decisions*

1 *ACTV and Nationwide News (1992)*

The implied freedom decisions emerged against this backdrop of evolution in Australian democracy. Changes in the practice of electoral democracy had prompted new constitutional questions. Professional culture had also begun to reflect on the nature of the Constitution's commitments and their relationship to long-held professional beliefs and narratives. In two judgments delivered on the same day in 1992 — *ACTV* and *Nationwide News* — a majority of the High Court concluded that a freedom of political communication was "implied in the system of representative government for which the *Constitution* provided."[48] This extended the method of implication to

[42] Ibid.

[43] Ibid 26.

[44] Anthony Mason, 'Courts, Constitutions and Fundamental Rights' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 219, 221–4.

[45] Ibid 223–4.

[46] Anthony Mason, 'Democracy and the Law' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 249, 249.

[47] Ibid.

[48] *ACTV* (n 4).

provisions establishing representative institutions. In doing so the Court broke with the 'continuity' narrative and implied principles that challenged more established professional beliefs surrounding parliamentary sovereignty.

In 1991 the Commonwealth amended the *Broadcasting Act 1942* (Cth) to regulate political advertising during all Commonwealth, state and local government elections.[49] The amendment prohibited advertising unless it conformed to the requirements of a prescribed framework that allocated free advertising. Ninety percent of free-time advertising was to be allocated based on a political party's representation in the preceding parliament. The amendment followed a Commonwealth parliamentary inquiry that had correlated the high cost of political advertising with the potential distortion of political processes by campaign finance and election funding.[50] During the second reading speech for the amendment, the Minister for Transport and Communications Kim Beazley claimed the restriction was "directed squarely at preventing potential corruption and undue influence of the political process".[51] Beazley drew attention to the amount of money involved in modern, electronic political campaigns and the pressure this placed on the electoral system.[52] Australian Capital Television, which held a commercial television licence, and the State of New South Wales both sought declarations that the amended provisions were invalid.

Nationwide News assessed the validity of a provision in the *Industrial Relations Act 1988* (Cth) prohibiting words or speech "calculated… to bring a member of the (Industrial Relations) Commission or the Commission into disrepute."[53] A freelance journalist published an article in 1989 titled "Advance Australia Fascist" that attacked the Arbitration Commission and its members. The journalist and the owner of newspaper were charged under the provision.

In both decisions a majority of the Court found relevant provisions to be invalid as a breach of the implied freedom of communication. The explanation for that implication varied between justices. Chief Justice Mason and Justices Deane and Toohey concluded that provisions establishing Parliament and the executive and allowing for constitutional referendum entrenched a particular form of government that required free political communication to properly function.[54] Chief Justice Mason noted that "[i]ndispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion."[55]

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[49] *Broadcasts and Political Disclosures Act 1991* (Cth).

[50] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Who pays the piper calls the tune — Minimising the risks of funding political campaigns. Inquiry into the Conduct of the 1987 Federal Election and 1988 Referendums* (Report No 4, June 1989).

[51] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991 (Kim Beazley, Minister for Transport and Communications) 3479.

[52] See HP Lee, 'The Implied Freedom of Political Communication' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383, 385.

[53] *Industrial Relations Act* 1988 (Cth) s 299(1)(d)(ii).

[54] *ACTV* (n 4) 135 (Mason CJ), 170 (Deane and Toohey JJ).

[55] Ibid 138 (Mason CJ).

Features of Chief Justice Mason's reasoning reveal its character as a 'stability seeking'. Firstly, Chief Justice Mason sought to identify a basis of the *Constitution*'s legitimacy in popular sovereignty. The judgment noted that "[d]espite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which elected representatives exercise sovereign power on behalf of the Australian people."[56] The judgment cited Lindell's article to this end.[57] Mason CJ also noted that that the Australia Acts marked the end of the Imperial Parliament's legal sovereignty and "recognized the ultimate sovereignty in the Australian people."[58] However, Chief Justice Mason also presented that account of popular sovereignty as compatible with the 'continuity' and rights exceptionalism narratives I explored earlier:

> The framers of the *Constitution* accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy… In the light of this well recognized background, it is difficult… to establish a foundation for the implication of general guarantees of fundamental rights and freedoms.[59]

The judgment presents freedom of communication as not only compatible with that professional narrative of rights exceptionalism but a consequence of it. Appealing to the authority of an established professional figure — Harrison Moore — Chief Justice Mason repeated the claim that "[t]he great underlying principle" of the *Constitution* "was that the rights of individuals were sufficiently secured by ensuring each an equal share in political power." There would be "scant prospect of the exercise of that power" without "freedom of communication."[60]

Chief Justice Mason's reasoning has the quality of a 'stability seeking' in a second respect: it expands the category of legal sources on which arguments about the commitments of representative government can be based. As I argued in an earlier chapters, legalist reasoning often depends on controlling and confining the range of sources that can lend authority to constitutional argument. This dispute about legal sources and their authority played out in the *Engineers' case* that I explored in the previous chapter. Chief Justice Mason' judgment involved reference to judicial interpretation in Canada[61] and the United States.[62]

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[56] Ibid 138.

[57] Lindell (n 39).

[58] *ACTV* (n 4) 138.

[59] Ibid 136.

[60] Ibid 139-40.

[61] Ibid 141.

[62] Ibid 143.

Finally, the introduction of an implication itself reveals the character of *ACTV* and *Nationwide News* as 'stability seeking'. In the previous chapter I argued that an implication is an inherently 'stability seeking' method. Its aim is to introduce an intermediate principle between the constitutional text and its application to a set of facts to ensure greater consistency, predictability and clarity between cases, that is responsive to developing questions regarding the text's meaning. By implying a freedom of political communication greater stability is brought to the interpretation of sections 7 and 24[63] — provisions entrenching representative government.

Justices Deane and Toohey, in a joint judgment, and Justice Gaudron in a separate judgments, offered similar reasons to Chief Justice Mason for implying a freedom of political communication. These judgments concluded that the freedom extended to "all political matters, including matters relating to other levels of government, within the national system which exists by the Constitution."[64] In *Nationwide News* Brennan J stylised the implication as similar to that introduced by Justice Dixon in *Melbourne Corporation*.[65] Brennan J tied that implication to the requirement that the Houses of Parliament be "chosen by the people" in sections 7 and 24:[66] "To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential." To support this latter proposition the judgment noted that the European Court of Human Rights had recognised a similar principles.[67]

That Justice Mason had rejected Justice Murphy's reference to implied 'guarantees' in the late 70s and early 80s, but recognised an implied freedom as Chief Justice in *ACTV* and *Nationwide News*, seems a contradiction at first glance. Yet the reasoning on which the two justices relied for their conclusions differed considerably. Justice Mason's reasoning was careful to tie the implied freedom to specific provisions in the *Constitution* — sections 7 and 24. The insistence of other justices that the implied freedom was not "a personal right"[68] — rhetoric that has continued to be invoked in the implied freedom cases — was arguably an attempt to ensure the implied freedom's partial compatibility with the 'continuity' and 'rights exceptionalism' narratives that persisted in Australian legal professional culture. The appeal to Justice Dixon's formula for constitutional implications served a similar function.[69] Tanya Josev notes that, in contrast to figures such as Justice Murphy or the later Justice Kirby, the members of the Mason Court "saw themselves as keepers of Dixon's flame"[70]

[63] Ibid 137 (Mason CJ).

[64] Ibid 169 (Deane and Toohey JJ).

[65] *Nationwide News* (n 5) 42.

