

THE RULE OF LAW IN READING DOWN: GOOD LAW FOR THE ‘BAD MAN’*

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When interpreting statutes, courts presume that Parliament intended the statute to bear a meaning which is constitutionally valid. When this presumption is applied unyieldingly, it can result in statutes being ascribed meanings which are unnatural, vague and changeable. That can impair the rule of law values of predictability and continuity in the law. This article argues that rule of law values can play a role in the constructional process — both in general and particularly in the context of reading statutes in conformity with the Constitution. The article explores this through an examination of two 2012 High Court decisions and proposes a set of interpretive maxims which courts could apply to temper unrestrained application of the presumption that statutes should be ascribed a meaning which is constitutionally valid.

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* In ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, Justice Oliver Wendell Holmes charted a ‘bad man’ theory of the law. According to that theory, Justice Holmes, hypothesising a bad man wanting advice on what he could lawfully do, argued that the ‘law’ meant only a ‘prophec[y] of what the courts will do in fact’: at 461. This perspective of the law — that those subject to the law typically need to know in advance how the law will in fact be applied to proposed conduct — underpins this article.

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I INTRODUCTION

The *Constitution* intersects with statutory interpretation in several ways. One of these ways is through the presumption that statutes should be ascribed a meaning which is constitutionally valid, not invalid (which I will call the ‘presumption of valid meaning’).¹ It has been accepted since the High Court’s fourth decision, in 1904, that laws should ‘receive such an interpretation as will make them operative and not inoperative’ and so courts should not assume that Parliament intends the words of an ‘enactment to have an application which would conflict with the *Constitution*’.² Another way in which the *Constitution* could intersect with statutory interpretation is through requiring the development of principles of statutory interpretation which help implement constitutional values. Unlike the United States Supreme Court,³ the High Court of Australia has not developed a robust set of interpretive principles designed to implement constitutional guarantees and values.

This article is about the role which one particular constitutional value, the rule of law, could play in identifying the contours of one particular principle of statutory construction — the presumption of valid meaning. My focus is on one of the rule of law principles identified by Joseph Raz: the principle that ‘the law must be capable of guiding the behaviour of its subjects’.⁴ This principle identifies *predictability* and *continuity* in law as two key values which any constitutional system giving effect to the rule of law should manifest. When laws are unpredictable or changeable, individuals cannot effectively

¹ The difficult concept of ‘intention’ is discussed further in Part III(A) below.

² *D’Emden v Pedder* (1904) 1 CLR 91, 119, 120 (Griffith CJ for Griffith CJ, Barton and O’Connor JJ).

³ For example, the Supreme Court of the United States has recognised a presumption against Congress intending to pre-empt state laws (see, eg, *Altria Group Inc v Good*, 555 US 70, 77 (Stevens J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2008)) in order to protect constitutionally prescribed State sovereignty (see, eg, *Pliva Inc v Mensing* (US Sup Ct, Nos 09–993, 09–1039 and 09–1501, 23 June 2011) slip op 13 (Sotomayor J (dissenting) for Ginsburg, Breyer, Sotomayor and Kagan JJ)) and the federal structure (see, eg, Cass R Sunstein, ‘Nondelegation Canons’ (2000) 67 *University of Chicago Law Review* 315, 331).

⁴ Joseph Raz, ‘The Rule of Law and its Virtue’ in Keith Culver (ed), *Readings in the Philosophy of Law* (1999) 13, 16. As Heydon J has said, ‘people should be able to know, by recourse to a competent lawyer, what the legal consequences of a proposed course of action are before embarking on it’: *PGA v The Queen* (2012) 245 CLR 355, 406 [138].

assess the lawfulness of their own conduct — thereby increasing the prospect that individuals will breach the law without intending to do so. Neither can individuals effectively assess the lawfulness of government conduct — thereby chilling individuals from seeking to restrain unlawful behaviour. Further, even a government attempting to faithfully apply the law may fail to do so. Unpredictability and changeability therefore undermine broader rule of law values in ensuring government and individuals are kept to the law.

In this article, I argue that there is a role for courts to consider the values of predictability and continuity when applying the presumption of valid meaning. My basic argument is this — it is surely true as an empirical proposition that legislators and legislative drafters would desire statutes to be valid. However, that subjective motive does not in itself warrant courts ascribing a valid meaning to statutes. What does give that warrant is that the subjective motive finds expression in statutory interpretation rules and the common law presumption of valid meaning. Those statutory and common law principles are permissible guides to the objective intention of Parliament. But the presumptive purpose expressed in those statutory and common law interpretation rules is not an absolute purpose: Parliament should not be taken to pursue it at all costs.⁵ This is because unrelenting applications of the presumption of valid meaning can exact significant costs on the rule of law values of predictability and continuity. Those unrelenting applications can result in a statute having a legal meaning which is ambulatory, vague and departs markedly from the statute's ordinary, grammatical meaning. Parliament ought not always be taken to intend those consequences to result. For this reason, courts can legitimately have regard to the costs inflicted on rule of law values when deciding whether and how to construe statutes to conform to the *Constitution*.

In Part II, I set out a limited defence of the proposition that rule of law values could play a role in statutory construction. This is a topic far broader than this article: my aim here is only to sketch the basis of such an argument. In Part III, I turn to the presumption of valid meaning. I set out the general principles governing the presumption and discuss a recent strand of authority

⁵ This language is taken from Murray Gleeson, 'Statutory Interpretation' (Speech delivered at Taxation Institute of Australia 24th National Convention, 'Justice Hill Memorial Lecture', Sydney, 11 March 2009) 12–13 <<http://www.hcourt.gov.au/publications/speeches/former/speeches-by-the-hon-murray-gleeson>>. This in turn reflects the observations of the Supreme Court of the United States that 'no legislation pursues its purposes at all costs': *Rodriguez v United States*, 480 US 522, 525–6 (1987) (per curiam). The High Court adopted this language in *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 632–3 [40]–[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

in which some judges appear to have accepted that rule of law values could play a role in guiding the application of that presumption. In Part IV, I explore two cases in which the High Court, after applying the presumption of valid meaning, gave statutes meanings that were variously unnatural, vague and ambulatory. I suggest that these are the kinds of cases in which courts should be willing to have regard to the values of predictability and continuity when applying the presumption of valid meaning. I also tentatively propose a set of interpretive principles which may help guide courts in effectuating those rule of law values in these cases.

The process of applying the presumption of valid meaning, and the outcome of that process, is often described as ‘reading down’ a statute. I will adopt that terminology for the purposes of this article, but it is worth observing that that terminology can confuse. It suggests that a statute has some ‘provisional’⁶ or ‘primary’⁷ meaning independent of the application of the presumption of valid meaning and that it is *that* provisional or primary meaning which must be ‘read down’. Axiomatically, the statute has *one* meaning only⁸ — the meaning ascribed to it after the application of all the principles of statutory interpretation, one of which is the presumption of valid meaning.⁹ A read down meaning of a provision reached after applying the presumption of valid meaning is no more a secondary or ‘new’¹⁰ meaning than a meaning given to that provision after having regard to statutory context, purpose or other presumptions. The terminology of ‘reading down’ also suggests that the presumption of valid meaning can only result in a provision having a narrower or ‘reduced’¹¹ meaning — that the provision is read *down*, rather than, say, read up or across. The problem with this is that it again assumes that a provision has some primary meaning which operates as a yardstick for determining the soundness of any final meaning — that is, that

⁶ See, eg, *Monis v The Queen* (2011) 256 FLR 28, 48 [84] (Allsop P) ([‘s]o provisionally construed, is the provision valid?’).