[66] Ibid 46-7.

[67] Ibid 47.

[68] See, eg, ACTV (n 4) 150 (Brennan J).

[69] See, eg, ibid 133-4 (Mason CJ), 163 (Brennan J).

[70] Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017) 104.

Justice McHugh framed the freedom in a slightly narrower way to other justices. Justice McHugh's judgment was more willing to refer to the freedom as a 'right', but conceived of the electoral process in a narrower sense. Sections 7 and 24 conferred a "right of freedom of communication… for the limited purpose of enabling the Commonwealth to choose their representatives in Federal Parliament."[71] This right extends to conveying and receiving "opinions, arguments and information likely to affect voting in an election for the Senate or the House of Representatives."[72] The freedom protected the process "which commences when an election is called and ends with the declaration of the poll."[73] Mc Hugh J left the question open as to whether the freedom could extend beyond that period.[74]

Justice Dawson's dissent anticipated the legalist objection to the implied freedom that emerged in later cases and certain legal professional quarters. On the one hand, Justice Dawson agreed that sections 7 and 24 provide "for a choice and that must mean a true choice."[75] Therefore an election where "the electors are denied access to the information necessary for the exercise of a true choice is not the kind of election envisaged by the Constitution."[76] However, Justice Dawson did not agree that this gave rise to an implication of freedom of political communication — an intermediate principle — in addition to the provisions themselves. This provided a much weaker standard against which to measure the restrictions on political advertising. "The question [was] not whether the legislation ought to be regarded as desirable or undesirable in the interests of free speech of even of representative democracy."[77] Parliament therefore had discretion to "provide the form of representative democracy which we are to have…"[78]

Justice Dawson's reasoning appealed to core Australian legalist articles of faith that I described in earlier chapters. It invoked the 'continuity' narrative and related beliefs regarding the interpretation of the Constitution as a statute. It asserted that the *Constitution* is contained in "an Act of the Imperial Parliament"[79] which excludes the idea of popular sovereignty[80] that other justices in *ACTV* had explored. It also invoked the 'rights exceptionalism' narrative as a second legalist objection to the implication of a freedom of political communication. This objection,

[71] ACTV (n 4) 240.

[72] Ibid 232.

[73] Ibid 231-2.

[74] Ibid 232.

[75] Ibid 187.

[76] Ibid.

[77] Ibid.

[78] Ibid 188.

[79] Ibid 180.

[80] Ibid 181.

which I explore further below, would become the core legalist objection to the implied freedom. It reasons as follows: because the constitutional framers made a 'deliberate' choice to not adopt a US-American style bill of rights, principles cannot be implied or derived from the constitutional text that are functionally similar to how rights operate in other legal systems. Applying this narrative, the *Constitution* should be interpreted as reflecting "a faith in the democratic process…"[81]

Other hallmarks of legalist reasoning — the control of the class of 'correct' legal sources and the rejection constitutional 'externalities' — feature in Justice Dawson's dissent. Employing a similarly structured argument to the majority in the *Engineers' case*, Dawson J rejected the authority of ideas drawn from 'outside' a 'true' class of legal sources, tacitly suggesting that the growth of rights catalogue outside Australia had influenced the majority: "…the heresy of importing into the Constitution, by way of implication, preconceptions outside the Constitution has been exposed and decisively rejected in the *Engineers' Case*."[82] It claimed that parliamentary supremacy was the 'model' for the Australian *Constitution*.[83]

2 *Professional Cultural Reaction and Subsequent Cases*

Justice Dawson's objections were echoed in other legal professional quarters. Jason Pierce's study of the 'Mason Court' era suggests that many fellow justices viewed it as replacing the "judge-as-caretaker image with the judge-as-creator image." Although views were mixed as to the "merits" of that development, [84] there was a common professional perception that the reasoning employed by the Court in decisions such as *ACTV* and *Nationwide News* reflected a 'transformation' of the Court's 'institutional role'.[85] These views have been repeated in scholarship. Key studies devoted to the Mason Court era describe it in terms of "transformation", "revolution" and its "politics".[86] Pierce describes the changes of this era as "radical."[87] This literature describes the development of the implied freedom — along with other notable developments such as native title[88] and the 'fair

[81] Ibid 182.

[82] Ibid 186.

[83] Ibid.

[84] Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 109.

[85] See, eg, Jason Pierce's argument that the Mason Court "supplant[ed] the orthodoxy": ibid 81.

[86] See, eg, David Solomon, *The Political High Court: How the High Court Shapes Politics* (Allen & Unwin, 1999); Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000); Pierce (n 86); Theunis Roux, 'Reinterpreting the Mason Court Revolution: An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43(1) *Federal Law Review* 1.

[87] Pierce (n 84) 14.

[88] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

markets' approach to section 92[89] — as part of a turn to what it describes as a more "substantive" mode of reasoning. This literature tends to understand 'substantive' reasoning as "values-based" and entailing a "substantive vision of democracy"[90] in opposition to the 'legalist' mode.

The perception that the Mason Court departed from the orthodox judicial role was rooted in professional cultural sensibilities. As I explored in the previous chapter, implications were an established part of Australian constitutional reasoning. If 'substantive' reasoning entails the development of principles and theories from a more basic expression in constitutional text, then the implication in *Melbourne Corporation* was equally substantive. In both *Melbourne Corporation* and *ACTV*, the Court identified precise constitutional provisions from which more general principles flowed. 'Value judgments' — what I described in an earlier chapter as a less determinate, programmable type of reasoning that applies a general good to a particular instance — were involved in both cases. A value judgment regarding the commitments of federal design and that it entailed a prohibition against discrimination was required to craft the *Melbourne Corporation* implication and derive further rules from it. The *ACTV* implication, however, conflicted with legalist narratives and beliefs — including the rights exceptionalism narrative, whose interaction with the implied freedom I explore more fully below. For this reason it was received by the profession differently. Tanya Josev notes, however, that the public and political reaction to *ACTV* and *Nationwide News* was "relatively muted and the print media seemed largely satisfied with the decision."[91]

Majorities of the Court applied the implied freedom again in *Theophanous v Herald and Weekly Times*[92] ('*Theophanous*') and *Stephens v West Australian Newspapers Ltd*[93] ('*Stephens*'). These cases reflect the Court working through the significance of the implied freedom for other areas of law. Importantly, they also reflect cracks beginning to form between justices regarding the reasons for the implication. Ultimately those cracks traced to attempts by some justices to ground the freedom in a 'legalist' explanation — one that reconciled it with the professional beliefs and narratives that *ACTV* had offended — while other justices sought to explain it on a new basis. In *Theophanous* the majority concluded that the implied freedom modified the operation of the common law of defamation. Theophanous, a Federal politician, sued a newspaper for defamation after it published an article attacking his suitability for office. Chief Justice Mason and Justices Toohey and Gaudron delivered a joint judgment concluding that the implied freedom would grant an equivalent protection to content within its scope as a common law defence to defamation.[94] The judgement restated that the implied freedom was "distilled from the provisions and structure of the Constitution, particularly from the concept of representative government enshrined

[89] *Cole v Whitfield* (1988) 165 CLR 360.

[90] See, eg, Theunis Roux and Rosalind Dixon, 'The Mason Court's Enduring Influence: Functionalism and Fair Markets' in *Dynamic and Principled: The Influence of Sir Anthony Mason* (The Federation Press, 2022) 162, 162.

[91] Josev (n 70) 148.

[92] (1993) 182 CLR 104.

[93] (1993) 182 CLR 211.

[94] *Theophanous* (n 92) 141.

in the Constitution".[95] Justice McHugh dissented on the basis that "nothing in the text, structure or history of the Constitution supports the proposition that the Constitution confers a general private right to defame public or political figures."[96] This reasoning — which would become known as the 'text and structure' approach — sought to assert a distinction between components of the system of representative government necessarily connected with particular provisions in the *Constitution*, and those not necessarily connected. It characterised the majority's description of the implied freedom as involving an "institution of representative government" existing "independently [of the Constitution's] text and structure…"[97] Justice McHugh dissented for the same reasons in *Stephens*.[98]

B *Reconciling the Implied Freedom with Legalist Beliefs: Lange (1997)*

This 'text and structure' approach sought to reconcile the implication of the freedom of political communication with core legalist beliefs and narratives. Firstly, its claim that the constitutional text could dictate one interpretation of the implication's content over another appealed to ideas of textual determinacy. As explored elsewhere in this thesis, a core legalist assumption is that legal instruments are determinate and that judicial choice is not involved in their interpretation. By insisting that the text itself could prescribe a 'correct' interpretation of the implication over another, without reference to any other considerations or the involvement of judicial choice, the 'text and structure' approach upheld that core legalist assumption. It also aligned with the traditional Australian legalist treatment of constitutional interpretation as similar to statutory interpretation, which I discussed in the previous chapter. Secondly, the 'text and structure' approach also invoked the idea of 'constitutional externalities': it rejected reference to considerations and sources 'outside' an appropriate class of legal sources. Finally, the 'text and structure' approach was more consistent with professional narratives.

These 'legalist' aspects of the 'text and structure' approach reflect in *Lange*,[99] where a majority ultimately established that approach as the correct basis for the implied freedom. When *Lange* was heard the composition of the Court had changed. With the departure of Chief Justice Mason and Justices Dean and Toohey a "more conservative mood began to take hold in the Court."[100] *Lange* concerned a defamation action brought by the former Prime Minister of New Zealand against the Australian Broadcasting Corporation. A unanimous Court reconsidered *Theophanous* and *Stephens* and limited the freedom to "what is necessary for the effective operation

[95] Ibid 121.

[96] Ibid 195.

[97] Ibid 195.

[98] *Stephens* (n 93) 259. In *McGinty v Western Australia* Justice McHugh referred to the view of the other justices as a claim that the Constitution contained a "free-standing principle" of representative democracy: (1995) 186 CLR 140, 234.

[99] *Lange* (n 3)

[100] Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 673.

of that system of representative and responsible government provided by the Constitution."[101] The 'text and structure' approach to the freedom "gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it."[102] The Court presented this as a narrower question to that asked by the majorities in *ACTV* and *Nationwide News*: "Under the *Constitution*, the relevant question is not, 'What is required by representative and responsible government?' It is, 'What do the terms and structure of the Constitution prohibit, authorise or require?'"[103]

Framing the question in this way reflected the legalist assumption of textual determinacy. It assumes that "terms and structure" contain semantic meanings and prescribe answers to concrete questions without reference to 'ideas' or visions of "representative and responsible government". [104] The *Lange* judgment also invoked the idea of 'constitutional externalities' that I've described as a feature of legalist reasoning. It distinguished the Australian *Constitution* from that of the United States, using protections in the latter as a foil to define the nature of the former's protections.[105] Finally and relatedly, the judgment appealed to the 'rights exceptionalism' narrative, insisting on two separate occasions that the implied freedom was not a 'private right'.[106] This argument also featured frequently in the argument between the parties, who had argued that the implied freedom raised a 'free-standing right'.[107]

In confining the implied freedom to the constitutional 'text and structure' and rejecting a 'free-standing' principle of representative democracy, the Court attempted to reconcile the *ACTV* decision with legalist beliefs. In doing so, it also deprived itself of the ability to articulate the kind of principled constraints that could settle future disagreements about the freedom's scope and stabilise developing doctrine. As I argued in the previous chapter, a constitutional implication is a 'stability seeking' method of interpretation. It introduces an intermediate principle, between general provision and concrete set of facts, to stabilise the meaning of that more general provision where there is a high degree of uncertainty regarding how the *Constitution* should work in particular circumstances. For this reason, implication sits in tension with legalist assumptions even as it serves methodical stability. It requires judicial choice and a value judgment, but embeds that choice in a principle that can guarantee greater stability and certainty for future value judgments. The 'text and structure' approach stunted that stabilising quality of the *ACTV* implication.

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[101] *Lange* (n 3) 561.

[102] Ibid 566-7.

[103] Ibid 567.

[104] Ibid.

[105] Ibid 563, 567.

[106] Ibid 567, 575.

[107] Ibid 528, 531, 539. See, eg, Transcript of Proceedings, *Lange v Australian Broadcasting Commissioner* (High Court of Australia, S109/1996, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, 6 March 1997).

C *Subsequent Questions*

1 *Structured Proportionality*

The instability of the 'text and structure' approach has reflected in questions about the standard of review — the development of further sub-tests to assess whether a law was invalid under the freedom of communication. As Adrienne Stone predicted presciently in 1999, the Court's insistence in *Lange* that 'text and structure' alone could guide the interpretation of the freedom has hampered its ability to develop more refined tests and build consensus between justices.[108] One debate in particular has reflected professional cultural anxieties regarding the development of the freedom in the absence of legalist justification. In *McCloy v New South Wales* ("*McCloy*") four justices led by Chief Justice Kiefel introduced the structured proportionality test to assess whether legislation was invalid for breaching the implied freedom.[109] To a certain extent this introduction reflected a judicial acceptance that "value judgments" — at least with respect to the strict proportionality stage[110] — are inevitably involved when assessing whether a more particular statutory provision is compatible with a more general constitutional standard. Given that "value judgments cannot be avoided altogether, their subjectivity is lessened and a more objective analysis encouraged" by adopting a structured proportionality test.[111] Another reason for adopting structured proportionality seemed to be the existing repertoire of concepts and justifications attached to it transnationally.[112] Relying on a structured proportionality test for the implied freedom placed it in dialogue with systems elsewhere where scholarship, theory and practice had already stabilised its application.

Justices Gageler and Gordon, in separate judgments, rejected using structured proportionality as the test for the implied freedom. One reason for this objection, repeated in subsequent judgments, was a view that structured proportionality was a poor contextual fit for the Australian implied freedom.[113] Another reason was the view that structured proportionality did not 'add' anything to "accepted methods of reasoning and analysis."[114] The latter claim has been borne out in subsequent cases, with the use or non-use of structured proportionality seemingly playing little role in outcomes.[115]

The judicial and scholarly attention that has been given to structured proportionality has been 'disproportionate' to its impact on concrete cases. What that disproportion may indicate is an ongoing preoccupation with how to

[108] Stone (n 100).

[109] (2015) 257 CLR 178.

[110] See, eg, ibid 195.

[111] Ibid 216.

[112] See, eg, ibid 215-20.

[113] See, eg, ibid 234 (Gageler J),

[114] Ibid (Gordon J) 282.