⁷ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 371 (Dixon J) (referring to the failure of Parliament’s ‘primary intent’).

⁸ Indeed, there would likely be constitutional difficulties if a statute had two correct meanings between which a ch III court could arbitrarily select.

⁹ *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (‘Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction’).

¹⁰ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 375 (Dixon J) (referring to a ‘new meaning producing a new operation’).

¹¹ *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 493 (Barwick CJ) (referring to ‘the reduced form or operation of the Act’).

the final meaning is only sound if narrower than the primary meaning. But again, the provision has only one meaning. That meaning is identified by the application of the principles of statutory construction. If the application of those principles results in the provision having a 'broader' meaning than the ordinary meaning of the statutory text, that cannot be an objection in itself.¹²

II STATUTORY CONSTRUCTION AND THE RULE OF LAW

In this Part, I sketch an argument that rule of law values can play a role in statutory interpretation. Legal scholars in the United States have developed a rich body of commentary identifying functional justifications for presumptions (or so-called 'canons') of statutory interpretation.¹³ For example, William Eskridge Jr has argued that many canons of interpretation are justified by rule of law values (predictability, objectivity and coherence), democracy values (ensuring that statutes are applied in ways reflecting the aims, goals and compromises that in fact drove the legislative process) and public values (values that are 'unquestionably cherished' in American history).¹⁴

Where the High Court has articulated a defence of the rules of statutory construction, it has typically defended them on doctrinal grounds: that is, that they are supported by precedent. There are, however, some notable exceptions to this. Below, I discuss several instances in which High Court judges have expressly defended rules of construction on 'functional' rule of law grounds. Further, as I will show, even aside from instances where rule of law values

¹² For example, a statute may need to be read to apply generally rather than discriminatorily so as not to infringe constitutional prohibitions on various kinds of discrimination (for example, s 92 (which proscribes discrimination of a protectionist kind against interstate trade and commerce), s 117 (which proscribes certain discrimination against individuals based on State residence) and the implication recognised in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (which can proscribe certain kinds of discrimination against states). A statute read, within the bounds of interpretive choice, to conform to these constitutional proscriptions may be ascribed a *broader* meaning than its 'first-glance' or 'ordinary' meaning so as to ensure that it applies generally, rather than specially. This may be better described as reading up rather than down.

¹³ Some leading accounts are contained in William N Eskridge Jr, 'The New Textualism and Normative Canons' (2013) 113 *Columbia Law Review* 531; John F Manning, 'Clear Statement Rules and the Constitution' (2010) 110 *Columbia Law Review* 399; Cass R Sunstein, 'Non-Delegation Canons' (2000) 67 *University of Chicago Law Review* 315; William N Eskridge Jr and Philip P Frickey, 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' (1992) 45 *Vanderbilt Law Review* 593; Cass R Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103 *Harvard Law Review* 405.

¹⁴ See Eskridge Jr, above n 13, 576–80.

have played an express role in High Court justification for principles of construction, rule of law values can be seen in a range of other principles.

High Court judges have expressly defended at least three important statutory presumptions on rule of law grounds. The first is the presumption against statutes having a retroactive operation. In 2012, in *Australian Education Union v General Manager of Fair Work Australia*,¹⁵ French CJ, Crennan and Kiefel JJ justified this presumption on the basis that:

In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations.¹⁶

This reflects the strong association many scholars have identified between the rule of law and non-retroactivity. So, in Joseph Raz's classic list of maxims associated with the rule of law, the first he identified was that '[a]ll laws should be prospective'.¹⁷

A second presumption which High Court judges have related to the rule of law is the principle of legality.¹⁸ The High Court's classic statement of this principle in *Coco v The Queen* holds that 'courts should not impute to the legislature an intention to interfere with fundamental rights' absent 'unmistakeable and unambiguous language'.¹⁹ Several judges, including two Chief Justices, have related this principle to the rule of law. So, Gleeson CJ said that

¹⁵ (2012) 246 CLR 117.

¹⁶ *Ibid* 134–5 [30]. See also *Haskins v Commonwealth* (2011) 244 CLR 22, 48 [72] (Heydon J) ('[i]t is characteristic of states governed by the rule of law that substantive laws are prospective, not retrospective').

¹⁷ Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210, 214.

¹⁸ In *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587–8 ('*Ex parte Pierson*'), Lord Steyn linked the 'principle of legality' and the 'rule of law' through a passage from *Halsbury's Laws of England*, vol 8(2) (4th ed, reissued, 1996) 13 [6]. That passage identified the 'principle of legality' as equivalent to the 'rule of law' and identified several principles as associated with that concept, particularly the principle that the exercise of power by government requires justification in positive law. In *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] ('*Electrolux*'), Gleeson CJ cited Lord Steyn's judgment in *Ex parte Pierson* in the context of describing the principle of legality as an aspect of the rule of law. The High Court's understanding of the principle of legality appears to have taken it well beyond any generic principle that the government is of and under the law.

¹⁹ (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), cited by the majority in *Lacey v A-G (Qld)* (2011) 242 CLR 573, 582 [17] n 66 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

the principle of legality was, '[i]n a free society, under the rule of law, ... an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.'²⁰ Moreover, Gleeson CJ, French CJ, and Crennan, Kiefel and Bell JJ have all identified the principle of legality, or the hypothesised parliamentary intent on which it is based, as 'an aspect of the rule of law'.²¹ The precise relationship between the principle of legality and the rule of law may be open to question. Even so, a majority of the High Court appears to perceive the principle of legality as deriving in part from the rule of law.

A third presumption is that against depriving citizens of access to the courts. In *Plaintiff S157/2002 v Commonwealth*,²² Gleeson CJ identified this presumption as deriving in part from the constitutional assumption of the rule of law.²³

Other principles of statutory interpretation can be understood to advance rule of law values of predictability and continuity, even if judges have not always expressly linked them to the rule of law. Take the principle that the 'process of construction begins with a consideration of the ordinary and grammatical meaning' of the text of the law.²⁴ Starting with a provision's ordinary, grammatical meaning helps ensure that statutory interpretation is tethered to the meaning that those subject to the law would give to its text. As Lord Diplock said in 1975, this advances the rule of law principle that 'a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it'.²⁵ I will return to this principle in Parts III and IV. Similarly, the Hon Murray

²⁰ *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [20].

²¹ *Electrolux* (2004) 221 CLR 309, 329 [21] (Gleeson CJ), quoted in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182] (Crennan, Kiefel and Bell JJ); *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 134–5 [30] (French CJ, Crennan and Kiefel JJ). See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (apparently approving Gleeson CJ's statement in *Electrolux*); *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ) (holding that the principle of legality 'may be sourced in rule of law concepts').

²² (2003) 211 CLR 476.