[115] See, eg, *Palmer v Western Australia* (2021) 272 CLR 505 ('*Palmer*').

manage 'value judgments' in the absence of legalism's "safe harbour".[116] As argued in chapter two, the legalist approach to constitutional reasoning holds that legal materials alone — constitutional text and structure — provide adequate restraint and minimise the role of judicial choice. That legalist approaches and their related beliefs and narratives dominated approaches in the High Court for so much of its history foreclosed the development of other, more sustainable mechanisms for judicial constraint. The professional cultural obsession with 'structured proportionality' — and related discussions about constitutional borrowing — potentially reflects deeper concerns about developing 'post-legalist' systems of constraint that can provide a principled basis for the exercise of judicial choice. The majority in *McCloy* sought to moor those questions in the 'safe harbour' of transnational academic discourse. Others — such as Justice Gageler — sought to adopt the 'categorical' approach to the freedom favoured in the United States and the "predictability of outcomes" supplied by doctrines originating in the common law.[117] These practices of 'constitutional borrowing' appear an attempt to 'borrow' the stability of practices of reasoning — professional cultural acceptance and a body of justification built up through professional cultural institutions — from elsewhere. Those points of 'stability' reference align moreover with networks to which the Australian legal profession tends to be exposed through transnational education and scholarly networks. Chief Justice Kiefel — credited for introducing structured proportionality in *McCloy* — was exposed to structured proportionality during postgraduate education while Justice Gageler's postgraduate education was completed in the United States.[118]

2 *Application to Executive Power*

How the implied freedom of political communication should interact with statutory[119] and non-statutory executive[120] powers has remained similarly contested. That question has arguably had a far greater impact on the operation of the implied freedom in practice despite receiving less attention than structured proportionality. In a series of cases developed since 2012 the High Court has confined the implied freedom as a restraint on legislative power but not on the executive exercise of discretionary powers created by legislation.[121] One of the Court's reasons for exempting executive power from the protection of the implied freedom appears to be concern that it

[116] See, eg, Adrienne Stone's description of the 'text and structure' approach as a "safe harbour" for judicial sensibilities: Adrienne Stone, 'The Limits of Text and Structure Revisited' 28(3) *University of New South Wales Law Journal* 842, 845.

[117] See, eg, *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171, 224. See also Anne Carter, 'Moving Beyond the Common Law Objection to Structured Proportionality' (2021) 49(1) *Federal Law Review* 73.

[118] See, eg, Rosalind Dixon and Amelia Loughland, 'Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia' (2021) 19(2) *International Journal of Constitutional* Law 455.

[119] See, eg, Janina Boughey and Anne Carter, 'Constitutional Freedoms and Statutory Executive Powers' (2022) 45(3) *Melbourne University Law Review* 903.

[120] See, eg, Kieran Pender, 'How Does the Implied Freedom of Political Communication Constrain Executive Power?' (2022) 96(10) *Australian Law Journal* 704.

[121] *Wotton v Queensland* (2012) 246 CLR 1; *Comcare v Banerji* (2019) 267 CLR 373; *Palmer* (n 115). For a discussion of this progression of cases see Boughey and Carter (n 119).

would otherwise have "the effect of treating the implied freedom as a personal right."[122] Janina Boughey and Anne Carter suggest that adopting this "legislation-centric approach" allows the Court to avoid grappling with the effect of the implied freedom in administrative decision-making "in a way which is compatible with Australia's separation of powers."[123]

How courts perceive their institutional role and assess the content of doctrines such as the separation of powers connects with legal professional culture. The Court's desire to avoid adjudicating on what may appear to be a 'personal right' seems motivated by the 'rights exceptionalism' narrative I described earlier. As the *Constitution* does not provide for rights, the Court interprets it so as to avoid developing doctrine that may be functionally similar to a right. This avoidance, however, has 'distorted' the development of a principled explanation for excluding executive power from the operation of the implied freedom of political communication.[124] Janina Boughey and Anne Carter for instance question whether the "legislation-centric approach is doctrinally coherent, justified, sufficient to give effect to constitutional guarantees, and practically workable."[125] That approach provides perhaps another illustration of how attempts to 'stabilise' the doctrinal consequences of the implied freedom — in this case by restricting its operation to appease legalist concerns — can become a source of instability in its own right.

IV EXPLAINING 'STABILITY SEEKING' DECISIONS

A *Legal Professional Cultural Change*

1 *Formal Institutional Explanations*

I have argued above that the evolving structure of representative democracy raised novel questions about certain sections of the *Constitution*. Those questions required the legal professional to consider the meaning of constitutional provisions in a new context. Australian legal professional culture had similarly evolved in a way that affected how it framed the interaction between broader processes of democratic change and constitutional commitments. Some of those changes, which I explore below, related to practices of legal education and scholarship. Other changes connected with High Court processes, which as I argued in chapter four play a similar role in the framing and perspective brought to constitutional problems.

[122] Ibid 24.

[123] Ibid 19-20.

[124] See, eg, comments of presenters in Kathleen Foley et al, 'Australian Capital Television v Commonwealth: 30 Years of the Implied Freedom of Political Communication' (Melbourne Law School, 12 September 2022) <https://law.unimelb.edu.au/centres/cccs/engagement/global-public-law-seminar-series/australian-capital-television-v-commonwealth>.

[125] Boughey and Carter (n 119) 46.

Jason Pierce's study of the Mason Court identifies some "institutional precipitants"[126] that may have influenced the Court's receptiveness to the parties' arguments regarding the implied freedom. A 1977 constitutional amendment introduced a mandatory retirement age of 70 for High Court justices. As Pierce notes, there was a view that the amendment would create a "more dynamic Court by fostering more turnover" and allowing younger barristers "at their professional peak" to be appointed.[127] This produced a younger Court composition. A further development was the special leave requirement introduced in 1984. Applicants then required 'leave' from the Court to appeal decisions from lower and Federal Courts and single High Court justices.[128] Pierce observes that analogous mechanisms in the United States had allowed the Supreme Court to "construct agendas", though he notes that justices and barristers interviewed had divided opinions on whether a similar 'agenda setting' function had developed in Australia.[129] A more balanced perspective may be that special leave requirements allowed barristers and litigants to more easily observe the "issues or precedents" that the Court may be willing to review.[130] Special leave requirements also allowed the Court to filter cases in line with the institutional role perceptions and professional cultural beliefs of its members.[131] The Court's increased control over the cases before it may have also fostered an awareness of the influence of judicial choice over legal development, a theme I return to below.

2 *Legal Education and Professional Beliefs*

These changes to institutional rules and the High Court's composition mattered in how they filtered broader, professional cultural change — including what I described in an earlier chapter as 'generational' change.[132] Generational change in the legal profession provides a vehicle for new intellectual currents to enter education and scholarship, in turn influencing what members of the legal profession perceive as the considerations that constrain constitutional reasoning. Some academic and judicial sources have credited Julius Stone's intellectual influence for shaping how several justices on the Mason Court framed legal problems.[133] Stone taught jurisprudence and international law at the University of Sydney between 1942 and 1972, having emigrated from the United Kingdom

[126] Pierce (n 84) 211.

[127] Ibid 212.

[128] Ibid 214–15.

[129] Ibid 216–17.

[130] See, eg, Pierce's analysis of interviews with barristers where he concludes that "the bar responds to the Court's cues on what issues or precedents it is keen to review. Agenda setting then goes beyond choosing among extant special leave applications": ibid 219.

[131] Ibid 220.

[132] Chapter three. See also description of Christoph Möllers, 'Der Methodenstreit Als Politischer Generationenkonflikt: Ein Angebot Zur Deutung Der Weimarer Staatsrechtslehre' (2004) 43(3) *Der Staat* 399.