²³ *Ibid* 492–3 [32].

²⁴ *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ).

²⁵ *Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg A-G* [1975] AC 591, 638. See also Cass R Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103 *Harvard Law Review* 405, 416.

Gleeson has observed that '[i]n a perfect world, the corollary of the rule of law would be that all reasonably educated citizens could discover their rights and responsibilities from the plain words of Acts of Parliament'.²⁶

Take also the following interpretive presumptions which some High Court judges have applied — that a meaning of a statute should not be preferred if:

- a) it would 'change ... the rules of interpretation accepted by all areas of government';²⁷
- b) it would displace fundamental principles of the common law;²⁸
- c) if it were a revenue statute, it would have an operation which was not 'clear' or non-conjectural or which would not 'facilitate[] obedience';²⁹
- d) it would have a statutory criterion which 'might be productive of uncertainty';³⁰
- e) it would expose persons to 'uncertainty';³¹ or
- f) it would disrupt 'settled arrangements'.³²

These principles can all be seen to advance the rule of law values of predictability and continuity in the law. Similarly, take the principle that, absent 'very

²⁶ Gleeson, above n 5, 21. See also *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340 (Gaudron J) (observing that the rule that statutes should be given their ordinary, grammatical meaning is 'dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage').

²⁷ *Momcilovic v The Queen* (2011) 245 CLR 1, 48 [46] (French CJ). Those rules are not, however, constitutionally entrenched: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

²⁸ See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). This presumption has been criticised: see, eg, James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 39–45 (and cases cited therein).

²⁹ *Federal Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325, 342 [55] (French CJ, Heydon, Crennan and Bell JJ).

³⁰ See *AMS v AIF* (1999) 199 CLR 160, 184 [64] (Gaudron J).

³¹ *Legal Services Board v Gillespie-Jones* (2013) 300 ALR 430, 455 [126] (Bell, Gageler and Keane JJ) (preferring an interpretation which would not 'expose clients to the expense and uncertainty of disputing with their lawyers over the beneficial ownership of trust money').

³² *AMS v AIF* (1999) 199 CLR 160, 184 [64] (Gaudron J) (rejecting a construction in part because it 'might be ... disruptive of settled arrangements').

strong grounds',³³ a later statute may not be taken impliedly to repeal an earlier statute. As United States Supreme Court Justice, Antonin Scalia, and Bryan Garner have argued, this presumption against implied repeals advances the rule of law value of continuity in the law.³⁴

There is support in precedent for viewing the rule of law and rule of law values as legitimate guides to statutory interpretation. Is there a basis in principle? The principles of statutory construction are either part of the common law or are prescribed by statute.³⁵ Neither the common law³⁶ nor statutes³⁷ can be at odds with the *Constitution*: so common law or statutory principles of construction would need to develop or give way if they were intractably inconsistent with constitutional imperatives. Further, constitutional values which are or have become 'contemporary values' may be capable of guiding the development of the common law³⁸ or possibly even forming part of the context in which statutes are construed.³⁹ It seems to follow from these observations that any principled basis for the rule of law playing a role in statutory interpretation would need to find its legitimacy in either or all of the following:

- a) the inherent requirements of the common law;
- b) some intent or preference ascribed to Parliament in its statutory variations of common law statutory construction principles;

³³ See *Ferdinands v Commissioner for Public Employment (SA)* (2006) 225 CLR 130, 138 [18] (Gummow and Hayne JJ), quoting *Saraswati v The Queen* (1991) 172 CLR 1, 17 (Gaudron J). Questions of course remain regarding how to render the earlier and later Acts consistent: see, eg, the views expressed in *Commissioner of Police (NSW) v Eaton* (2013) 294 ALR 608, 619–21 [43]–[48] (Crennan, Kiefel and Bell JJ), 631 [98] (Gageler J).

³⁴ Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) 327–33.

³⁵ See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

³⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*') ('[t]he common law and the requirements of the *Constitution* cannot be at odds').

³⁷ *Ibid* 564 ('the basic law of the *Constitution* provides the authority for the enactment of valid statute law').

³⁸ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 142 (Brennan J) (observing that 'appreciation of contemporary values' may warrant development of the common law).

³⁹ See, eg, *ANS v ML (AP)* [2012] UKSC 30 (11 July 2012) [33] (Lord Reed; Lady Hale and Lord Wilson agreeing) (construing a statute in light of 'societal values which Parliament can be taken to have intended it to embody').

- c) some modification of the common law or interpretation statutes *required by the Constitution*;
- d) some modification of either the common law presumption of valid meaning or the meaning ascribed to interpretation statutes *guided by the Constitution*; or
- e) some crystallisation of rule of law values into an extra-legal fact forming part of the context in which Parliament legislates.

Each of these bases involves complex issues for which it is beyond the scope of this paper to resolve. While it is accepted that the rule of law is an assumption on which the *Constitution* is based,⁴⁰ the High Court has yet to determine ‘all that may follow’⁴¹ from that observation. Even if it were accepted that the *Constitution* could require or guide the development of principles of statutory interpretation, it would be another step to hold that what was required or guided by constitutional norms was statutory construction conforming to specific values associated with the rule of law. I do not pursue this issue further in this article. Instead, having observed that there is a plausible argument that rule of law values could play a role in statutory construction, I turn to consider how the specific rule of law values of predictability and continuity could affect the process of reading down.

III READING DOWN: GENERAL PRINCIPLES AND THE ROLE OF THE RULE OF LAW IN READING DOWN

A Reading Down: General Principles

In this Part, I discuss the general principles governing reading down. I suggest there is an argument that, when the presumption of valid meaning operates, it operates alongside, and not exclusive of, other principles of construction. This argument, in short, is that Parliament does not pursue the purpose of validity at all costs.

The general principles governing reading down are relatively well-settled. The meaning of a provision, including relevantly any read down meaning,

⁴⁰ The classic statement for this proposition is found in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

⁴¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ).

depends on Parliament's intention.⁴² The relevant intention is not some subjective intent of Parliament, legislators or the executive government. It is the objective intention identified by the meaning ascribed to statutory text 'reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'.⁴³ In this respect, the High Court has affirmed that 'judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.⁴⁴ The accepted rules of interpretation include the common law presumption of valid meaning — that 'so far as different constructions of [a provision] are available, a construction is to be selected which, so far as the language of [the provision] permits, would avoid, rather than result in, a conclusion that the section is invalid'.⁴⁵

The High Court has not authoritatively articulated the rationales for this common law principle. At least five rationales can be identified. In *Federal Commissioner of Taxation v Munro* ('*Munro*'),⁴⁶ Isaacs J articulated two, one based on judicial respect for the legislature, and the other on the adverse social consequences which may flow from a declaration of invalidity. He said:

⁴² See, eg, *Pidoto v Victoria* (1943) 68 CLR 87, 108 (Latham CJ) ('*Pidoto*') ('[t]he whole question is one of the intention of Parliament'); *Monis v The Queen* (2013) 249 CLR 92, 209 [330] (Crennan, Kiefel and Bell JJ) ('[t]he solution ... may be found in the intention of the statute').