[133] See, eg, Michael Kirby, 'Julius Stone and the High Court of Australia' (1997) 20(1) *University of New South Wales Law Journal* 239; Murray Gleeson, 'Julius Stone and the Legal Profession' in Helen Irving and Jacqueline Mowbray (eds), *Julius Stone: A Study in Influence* (The Federation Press, 2010) 9; Josev (n 70) 103. See also Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence' (2008) 31(1) *University of New South Wales Law Journal* 107.

and the United States.[134] And although the major part of his professional life was spent in Sydney, Stone was a vehicle through which ideas sometimes described as 'realist' could be translated into Australian legal education.[135] During his time at the University of Sydney, Stone taught the later Chief Justice Anthony Mason as well as Justices William Deane, Mary Gaudron and Murray Gleeson.[136] Justice Michael Kirby — a critic of legalist approaches — identified Stone amongst his intellectual influences.[137]

Julius Stone's ideas can be thought of as 'post-legalist' and relevant to an argument that doctrinal developments like the implied freedom can be motivated by a desire for methodological stability. The idea that long-term stability requires legal concepts to adapt over time runs through Stone's work. In *The Province and Function of Law* Stone stated that the "defence of legal 'certainty', insofar as it assumes that certainty can be attained by continuing to adhere closely to logical development of the 'principles of law', is defending what has never existed. The appearance of certainty and stability in legal rules and principles conceals existing uncertainty."[138] Stone argued that justices have 'leeways of choice' in certain cases, where legal materials can support several interpretations. Judges must choose between those interpretations, consciously or otherwise, by adverting "to factors of justice and social policy" or considerations that 'transcended' any formal statements of law.[139] Nonetheless, judges tend to conceal the indeterminacy of legal materials in such cases through 'illusory reference', where a legal conclusion is presented as necessary or inevitable and judicial choice is denied. Stone's later work outlined six 'categories' of illusory reference. Stone nonetheless saw this process — the exercise of judicial discretion but justification through illusory reference — as inherent to the development of the common law.[140] Illusory reference allows justices to create the impression of certainty and stability where there is none.

Stone's ideas and their normative component influenced his work as educator. Justice Michael Kirby noted that the idea that "judges — and particularly appellate judges — have choices which they must make honestly exposing for analysis the considerations which they have preferred in reaching their conclusions. It was this teaching of such a simple and apparently self-evident truth that won Stone such a large band of intellectual supporters and admirers."[141] There are distinct parallels between Stone's exhortation for judges to wear judicial discretion and

[134] See Leonie Star, *Julius Stone: An Intellectual Life* (Sydney University Press, 1992) 98–131.

[135] See, eg, Josev (n 70) 103.

[136] Ibid; Adrienne Stone, 'Julius Stone: A Reflection' in Julius Stone: A Study in Influence (The Federation Press, 2010) 13.

[137] See, eg, Kirby, 'Julius Stone and the High Court of Australia' (n 133).

[138] Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control* (Associated General Publications Pty Ltd, 1946) 204–5.

[139] Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9(2) *University of New South Wales Law Journal* 26, 29; Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985) 97.

[140] See, eg, Julius Stone, *Precedent and Law: The Dynamics of Common Law Growth* (Butterworths, 1985).

[141] Michael Kirby, 'Julius Stone: An Intellectual Life by Leonie Star' (1993) 67 *Australian Law Journal* 74, 75.

the ‘true’ considerations influencing its exercise openly, and Mason’s extra-judicial writings. Mason’s 1987 address, “Future Directions of Australian Law”, noted that judges did exercise choice “at the appellate level at least” and that when they do so, should “have an eye to the justice of a rule, to the fairness and practical efficacy of its operation in the circumstances of contemporary society.” His account echoes Stone’s theory of the development of the common law: “A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today.”[142] Elsewhere he observed that ‘values’ are inevitably involved in judicial reasoning and that ‘community standards’ and ‘policy considerations’ are “influential and relevant.”[143] Mason recognised that “values, especially moral values” play a role “in the determination of legal principle…”[144]

Regardless of his individual influence, Stone’s work should be thought of as part of a general evolution in the Australian academic climate.[145] Critics of legalist approaches became mainstream and legal education emerged as an ‘academic’ as well as technical discipline.[146] Australian legal education had also undergone significant structural changes during the 1950s and 60s, with an expanded student base and an increased number of full-time academics replacing practitioners as teachers. This created an academic community prepared to write specifically Australian textbooks and teaching materials that referenced Australian, rather than purely English, materials.[147] Legal historian Susan Bartie suggests that, amongst this ‘first generation’ of academics, Stone was not the sole critic of legalist reasoning, with other academics engaging with contemporary US-American critiques of formalism.[148] As Tanya Josev notes, these changes would percolate through to senior members of the legal profession in the 1970s and 1980s.[149]

B *Professional Beliefs and Stability Seeking Decisions*

1 *The Decline of Legalist Narratives*

[142] Mason, ‘Future Directions in Australian Law’ (n 40) 21.

[143] Sir Anthony Mason, ‘Rights, Values and Legal Institutions: Reshaping Australian Institutions’ in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 80, 85.Sir Anthony Mason, ‘Rights, Values and Legal Institutions: Reshaping Australian Institutions’ (1997) 1 *Australian International Law Journal* 11, 85.

[144] Mason (n 108) 63.

[145] Josev (n 70) 103–104.

[146] See, eg, Susan Bartie, *Free Hands and Minds: Pioneering Australian Legal Scholars* (Hart, 2019).

[147] Susan Bartie, ‘Functionalism, Legal Process, and the Transformation (and Subordination) of Australian Law Schools’ in Susan Bartie and David Sandomierski (eds), *American Legal Education Abroad: Critical Histories* (New York University Press, 2021) 92.

[148] Ibid 92–3.

[149] Josev (n 70) 104.

This account of legal professional cultural change would suggest that, by the 1970s and 1980s at least, key ideas, beliefs and narratives that were necessary for the sustainability of legalist reasoning had become less stable for the new generation of the legal profession. Ideas that were necessary to organise constitutional interpretation, which I've described elsewhere as 'continuity', 'rights exceptionalist' and 'parliamentary sovereignty' narratives, became less self-evident. With the declining influence of those narratives, the separation through which Dixon stabilised legalist reasoning — robust engagement with some constitutional ideas but not others — became less reliable. And if implication had been rehabilitated as a method by Owen Dixon, it was open to extend its use to those sections connected with representative government as legalist beliefs and narratives began to lose their hold.

The decline in those legalist narratives coincided with the lessening hold of a core assumption of legalist reasoning — the determinacy of the text. As Chief Justice Mason noted outside the Court, the "declaratory theory" of judicial decision-making — that judges merely 'discover' the law as it is — "was an artificial construct."[150]Given that judges do exercise choice in certain cases, denying the existing of that choice and failing to explain the considerations that inform it undermines the quality of judicial reasoning. Mason referred to the "modern emphasis on the need for openness and transparency" which in turn required that the "judge reveals all the matters which have been taken into account in the making of the decision."[151] At the same time, the lessening hold of legalist beliefs was not a full capitulation to a radical 'legal realism' or denial that the judicial function remained constrained by legal materials. Chief Justice Mason — like Julius Stone — saw the determinacy of legal materials as a spectrum, and recognised that those cases where judicial choice was available still involved restraint.[152] Even in those cases where judges take policy considerations into account, the exercise of judicial choice is constrained by principles and a process that distinguish it from a political choice.[153] The Mason Court's reasoning, including in the implied freedom cases, can be better through of as 'post-legalist' — one that sought to articulate principled constraints on judicial choice while recognising that there were cases where legal materials did not wholly determine outcomes.