⁴³ *Zheng v Cai* (2009) 239 CLR 446, 456 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). See also *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 289 ALR 1, 18 [64] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*2012 PSA Case*'). The approach articulated by the High Court appears to use 'intention' as equivalent to the 'legal meaning' of a provision (that is, the 'meaning' of the statute; as to the concept of 'legal meaning', see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ)). In this article, when I refer to legislative or parliamentary 'intention', I mean only 'intention' in this narrow sense. I do not mean Parliament's subjective preference either as to the meaning of a provision or for the application of any particular interpretive presumption.

⁴⁴ *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). The concept of the 'constitutional relationship' between the branches is under-theorised by the High Court, but appears to include the principle that, ordinarily, a ch III court cannot make law — the court's permissible role is confined to interpreting and applying laws. The concept may include the further principle that if a ch III court were materially to depart from the accepted rules of interpretation when interpreting a statute, it would thereby *make* law, rather than interpret it.

⁴⁵ *New South Wales v Commonwealth* (2006) 229 CLR 1, 161 [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

⁴⁶ (1926) 38 CLR 153.

It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the *Constitution* may find that duty inescapable. ... [T]he question is: Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res magis valeat quam pereat*. Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the *Constitution*, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail.⁴⁷

A third justification, expressed by scholars commenting on the United States Supreme Court's reading down jurisprudence, is that the presumption tracks the legislature's probable subjective preference for validity over invalidity.⁴⁸ A fourth justification (albeit a self-serving one) is simply that Parliament can be taken subjectively to expect that statutes will be construed in light of the presumption of valid meaning.⁴⁹ A fifth justification, expressed in the Privy Council case of *Macleod v Attorney-General (NSW)* on which Isaacs J relied in *Munro*, is that Parliament may be taken to be aware of and legislated on the basis of 'well-known and well-considered limitation[s]' on power.⁵⁰

⁴⁷ Ibid 180. The last three sentences of this excerpt were adopted in *2012 PSA Case* (2012) 289 ALR 1, 18 [64] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁸ See, eg, Cass R Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103 *Harvard Law Review* 405, 468–9.

⁴⁹ See, eg, Gleeson, above n 5, 19.

⁵⁰ [1891] AC 455, 459 (Lord Halsbury LC for Lords Halsbury LC, Watson, Hobhouse and Macnaghten and Sir Richard Couch) (construing a New South Wales statute so as not to apply extra-territorially). This rationale is similar to that sometimes expressed to justify the proposition that, if Parliament presumptively intends statutes to conform to treaty obligations, that intention extends only to statutes 'enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument': see, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). These third to fifth justifications are arguably not inconsistent with the principle that when construing a statute,

This common law presumption of valid meaning is fortified by general Commonwealth, State and Territory interpretation statutes, which in effect express Parliament's intention, preference or purpose that statutes should be ascribed a meaning which does not exceed constitutional limits.⁵¹ Some statutes contain statute-specific expressions of Parliament's preference or purpose that the statute, or particular provisions, should not be ascribed a meaning which exceeds general or specific constitutional limits.⁵² These statute-specific provisions may both strengthen any inference that Parliament's objective preference or purpose was that the statute be read within power⁵³ and provide specific textual guidance to the court about what Parliament intended the statute to mean to ensure it was within power. Express statutory provisions of these kinds are only guides to Parliament's intent: they cannot render valid that which is invalid⁵⁴ or cannot constitutionally be rendered valid.

The common law principle and its statutory cousins do not authorise courts to 'legislate' under the guise of statutory construction.⁵⁵ Whether or not

the relevant intention is an objective intention, rather than a subjective intention. These justifications go to supporting a general principle (the presumption of valid meaning), which is then applied by courts to ascribe a legal meaning to specific statutory text irrespective of parliamentarians' subjective intention as to the meaning or application of that text.

⁵¹ *Legislation Act 2001* (ACT) s 120; *Acts Interpretation Act 1901* (Cth) s 15A; *Interpretation Act 1987* (NSW) s 31; *Interpretation Act* (NT) s 59; *Acts Interpretation Act 1954* (Qld) s 9; *Acts Interpretation Act 1915* (SA) s 22A; *Acts Interpretation Act 1931* (Tas) s 3; *Interpretation of Legislation Act 1984* (Vic) s 6; *Interpretation Act 1984* (WA) s 7. It is beyond the scope of this article to consider the differences, if any, between the different formulations of words used in these provisions. See, eg, *2012 PSA Case* (2012) 289 ALR 1, 11 [35] (French CJ) (suggesting that different formulations may have a different effect).

⁵² See, eg, *Tobacco Advertising Prohibition Act 1992* (Cth) s 4A(1) ('Unless the contrary intention appears, if a provision of the Act: (a) would, apart from this section, have an invalid application; but (b) also has at least one valid application; it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application').

⁵³ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 371–2 (Dixon J) ('[t]he fact that it is not a general law governing all statutes but is a particular provision of the *Banking Act* [1947 (Cth)] itself doubtless strengthens its effect').

⁵⁴ *Ibid* 372 ('in the nature of things it cannot be more than a guide. ... [T]he extent to which any part of the enactment held to be bad is inoperative must depend upon the real intention of the legislature').

⁵⁵ See, eg, *Pidoto* (1943) 68 CLR 87, 110 (Latham CJ) ('the *Acts Interpretation Act* [1901 (Cth)] does not authorize a court to adopt such a method of promulgating a law under the guise of ascertaining it'); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 493 (Barwick CJ) ('in such a case the court is not required to legislate'). This constraint may in some cases be constitutionally required: see, eg, *JT International SA v Commonwealth* (2012) 291 ALR 669, 694 [99] (Gummow J) (French CJ agreeing at 675 [9]). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 92 [169] (Gummow J), 159 [399]–[400] (Heydon J).

this constraint is constitutionally required in all instances, it clearly represents the absolute limits of the preference or purpose ascribed to Parliament by existing principles. These limits are reinforced by, and at least partly coextensive with, the High Court's description of the contemporary approach to statutory interpretation, which, as discussed above, emphasises that judicial findings of legislative intention are an expression of the constitutional relationship between the arms of government as to the making, interpretation and application of laws. The idea is that in applying the presumption of valid meaning, courts must respect that relationship: if courts were to legislate when reading down, they would risk departing from the accepted relationship between the judiciary and other branches of government.

The High Court has left vague both the precise limits of interpretive choice permissible before a court will cross into the realm of legislating and the precise boundaries of the 'constitutional relationship' between the branches. In *Zheng v Cai*, the High Court suggested that the boundaries may be crossed where the court does not reach a construction of the statute 'by the *application* of rules of interpretation *accepted* by all arms of government in the system of representative democracy'.⁵⁶ This suggests that at least two criteria govern the boundaries of permissible interpretation:

- a) the rules of interpretation must be faithfully, and not spuriously, *applied*; and
- b) those rules of interpretation must be the accepted ones.

The second criterion simply raises the question: what precisely is the content of the 'accepted' rules of interpretation? While the High Court has not fully articulated this notion, it presumably incorporates the idea that courts should apply the conventional rules of interpretation recognised by authoritative, possibly long-standing, precedent.⁵⁷ If this is a correct understanding of the High Court's approach, the approach is a conservative one: it suggests that courts will depart from the constitutional relationship if they apply rules of interpretation which are novel or unexpected. It is beyond the scope of this article more fully to explore the notion of the 'constitutional relationship' between the branches of government which underpins the ascription of

⁵⁶ (2009) 239 CLR 446, 456 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) (emphasis added).

⁵⁷ See, eg, *Commissioner of Police v Eaton* (2013) 294 ALR 608, 631 [96] (Gageler J). These rules of interpretation would presumably include those governing the construction and application of Acts Interpretation Acts.

meaning to a statute; what is important for this article is how that relationship applies in the context of the presumption of valid meaning. What it appears to mean is, at least, that courts should identify the content and limits of the presumption by reference to authoritative, long-standing articulations of it. As set out above, this would mean, in particular, that when applying the presumption of valid meaning, courts cannot legislate under the guise of interpretation.

When will a court pass beyond the bounds of interpretation and into the realm of law-making? There is of course significant room for disagreement about when precisely a court will cross that line. That line may be passed, for example, where the court:

- a) is given ‘a discretion or, at least, a choice as to what the law should be’;⁵⁸
- b) would be unable to determine ‘except in an arbitrary manner’ which meaning to ascribe to statutory text;⁵⁹
- c) would be ‘left to select for itself the area in which the statute should be left to operate’;⁶⁰
- d) would be required to ‘re-express’⁶¹ the statute; or
- e) would ‘become [Parliament’s] draftsman and reframe the statute’.⁶²

This absolute limit — that Parliament is not to be taken to have a preference or purpose that its statutes be read validly if to do so would involve the courts legislating — has generated a subsidiary principle, sometimes stated as a rule: that a provision cannot be read down unless ‘the law itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of, the law’.⁶³

⁵⁸ *Western Australia v Commonwealth* (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁵⁹ *Pidoto* (1943) 68 CLR 87, 110 (Latham CJ).

⁶⁰ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 61 (Brennan J).

⁶¹ *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 482 [125] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

⁶² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 245 (Webb J).

⁶³ *Pidoto* (1943) 68 CLR 87, 109 (Latham CJ). This principle was identified as an absolute rule in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 339 (Brennan J), 349 (Dawson J), 354–5 (Toohey J), 372 (McHugh J). It is beyond the scope of this article to identify whether this should be understood as an absolute rule or as instead a rule of thumb. The context in which Latham CJ referred to the relevance of a ‘standard or test’ in *Pidoto* suggests he intended only to hold that, where there is a standard or test, that will entail that the court will not legislate

The identification of the permissible limits on the court's power to ascribe a constitutionally valid meaning to statutory text is intimately intertwined with the court's application of the ordinary rules of statutory construction. This follows necessarily from the observations that, in reading down a provision, *all* a court is doing is giving effect to Parliament's intent and that intent comprises *only* the meaning given to the text after the application of the 'rules of construction, common law and statutory, ... known to parliamentary drafters and the courts'.⁶⁴ The presumption of valid meaning is just *one* of those rules of construction — and it necessarily operates only on given statutory text. One consequence of this is that the text necessarily constrains the process of reading down. A provision can only be read down 'so far as its language permits'⁶⁵ or is 'apt to include'⁶⁶ the valid meaning. Similarly, a provision cannot be read down if the text is 'intractably inconsistent' with being read in conformity with the *Constitution*⁶⁷ or Parliament has, with 'irresistible clearness',⁶⁸ given a provision an invalid meaning. Several statements of the presumption suggest that statutory text is the *only* means by which the presumption of valid meaning can be refuted. So, in comments cited with approval by five High Court judges in 2012,⁶⁹ Isaacs J said that

[t]here is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail.⁷⁰

However, other cases suggest that context, structure, purpose and other principles of interpretation may also have a role to play in deciding whether

when reading down. In other words, the existence and application by the court of a standard or test in the Act may be a sufficient, but not necessary, condition for any reading down to be permissible. Notably, in *Victoria v Commonwealth* (1996) 187 CLR 416, the majority referred to these cases suggesting that there was a need for a standard or test without suggesting that that was a necessary condition: at 502–3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

⁶⁴ *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

⁶⁵ *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

⁶⁶ *2012 PSA Case* (2012) 289 ALR 1, 18 [65] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁷ *Lange* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁶⁸ *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ), quoting *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

⁶⁹ *2012 PSA Case* (2012) 289 ALR 1, 18 [64] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁰ *Munro* (1926) 38 CLR 153, 180.

the presumption of valid meaning is refuted. So, a court may decline to read down a statute if to do so would be contrary to inferences as to the intent or meaning to be ascribed to the provision arising from the provision's purpose⁷¹ or the statute's structure.⁷² Further, a court may decline to read down a statute because a proposed reading down lacks support in the 'legislative history and framework' of the statute.⁷³ Similarly, consistent with courts' general hesitation to imply terms into statutes,⁷⁴ courts may be reluctant to read down a statute by implying in a 'foreign integer'⁷⁵ even if the implication of such terms would render the provision valid. These cases can be made consistent with statements of the presumption which identify the statutory *text* as the only constraint on reading down by the observation that that text itself must be interpreted — and that process of interpretation necessarily directs attention to a range of interpretive principles other than the presumption of valid meaning.

Does this strand of authority suggest that the prohibition on courts legislating is not the only constraint on courts reading down a statute? If this strand of authority is correct, it could be read in two ways. First, it could be read to indicate the prohibition on courts legislating is not the only constraint on reading down. Rather, text, structure, statutory purpose and other interpretive presumptions also constrain that process. Alternatively, they may suggest that even if the prohibition on judicial legislation is the only constraint on reading down, the concept of 'judicial legislation' should be understood broadly. On that broad understanding, the concept would incorporate a prohibition on any departure from Parliament's intent, where

⁷¹ See, eg, *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 93 [248] (Gummow, Crennan and Bell JJ) (declining to read down a provision in a way which would 'prejudice' one class of persons because the statute manifested a 'particular concern' for that class of persons).

⁷² See, eg, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 339 (Brennan J), 372 (McHugh J) (declining to read down a statute because it would be contrary to an *expressio unius est exclusio alterius* ('express mention of one thing excludes all others') inference).

⁷³ *Monis v The Queen* (2013) 249 CLR 92, 210 [335] (Crennan, Kiefel and Bell JJ) (declining to excise 'political communication[s]' from a statutory speech prohibition because the legislative history and framework suggested that the intention was to penalise communications with a certain degree of 'offensiveness' rather than to prohibit communications by reference to 'subject matter').

⁷⁴ See, eg, *Wentworth Securities Ltd v Jones* [1980] AC 74, 105–6 (Lord Diplock); *Birmingham v Corrective Services Commission (NSW)* (1988) 15 NSWLR 292, 299–300 (Hope JA), 302 (McHugh JA). See also *Taylor v The Owners – Strata Plan No 11564* (2014) 306 ALR 547, 556–8 [35]–[40] (French CJ, Crennan and Bell JJ), 563–4 [65] (Gageler and Keane JJ).

⁷⁵ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 93–4 [250]–[251] (Gummow, Crennan and Bell JJ).