The *ACTV* and *Nationwide News* not only established that a freedom of communication could be implied into the *Constitution*. Those decisions were also significant at the level of method. They represent an attempt to ground constitutional reasoning in 'post-legalist' principles that would be more sustainable, plausible and responsive to contemporary questions. As I explored above, *ACTV* and *Nationwide News* sought to replace ideas that were less certain — such as parliamentary sovereignty and the treatment of the *Constitution* as a statute — with new ideas such as popular sovereignty that could guide interpretation in future cases, where legalist explanations no longer could. *ACTV* and *Nationwide News* were also significant in terms of judicial justification. 'Legalist' practices of reasoning and forms of argument relied on claims of determinacy. Like statutory interpretation, the judge does no more than interpret the text. This meant that legalist justifications offered little guidance in circumstances where

[150] Mason, 'Legislative and Judicial Law-Making' (n 144) 61.

[151] Ibid 64.

[152] See, eg, ibid 68–70.

[153] Ibid 65–6.

legal materials were not experienced by the judge as wholly determinate or could support more than one interpretation. And even in those circumstances where legalist approaches did recognise the availability of judicial choice, these tended to offer a simplistic account of the role of the judge. Owen Dixon, for instance, had said the judge should be informed by "more enduring conceptions of justice" rather than from "political or sociological propensities" in such cases.[154] The Mason Court's reference to other standards in its reasoning — including 'community' standards and international law[155] — can be thought of as an attempt to develop the legalist treatment of value judgments on a more principled basis. When interviewed, the Mason Court justices perceived themselves as more willing to "establishing overarching principles" when compared to their predecessors.[156] One Mason Court justices suggested that the Court perceived that English courts had become a less reliable guide for the articulation of "underlying principles".[157] Empirical analysis indicates that the Mason Court "ushered in lengthier judgments".[158]

2 *Professional Beliefs and Resistance*

The Mason Court's attempt to 'stabilise' a 'post-legalist' approach to method became itself a source of instability. While the legalist 'hold' over professional culture had become less total, its influence and half-life persisted. To those who continued to subscribe to its assumptions — such as the determinacy of legal materials and the denial of judicial choice — there was no need for further 'stability seeking'. From that perspective the *ACTV* and *Nationwide News* decisions were impermissible instances of "judicial law making", a theme that recurred is interviews of members of the legal profession in the aftermath. Pierce's interviews suggest that there was a division amongst judges, some of whom described the Mason Court as "judicial legislators".[159] This conflicted with the view that judicial function "should remain one of discovery and interpretation, not creation."[160] Other interviewed justices who accepted the Mason Court's reasoning practices — including the implied freedom — tended to already accept that judicial choice had always played a role in legal development but had only recently been "forthright" about it.[161] Regardless of where they sat on that division, most justices agreed that the Mason

[154] Dixon, 'Concerning Judicial Method' (n 100) 122.

[155] See, eg, Mason, 'Courts, Constitutions and Fundamental Rights' (n 44).

[156] Pierce (n 84) 87.

[157] Ibid 88.

[158] Ibid 91.

[159] Ibid 111.

[160] Ibid 110.

[161] Ibid.

Court's reasoning was distinct in how it reasoned, with "near universal agreement among the [interviewed] appellate bench that the Mason Court replaced the judge-as-caretaker image with the judge-as-creator image."[162]

There may be two, related explanations for the destabilising effect of the Mason Court's decisions. The first of these is the prolonged influence of legalist beliefs within Australian legal professional institutions. The legalist hold had never been total — figures such as Herbert Vere Evatt, Lionel Murphy and Geoffrey Sawer are scattered across Australian professional cultural history. Nonetheless, legalist reasoning had influenced Australian legal culture for longer than in other Anglophone systems. Pierce observed that a "striking" feature of his interviews with judges who supported the Mason Court's developments was that those judges perceived the departure from legalism as "just recently accepted" and "on the vanguard of progressive legal thought in Australia."[163] Regardless of whether legalist beliefs and assumptions were broadly held, the Australian professional community perceived them as such.

A second, related explanation for the destabilising influence of the Mason Court connects with the cultural vocabulary that mediated that change. At the time when the Mason Court's decisions began to openly challenge the legalist image of the judicial function, the 'judicial activist' trope was being imported into Australian culture from the United States.[164] The language employed in scholarship, contemporary commentary and by interviewed judges would suggest that Australian legal professional culture adopted the categories and schemas that had featured in debates in the United States to explain the Mason Court's decisions. Pierce's study for instance tends to describe the Mason Court as engaging in "judge-made law".[165] In commentary outside the Court, Chief Justice Mason himself employed similar terminology.[166] To those who did not perceive the existing role of choice and values in legal reasoning, 'judicial law making' would resemble the function of the legislature. This failed to capture the nuance of figures such as Mason and Julius Stone, whose work is perhaps better thought of as a search for mechanisms for constraining and controlling judicial reasoning because of the limits of legalist reasoning to constrain and control. The subtext in commentary that the Mason Court had become "political"[167] similarly tended to present judicial reasoning in binary terms. Reasoning was either 'legalist' *or* 'realist' and concerned with "social" and 'substantive' issues *or* "federal" questions.[168] None of these terms accurately captured the nature or motive underpinning some of the Mason Court's decisions, which as I have argued above, were prompted by the

[162] Ibid 109.

[163] Ibid 110.

[164] See generally, Josev (n 73).

[165] Pierce (n 84) 109.

[166] See, eg, Mason, 'Future Directions in Australian Law' (n 40) 11.

[167] See, eg, Pierce (n 84) 245; Solomon (n 86).

[168] See, eg, Pierce (n 84) 139. Pierce quotes one justice who claims that "…the constitution is now concerned with social matters. In Dixon's time it was concerned with Section 92 matters and relationships between the states and the Commonwealth."

instability of such distinctions altogether. The Australian cultural reliance on intellectual currents abroad — in this case, the United States — led it to adopt a vocabulary ill suited to explain and resolve organic professional cultural conflicts. Similarly, the perception that the implied freedom decisions were inspired by the growth of rights catalogues elsewhere[169] arguably undermined acceptance of those decisions as organic responses to Australian constitutional commitments.

V SUMMARY

Australian legalism emerged as a constitutional method in certain professional cultural conditions. As I explored in the previous chapter, the High Court's early 'stability seeking' decisions had appealed to pre-federation beliefs and practices about the determinacy of legal materials that were British in origin. For legalist assumptions to be workable in the context of a new *Constitution*, and for constitutional meaning to be experienced as determinate, certain professional beliefs and narratives needed to be stable and reproduced through professional cultural institutions. I described one of these narratives in the previous chapter as the claim the *Constitution* largely 'continued' the pre-federation constitutional order, albeit in a federal configuration. Owen Dixon was therefore able to reconcile — at least cosmetically — legalist claims of textual determinacy and the denial of judicial choice with engagement with ideas and theories in the text connected with federalism and separation of powers.

But because judges in the Dixon era rehabilitated constitutional implications as a method, it was open for future generations to extend its use. Over subsequent decades core legalist articles of faith became less stable. This resulted from two colliding trends. On the one hand electoral processes and practices of 'choosing' representatives in elections had evolved significantly. This placed pressure on provisions in the *Constitution* connected with electing and 'choosing' government. In other liberal democracies fundamental rights had borne the brunt of questions connected with political communication, arguably foreclosing a framing as democratic problems they may otherwise have received. In Australia the influence of democratic structural change was felt directly on those provisions stipulating processes of electoral choice. This prompted novel questions. At the same time processes of professional cultural change increased the readiness of advocates and judges to recognise institutional commitments and frame problems as threats to those commitments. As ideas of parliamentary sovereignty, continuity and constitutional interpretation as statutory interpretation became less self-evident, there was less reason to restrict the use of constitutional implication.