‘intent’ means only the meaning ascribed to a provision after the application of *all* the principles of construction of which the presumption of valid meaning is only one. Again, this would indicate that text, structure, statutory purpose and other interpretive presumptions can validly play a role in that constructional process.

In identifying whether and how factors other than the presumption of valid meaning affect the constructional process, it is useful to distinguish between two categories of case. In the first category, a provision has two available meanings — an invalid meaning and a valid meaning — and a court is deciding whether Parliament objectively intended the invalid meaning rather than the valid meaning. In the second, a provision has three or more available meanings — an invalid meaning and two or more valid meanings — and the court, having formed the view that Parliament did not objectively intend the invalid meaning, is deciding between the available valid meanings. It is consistent with the observations in this Part that principles of interpretation other than the presumption of valid meaning could play a role in both of those categories. In this article, I focus on the first of these categories because it more directly raises the question of whether and how interpretive factors other than the presumption of valid meaning might bear on the interpretive process.⁷⁶ In this first category, the question is whether the presumption of valid meaning can be *wholly refuted* by other interpretive factors.

B *An Argument for the Rule of Law in Reading Down*

In the previous Part, I outlined an argument that the presumption of valid meaning ought to be applied alongside, and not exclusive of, other relevant principles and presumptions of construction. In this Part, I suggest there is a plausible argument that some rule of law values could play a role in that constructional process. I show that there is a limited basis in precedent for this argument and propose that this argument is not wholly inconsistent with the rationales for reading down identified in the previous Part. I also suggest that there are special reasons for having regard to the values of predictability and continuity when reading down.

⁷⁶ However, the second of these categories also raises interesting questions as to the scope and weight of the presumption that Parliament intends statutes to have a valid meaning. In particular, they raise the question of whether a court should strive to give a provision an effect which most closely tracks the effect of the ‘initial’, but invalid, meaning of the provision and what role text, structure and other facts may play in encouraging the court to give the provision a meaning other than that which most closely tracks the effect of any ‘initial’ meaning.

I turn first to the argument from precedent. In *International Finance Trust Co Ltd v New South Wales Crime Commission* ('*International Finance Trust*'),⁷⁷ a question arose about the validity of s 10 of the *Criminal Assets Recovery Act 1990* (NSW), which authorised the Supreme Court of New South Wales to make, on application by the New South Wales Crime Commission ('Commission'), an order restraining dealing in specified proprietary interests.⁷⁸ Section 10(2) relevantly provided that '[t]he Commission may apply to the Supreme Court, ex parte, for a restraining order' in respect of the various specified kinds of proprietary interests. Section 10(3) provided that the Supreme Court 'must make the order' if certain circumstances eventuate. Section 10 was challenged on the basis that it impermissibly subjected the Supreme Court to direction at the behest of the executive government, contrary to the implication identified in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').⁷⁹

An important issue in determining this challenge was the extent to which s 10 required the Supreme Court to proceed ex parte on application by the Commission. The Commission accepted that the provision required the Court to proceed ex parte and submitted that an alternative construction should not be adopted 'unless ... needed to render the provision constitutional'.⁸⁰ New South Wales argued that, properly construed, s 10 'would allow the Court to require the party affected to be given notice before hearing an application made ex parte'.⁸¹ No express text empowered the Court to issue such notice. A decision handed down three months prior to the hearing in *International Finance Trust* provides important context to these arguments. In *K-Generation Pty Ltd v Liquor Licensing Court*,⁸² which involved a *Kable* challenge to the validity of a court having regard to secret evidence, the High Court had shown a willingness to read statutory provisions very permissively to ensure courts retained broad powers to accord procedural fairness to persons affected by potential decisions.⁸³ The argument of New South Wales

⁷⁷ (2009) 240 CLR 319.

⁷⁸ Note that after the decision in *International Finance Trust*, s 10 was repealed and replaced by s 10A via *Criminal Assets Recovery Amendment Act 2009* (NSW) sch 1 item 3.

⁷⁹ (1996) 189 CLR 51. The implication being that no Parliament can confer on a ch III court a function which is incompatible with that court's status as a repository of federal jurisdiction.

⁸⁰ *International Finance Trust* (2009) 240 CLR 319, 348–9 [40] (French CJ).

⁸¹ *Ibid* 349 [40].

⁸² (2009) 237 CLR 501.

⁸³ See *ibid* 531–2 [93]–[99] (French CJ), 542–3 [143]–[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 576–80 [257]–[258] (Kirby J).

in *International Finance Trust* effectively implored the Court to adopt a similar degree of interpretive flexibility when construing s 10.

In *International Finance Trust*, when assessing the validity of s 10, French CJ referred to a version of the presumption of valid meaning — that, ‘where there is a constructional choice that would place the statute within the limits of constitutional power and another that would place it outside those limits, the former is to be preferred’.⁸⁴ He continued:

There is a caveat which should be entered in relation to these principles. The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen [see *Interpretation Act 1987* (NSW) s 34(3)]. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning.⁸⁵

The second point displays a clear sympathy for the rule of law value in statutes having a predictable meaning. French CJ then observed, apparently having regard to the principles identified in this excerpt, that it was not ‘a case in which ... the Court should read ... into the section by some form of implication unsupported by its text’ a power in the Court to require the Commission to give notice of its application to an affected party.⁸⁶

French CJ’s comments in *International Finance Trust* reflected his earlier comments as a Federal Court judge that:

⁸⁴ (2009) 240 CLR 319, 349 [41].

⁸⁵ *Ibid* 349 [42]. These comments were adopted in *R v Momcilovic* (2010) 25 VR 436, 463–4 [98] (Maxwell P, Ashley and Neave JJA) and *Re Application for Bail by Islam* (2010) 4 ACTLR 235, 252 [61]–[64] (Penfold J).

⁸⁶ (2009) 240 CLR 319, 350 [44].

In a representative democracy those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. That proposition informs the approach of courts to the interpretation of laws in taking as their starting point the ordinary and grammatical sense of the words ...⁸⁷

The value of predictability also played a role in Heydon J's observations in *Plaintiff M47/2012 v Director-General of Security* ('*Plaintiff M47*').⁸⁸ One issue in *Plaintiff M47* was whether the court should adopt an extended version of the presumption of valid meaning. According to that extended version, statutes should be read down to avoid the mere *risk* of constitutional invalidity⁸⁹ (as distinct from the *fact* of constitutional invalidity). Heydon J declined to adopt that extended version of the presumption of valid meaning partly on the basis that it would cause '[g]rave uncertainty': 'minds [would] differ widely about the *risk* of constitutional invalidity' giving rise to 'a prospect of interminable disputes about the extent of the relevant risk'.⁹⁰

These cases furnish a basis in precedent, albeit a limited basis, for accepting that rule of law values can play a role in reading down. Would accepting the relevance of those values be consistent with the rationales for reading down identified in Part III(A)? At first glance, accepting that interpretive factors other than the presumption of valid meaning could play a role in reading down seems inconsistent with Isaacs J's first rationale for the presumption of valid meaning — the judicial respect for the political branches rationale. That rationale was that courts should generally be cautious before exercising their 'serious and responsible duty' to declare a statute invalid because an elected Parliament has 'considered [that statute] necessary or

⁸⁷ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410 [430] (French J). See also *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 132 FCR 31, 41 [23] (French J) ('[t]hose who are subject to the law and those who apply it are entitled to expect that it means what it says').

⁸⁸ (2012) 292 ALR 243.

⁸⁹ The presumption advocated by the plaintiff in *Plaintiff M47* was a version of the avoidance canon (or 'modern avoidance' canon) applied by the Supreme Court of the United States, according to which courts prefer a construction of a statute that does not raise serious constitutional problems: see, eg, *Edward J DeBartolo Corporation v Florida Gulf Coast Building & Construction Trades Council*, 485 US 568, 575 (White J for Rehnquist CJ, Brennan, White, Marshall, Blackmun and Stevens JJ; O'Connor and Scalia JJ concurring) (1988). The canon is much discussed in the literature: see especially Trevor W Morrison, 'Constitutional Avoidance in the Executive Branch' (2006) 106 *Columbia Law Review* 1189.

⁹⁰ *Plaintiff M47* (2012) 292 ALR 243, 334 [341] (emphasis in original).

desirable for the public welfare'.⁹¹ If interpretive factors other than the presumption of valid meaning could play a role in reading down, it could mean that courts would hold Parliament to an invalid meaning of a provision even though the court could select a valid meaning without engaging in judicial legislation. That would naturally increase the number of cases in which courts would need to exercise their 'serious and responsible duty' to declare statutes invalid. But this rationale for the presumption should not be taken too far. This rationale identifies as the source of judicial disrespect the frustration of what Parliament 'has considered necessary': in other words, the frustration of some notional intent ascribed to Parliament. But the very question raised by the relationship between the presumption of valid meaning and other interpretive factors is what Parliament's intent is: *what* has Parliament objectively considered necessary? The question is whether interpretive principles, including rule of law values, can bear on the intent or meaning ascribed to the provision. If Parliament has objectively intended an invalid meaning, it would be an affront to both the *Constitution* and to Parliament for the court to fail to cognise that invalid meaning and instead declare the law valid. This means that this first rationale simply returns the question to the issue of which principles may properly bear on the process of ascribing meaning to a provision and whether Parliament objectively ought to be taken to have pursued validity at all costs.

The second rationale identified by Isaacs J was that when a statute is declared invalid it can have adverse 'consequences' including 'confusion of public business'.⁹² Far from being inconsistent with rule of law values playing a role in reading down, this rationale is sympathetic to the values of predictability and continuity. The 'confusion of public business' which results from a statute being given an unnatural, vague or changeable meaning in pursuit of validity may be as or more significant than that which results from a patently invalid statute being held to its ordinary, invalid meaning. In the former case, the reading may be unpredictable to the public; in the latter case, the invalidity may be wholly predictable.

The third rationale for the presumption of valid meaning directs attention to the legislature's likely subjective preference for validity. Even assuming that the existence of such a general preference was empirically accurate⁹³ and

⁹¹ *Munro* (1926) 38 CLR 153, 180 (Isaacs J).

⁹² *Ibid.*

⁹³ See generally Abbe R Gluck and Lisa Schultz Bressman, 'Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons' (Pt 1) (2013) 65 *Stanford Law Review* 901 (discussing the results of an empirical study of congress-

subjective preference could form a sound basis for justifying an interpretive rule,⁹⁴ a question would remain about the depth of that subjective preference. Was the subjective preference for validity at all costs? Even if the subjective preference was for validity at all costs, there would be a further question about whether courts, when ascribing a *legal* meaning to statutes, ought to constrain that preference in pursuit of constitutional, legal or community values, such as the rule of law.

The fourth rationale for the presumption of valid meaning suggests that Parliament may be taken to have legislated on the basis that its statutes would be interpreted in accordance with the presumption of valid meaning. Lastly, the final rationale for the presumption of valid meaning suggests that Parliament can be taken to be aware of and have legislated on the basis of ‘well-known and well-considered limitation[s]’ on power.⁹⁵ These rationales both again simply return the question to the depth courts ascribe to the presumption of valid meaning. *What* presumption is Parliament taken to have legislated on the basis of? *How far* ought Parliament be taken to have legislated on the basis of ‘well-known’ limitations on power? Further, as I will show in Part IV(A), the view that Parliament ought be taken to have legislated on the basis of ‘well-known’ limitations on power can cut against taking the presumption of valid meaning too far — in particular, it could suggest that courts not read down statutes to conform to significant, unforeseeable developments in constitutional law.

French CJ’s observations in *International Finance Trust* indicate that unrelenting applications of the presumption of valid meaning can pose special risks to the values of predictability and continuity. These special risks arise for several reasons:

- 1 *Changeable statutory ‘meanings’*. Constitutional law develops in line with High Court judgments. The High Court cannot develop constitutional law prospectively.⁹⁶ Lower courts applying the presumption of valid meaning

sional drafters and showing how subjective preferences for interpretive rules often departed markedly from those applied by the courts).

⁹⁴ Cf *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [20] (Gleeson CJ) (‘[a] statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion’).

⁹⁵ *Macleod v A-G (NSW)* [1891] AC 455, 459 (Lord Halsbury LC for Lords Halsbury LC, Watson, Hobhouse and Macnaghten and Sir Richard Couch).

⁹⁶ *Ha v New South Wales* (1997) 189 CLR 465, 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

read and apply statutes to conform to constitutional doctrine as it is expressed by the High Court from time to time. This means that the way statutory provisions are actually applied can vary substantially as constitutional law develops. Any new development in constitutional law, resulting in changed application of statutes, would presumptively apply to conduct engaged in prior to the new development.

- 2 *Vague statutory meanings.* As I will discuss further below, by a special device, the High Court appears to have allowed Parliament to confer broad discretionary powers on the basis that those powers are subject to an implicit statutory prohibition on the power being exercised to infringe a constitutional limitation. As I will argue in Part IV(B) below, this can make it very difficult for government and individuals to identify whether an exercise of the power would be or is valid.
- 3 *Material departure from the statute's ordinary meaning.* The strength with which the presumption of valid meaning is sometimes expressed — for example, that the provision is to be given a valid meaning if the meaning is textually 'available'⁹⁷ — entail that the meaning given to a provision after the application of the presumption can depart markedly from the ordinary, grammatical meaning of the provision's text. The text of a provision can yield *many* meanings, even if many of those are strained or bizarre.
- 4 *Meanings dependent on both constitutional law and principles of reading down.* Where those subject to the law are attempting to predict the lawfulness under statute of proposed conduct and courts robustly apply the presumption of valid meaning, those subject to the law must make two assessments. They must assess both the state of constitutional law (no mean feat) and, having regard to the state of that law, the likely interpretive choice a court would make in reading the statute down. These are very difficult assessments requiring knowledge of the contents of the Commonwealth Law Reports and how a sometimes broadly-worded statute would be read to contour to the contents of the judgments in those reports. The potential for a chill on private or governmental conduct is manifest.