In light of the declining credibility of legalist assumptions, *ACTV* and *Nationwide News* sought to establish a 'new' form of methodological stability. They did so by introducing ideas — such as popular sovereignty — that could substitute for ideas such as parliamentary sovereignty and literalism that were no longer self-evident or reliably guide judicial reasoning in a contemporary context. Those decisions became a source of instability themselves, given the persistence of legalist sensibilities in some quarters of Australian legal professional culture. It landed the Court in a "nasty dilemma", where a return to legalist explanations involved a "serious loss of

[169] See, eg, Patapan (n 6) 49.

credibility" while their "abandonment" resulted in "a serious loss of legitimacy."[170] The attempt of the subsequent Court to square the implied freedom with legalist ideas particularly frustrated the development of new, 'post-legalist' methods that could recognise the necessity of judicial choice but supply principled controls for its exercise.

[170] Michael Coper, 'Concern about Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 572.

CHAPTER TEN: CONCLUSION

I LEGAL PROFESSIONAL CULTURE AS CONTEXTUAL LAYER

A *Professional Cultural Beliefs and Narratives*

This thesis has considered two legal professional cultures that have developed around very different institutions and approaches to method. 'Professional cultural institutions' — practices of education, training, scholarship and knowledge production — differ considerably. While German legal methods at least formally reject precedent, German legal education and practical training anchor legal reasoning within an interpretive community. This performs a similar function. Like other common law systems, Australian professional culture relies on precedent to anchor the contestability of the common law method and practices of dissent. Despite these differences, both cultures share high levels of 'cohesion'. For most of their constitutional histories they have been marked by high levels of agreement about methods. They have lacked the conflict seen in other legal systems or, in Germany's case, evident during the Weimar Republic. I have argued that this cohesion, connected with the way in which professional cultural institutions interact, is responsible for the prevalence of legalist reasoning in both Australian and German constitutional histories.

I have also argued that professional cultural institutions produce and maintain beliefs and narratives within the legal community. High levels of acceptance of core professional beliefs and narratives may explain why German and Australian cultures are so cohesive. The German case studies that I have explored would suggest that beliefs about institutional authority — and particularly that of the Federal Constitutional Court — are responsible for high levels of agreement about method. In chapter six I explored how the newly established FCC was able to direct inchoate beliefs associated with the Weimar and post-war 'anti-positivist' moment into an acceptance of particular doctrinal developments that then entrenched and expanded its authority. Over time, those beliefs then crystallised to accept the authority of the FCC and create an institution-oriented form of legalist reasoning. Narratives similarly emerged to justify that orientation, connected with the professional instability of the Weimar Republic. These beliefs and narratives had a stabilising effect on practices of reasoning and the experience of constraint of choice. Institutional features of the FCC and the German approach to method ensured that those beliefs and narratives were sustainable. The Court decides unanimously. German constitutional method separates 'standards' from their concrete application to facts, ensuring replicability and protecting the appearance of coherence. The professional community receives those standards and is responsible for applying these to facts at scale. Career incentives recruit public law scholars to the task of 'smoothing' doctrine into a coherent body. Scholarship practices therefore reinforce beliefs and narratives that shore up the cultural authority of the FCC.

Australian cultural beliefs and narratives that have been responsible for stabilising constitutional reasoning were adapted from pre-federation legal professional culture. During an initial period the personal knowledge of High Court judges, who had been framers, provided structure and constraint constitutional interpretation. After this period the Court reverted to beliefs about the interpretation of legal instruments and the authority of the institutions that enact them that were inherited from Britain. Associated narratives, which I have described elsewhere as 'continuity', 'parliamentary sovereignty' and 'rights exceptionalist', attached to the founding constitutional

moment and sought to reconcile it with existing professional beliefs that had predated federation. In federal questions this had the consequence of tilting outcomes in favour of the Commonwealth. After the second world war, the High Court under the leadership of Owen Dixon departed from existing approaches the interpretation of legal instruments in federal and separation of powers questions. It did so by separating those ideas closely associated with the 'continuity' narrative from those perceived to derive from US-American reference. This stabilised Australian legalism, allowing it to develop principled mechanisms through constitutional implication to deal with federal questions.

Both Australian and German constitutional histories also demonstrate that cultural beliefs and narratives are plastic. They can evolve, be challenged, and be replaced. The institutional orientation of German beliefs and narratives produced a high level of professional cultural cohesion. Those same beliefs were brought into contradiction, and produced conflicts, when confronted with European integration. European integration introduced a second source of law, and level of courts, that disrupted the centralised structure of German legal professional culture. On the one hand professional cultural socialisation had trained a belief in coherence and a deference to institutional authority. Without a clear hierarchy, however, German legal professionals lacked a guide as to how institutional conflicts should be resolved. How contradiction or incoherence between norms were to be resolved was similarly unclear. This reintroduced a degree of instability in constitutional reasoning, Generational change within the German legal profession has similarly challenged core concepts — including that of the state — responsible for bringing coherence to German legal professional culture.

'Endogenous' and 'exogenous' processes placed a similar kind of pressure on Australian professional cultural beliefs and narratives. Australia's gradual acquirement of independence, the passage of the Australia Acts and novel questions about provisions entrenching representative democracy prompted critical reflection on the 'continuity' and 'parliamentary sovereignty' narratives. Professional cultural processes including the growth of critical and 'post-legalist' education and generational change mediated those external pressures.

B *Significance for Comparison*

Some of the insights in this thesis can be confined to Australian and German case studies. But my argument that cultural beliefs and narratives assist in stabilising legal professional culture and practices of reasoning may apply beyond those jurisdictions. If so, it has consequences for comparative analysis. Comparative analysis that fails to understand the beliefs and narratives that matter in a jurisdiction under study— and how its professional culture constrains choice in legal actors and socialises them in reasoning — is liable to misunderstand its constitutional practice. As an illustration, scholarship that describes German fundamental rights reasoning as 'political' will miss complex mechanisms, anchored by beliefs about institutional authority and institutional roles, that constrain legal actors and ensure a stable distinction between political and legal forms of argument.

Greater attention to how 'professional cultural institutions' and court design socialise lawyers and judges in an experience of constraint of choice can break 'myths' and stereotypes about method. In chapter three I explored how features of German and Australian methods — 'civil' and 'common law' systems — converge when viewed in practice and context. The German approach to method anchors itself through more extensive practical training

than its Australian — or common law — counterpart. Mirjan Damaška observed that the "continental lawyer" may have less "adjustment problems" to the "American law school" after having more practical experience in applying their own methods.[1] The cosmetic differences between both systems matter, however, for the beliefs that each system has about method and that supply a basis for constraining their application.

Professional cultural differences also influence how scholars produce knowledge and understand 'good' scholarship. The German system, as I explored in chapter three, favours doctrinal approaches in scholarship to a greater extent than the Australian. But the relationship between professional socialisation, beliefs about method and scholarship also runs deeper. German scholarship, for instance, tends to focus on exhaustive and precise definitions and comprehensive theoretical systems. This can be difficult for common law trained scholars to penetrate even when translated into English.[2] Australian and other Anglophone scholarship favours practical examples and close analysis of case studies to support theoretical arguments. The German scholar may perceive this work as lacking precision.[3] These scholarly instincts, while also emerging from the distinct rules that govern scholarship in each system, may reflect some of the differences in socialisation and 'doing legal knowledge' that I have explored in this thesis.

Reflecting on how beliefs and narratives stabilise method elsewhere can ultimately assist a scholar to better reflect on their 'home' jurisdiction.[4] In this thesis I have sought to demonstrate the role of socialised beliefs and narratives in supporting an experience of constraint of choice and shaping how a professional community develops and adapts constitutional method. This is more perceptible in a foreign system. To return to David Foster Wallace's parable of fish swimming: 'water' is easier to understand when one lives on land. Having observed how beliefs or narratives work in a foreign culture, it becomes more plausible that these may feature in a scholar's own system. Observing legal professional culture elsewhere trains the scholar 'where to look' at home.

II AFTER LEGALIST REASONING

A *Reflections on 'Stability Seeking'*

Beliefs, narratives and socialised instincts regarding institutional roles were relevant to the case studies I explored of 'stability seeking'. I explored a diverse range of decisions connected with fundamental rights, federalism, supranational integration and democracy. Each of these decisions has enjoyed 'canonical' status within legal professional culture. And yet, reception of these decisions varied. I have argued that divergence between how these decisions were received can be explained by the cultural beliefs and narratives with which they interacted.

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[1] Damaška (n 180) 1376.

[2] See, eg, comments of Justin Collings, 'Introduction' in Matthias Jestaedt et al (eds), *The German Federal Constitutional Court: The Court without Limits* (Oxford University Press, 2020) xiii.

[3] See, eg, Damaška (n 180).

[4] See, eg, Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26(2) *Harvard International Law Journal* 411, 441.

Early 'stability seeking' reasoning in both decisions occurred within critical junctures when existing legal professional beliefs and narratives were less stable. The Weimar Republic was accompanied by instability in professional beliefs and narratives. When a new court and institution was established in the early Republic, that court could introduce ideas to which the 'natural law' moment was receptive and that then stabilised approaches to constitutional method. Over time, beliefs and narratives evolved to attach to the Federal Constitutional Court itself rather than natural law ideas. The Australian High Court's decision in the 1920 *Engineers' case* enjoyed a similar reception because it appealed to beliefs and narratives that had held power prior to federation.

I then explored a second set of 'stability seeking' decisions in Australia and Germany that did not achieve the same level of acceptance as their predecessors. In these cases the beliefs and narratives with which those decisions interacted had become less stable, but the circumstances of that instability was very different to that addressed by earlier 'stability seeking' decisions. The earlier critical juncture and period of instability in both Australia and German involved conflict about the direction that the Court should take. But the professional community was aware of the conflict and agreed on the value of stabilising measures. In the new German Federal Republic's case, the memory of Weimar and professional conflict increased receptivity to strong institutional guidance. And while the Australian *Engineers' case* was controversial, the new High Court and its approach to federalism was relatively young. The profession was receptive to its 'bedding down' of constitutional questions. When the later European integration and implied freedom decisions were delivered, the perception that the status quo was unstable was not universal. Generational change in both legal professional cultures also played a role in perceptions of stability. European integration was accompanied by changes to German legal education and a new generation more comfortable with constitutional pluralism and conceptions of democracy beyond national publics. To this cohort, the FCC's approach to 'seeking stability' was unsatisfactory. Changes in legal education in Australia had also led to questioning of legalist tenets and the denial of choice. The mixed reception of the implied freedom that I explored in chapter nine cut across those who had believed that judicial choice had always been involved in constitutional reasoning but only recently been acknowledged, and those who did not.[5] This former group was more able to see new ideas as updating the conceptual 'scaffolding' where older narratives no longer offered adequate guidance.

If this account of 'stability seeking' reasoning is accepted, it offers another way of understanding a class of decisions that can be controversial and attract censure as 'judicial activism'. The extent to which an argument is 'legal' or 'political' in nature depends on whether it can rely on principled, professionally culturally sanctioned mechanisms that constrain the choices open to the legal actor. 'Stability seeking' emerges in those periods when the mechanisms for constraint are changing, but a professional cultural licence has not yet emerged for new mechanisms. But in those cases, the judge or legal actor is nonetheless motivated by cardinal professional values of stability and coherence.

B *When Legalist Reasoning Destabilises*

[5] See Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 110.

'Stability seeking' can nonetheless encounter a paradox. As the case studies I have explored in this thesis demonstrate, decisions that attempt to 'shore up' existing beliefs or introduce new ideas altogether may not be successful. 'Stability seeking' may, moreover, become a source of instability itself. In chapter seven I explore how the reasoning that the FCC employed to 'shore up' beliefs in its institutional authority and salvage ideas of the state and democracy organised along national publics, failed to fully bring the profession 'on board'. Moreover, the Court's attempt to broker compromise between pluralising beliefs and narratives in decisions such as *Lisbon* compromised the coherence of its reasoning. The early implied freedom decisions similarly became a source of ongoing conflict in the Australian professional community.

Accepting 'stability seeking' as a legitimate form of judicial reasoning comes with other risks. 'Stability seeking' may pose greater risks to the stability of legal reasoning when engaged too frequently. It may only succeed in stabilising constitutional reasoning where there is a basic level of cohesion and trust between professional cultural institutions, as in Germany and Australia. As with any judicial reasoning, it may be abused by bad faith actors or relied upon as a cloak to depart from accepted legal professional standards. In this respect it has a defence. As I have sought to explore in case studies, 'stability seeking' reasoning speaks to the legal professional community and legal professional institutions for acceptance. Where a professional community that is otherwise free and independent does not accept the reasoning, it will not achieve stability. This decentralises authority from courts, reducing their risk of capture through appointment processes.

Case studies in this thesis would also suggest that an excessive commitment to beliefs and narratives whose persuasive power is in decline can be destabilising. The Australian High Court's 'stability seeking' reasoning in *Lange*, while attempting to reconcile the implied freedom with legalist beliefs about interpretation, ultimately deprived it of the ability to develop more sophisticated 'post-legalist' mechanisms to guide future reasoning. The Court's anxieties about the freedom and desire to distinguish it from a 'personal right' have also distorted aspects of its doctrinal development, as I explored in chapter nine. An extreme instance of this are comments by the recently appointed Justice Steward, who in 2021 questioned whether the implied freedom 'existed' because of the Court's ongoing struggle to decide how it should be applied.[6] This form of excessive legalism fails to capture the rootedness of constitutional meaning in an interpretive community. The stability that can accompany legalist reasoning when it is the dominant approach of an interpretive community doesn't flow from the a priori qualities of legalist reasoning itself. Rather it flows from the agreement and cohesion within the interpretive community that allows legal materials to be experienced as constraining interpretation, with only one meaning available. Once other methods other than legalism have credibility, and professional cultural beliefs evolve and pluralise, legalist reasoning has a limited power to persuade.

[6] *LibertyWorks Inc v Commonwealth* [2021] HCA 18 [149].

SUMMARY OF ACRONYMS AND FREQUENTLY USED TRANSLATIONS

I ACRONYMS

ECJ	European Court of Justice
FCC	German Federal Constitutional Court
HCA	High Court of Australia

II FREQUENTLY USED TRANSLATIONS

Bundesverfassungsgericht	German Federal Constitutional Court
Methodenstreit	methods debate
Staatsrecht	state law
Staatsrechtslehrer	public law scholar
Vereinigung der Deutschen Staatsrechtslehrer	Association of Public Law Scholars

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