The potentially adverse rule of law implications arising from these observations are underscored by the fact that these factors operate in circumstances

⁹⁷ *Work Choices Case* (2006) 229 CLR 1, 161 [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

where, by definition, government is acting at the edges of constitutionally permissible power. This means that where the scope of statutorily conferred legal power is difficult to assess, there is a predictable chill on individuals suing to hold government to its constitutional limits. Equally, there may be a regulatory chill — the executive, uncertain as to the scope of its power, may refrain from performing its statutory duties. In the next Part, I explore these risks to rule of law values by examining two recent cases in which the High Court applied the presumption of valid meaning to ascribe changeable, unnatural and vague meanings to statutes.

IV READING DOWN AND THE RULE OF LAW

A *Ambulatory Meanings: Public Service Association of South Australia Inc v Industrial Relations Commission (SA)*

In *Clark v Martinez*⁹⁸ and *Harris v United States* ('*Harris*'),⁹⁹ the United States Supreme Court rejected an ambulatory view of the 'modern avoidance' canon — which holds that Congress does not intend statutory provisions to raise serious constitutional doubts. The Supreme Court held that that presumption did not operate to give statutes a meaning contouring to constitutional law as understood from time to time. So, in *Harris*, the Court expressly rejected 'a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the *Constitution* later changed'.¹⁰⁰ Similarly, in *Pape v Commissioner of Taxation*, outside the context of reading down, Heydon J rejected the 'idea that a statute can change its meaning as time passes, so that it has two contradictory meanings at different times, each of which is correct at one time but not another, without any intervention from the legislature'.¹⁰¹

The High Court could have taken a similar, non-ambulatory approach to the presumption of valid meaning. On a non-ambulatory approach, statutes might be read, for example, to conform to:

⁹⁸ 543 US 371, 382 (Scalia J for Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg and Breyer JJ) (2005).

⁹⁹ 536 US 545, 555–6 (Kennedy J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Breyer JJ) (2002).

¹⁰⁰ *Ibid* 556.

¹⁰¹ (2009) 238 CLR 1, 145 [423].

- a) constitutional law as it was at the time of enactment;
- b) constitutional law as it was at the time of enactment together with reasonably foreseeable developments from that law; or
- c) constitutional law as it is from time to time *unless* a new development in constitutional law involves a significant rupture from prior doctrine which could not have been reasonably foreseeable.

Each of these approaches raises their own issues. I do not here mount a defence of any of these approaches: my aim, instead, is to show how the High Court appears to have adopted none of them and has instead adopted a wholly ambulatory approach to the presumption of valid meaning.

This conclusion seems to follow from the High Court's 2012 judgment in *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* ('2012 PSA Case').¹⁰² The 2012 PSA Case involved an issue as to the construction of s 206 of the *Fair Work Act 1994* (SA) ('1994 Act').¹⁰³ That section provided:

- (1) A determination of the [Industrial Relations] Commission is final and may only be challenged appealed against or reviewed as provided by this Act.
- (2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction.

In 1991, in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* ('1991 PSA Case'),¹⁰⁴ the High Court had considered a statutory predecessor to s 206.¹⁰⁵ That predecessor was s 95(b) of the *Industrial Conciliation and Arbitration Act 1972* (SA) ('1972 Act'), which had provided:

no award, order or proceeding of any kind of the Commission ... can be challenged, appealed against, reviewed, quashed or called in question on the ground of excess or want of jurisdiction.

In the 1991 PSA Case, the High Court held¹⁰⁶ that the phrase 'excess or want of jurisdiction' applied to 'permit erroneous assumptions of jurisdiction to be

¹⁰² (2012) 289 ALR 1.

¹⁰³ This Act was formerly known as the *Industrial and Employee Relations Act 1994* (SA).

¹⁰⁴ (1991) 173 CLR 132.

¹⁰⁵ See 2012 PSA Case (2012) 289 ALR 1, 6 [16] (French CJ) (describing s 206 as a 'successor' to s 95).

¹⁰⁶ Or apparently held: see *ibid* 14 [49] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

checked by judicial review, but not erroneous refusals to exercise jurisdiction'.¹⁰⁷ Following the *1991 PSA Case*, the South Australian Parliament enacted the 1994 Act, which repealed the 1972 Act.¹⁰⁸ Ordinarily, where statutory text which has been given an 'authoritative ... construction'¹⁰⁹ is repealed and replaced by identical statutory text in another statute, there would be a strong inference that the provision ought to be ascribed the meaning given to it in that authoritative construction.¹¹⁰ This meant that there would have been a strong inference that the phrase 'excess or want of jurisdiction' should be ascribed the same meaning as it was given by the High Court in the *1991 PSA Case*. In the *2012 PSA Case*, the High Court even accepted that lower courts, in construing s 206 of the 1994 Act, were, prior to the *2012 PSA Case*, bound (in a *stare decisis* sense) to apply the construction given to 'excess or want of jurisdiction' in the *1991 PSA Case*.¹¹¹

In between the enactment of the 1994 Act and the High Court's judgment in the *2012 PSA Case*, there were substantial developments in the High Court's ch III jurisprudence. In 2010, the High Court held in *Kirk v Industrial Court (NSW)* ('*Kirk*')¹¹² that State Supreme Courts could not be deprived of their 'supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power'.¹¹³ The Court observed that that supervisory

¹⁰⁷ (1991) 173 CLR 132, 142 (Brennan J). See also at 151–2 (Deane J), 160 (Dawson and Gaudron JJ), 164–5 (McHugh J).

¹⁰⁸ *Industrial and Employee Relations Act 1994* (SA) sch 1 cl 1.

¹⁰⁹ *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 406 [61] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (where the High Court declined to construe a statutory provision in light of tribunal interpretations of statutory text prior to the enactment of a new provision because they were 'not based upon any authoritative consideration of the question of construction'). See also at 435 [146]–[147] (Heydon J).

¹¹⁰ See, eg, *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

¹¹¹ *2012 PSA Case* (2012) 289 ALR 1, 14 [50] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (holding that the Full Court of the Supreme Court 'correctly held that it was required' to apply the High Court's construction of s 95(b) in construing s 206). Their Honours also appear to have felt a need to apply the High Court's principles regarding the overruling of prior decisions in adopting an interpretation of s 206 which departed from that given in the *1991 PSA Case*: see at 18–19 [66] (holding that the interpretation in the *1991 PSA Case* 'has now been shown to be "wrong in a significant respect"', citing *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (other citations omitted)).

¹¹² (2010) 239 CLR 531.

¹¹³ *Ibid* 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

role was exercised through the grant of mandamus, amongst other remedies¹¹⁴ and that the line between permissible and impermissible insulation of errors in executive and judicial power from Supreme Court review was that between non-jurisdictional error (permissible) and jurisdictional error (impermissible).¹¹⁵

In the *2012 PSA Case*, the High Court applied these observations from *Kirk* to hold in effect that s 206 of the 1994 Act could not validly insulate the exercise of State executive and judicial power against the issue of mandamus to enforce an erroneous refusal to exercise jurisdiction.¹¹⁶ This meant that if s 206 were given the meaning which the High Court had given it in the *1991 PSA Case*, s 206 would be invalid. The High Court instead applied the presumption of valid meaning to hold that s 206, properly construed, authorised the grant of mandamus to redress jurisdictional errors, including an erroneous refusal to exercise jurisdiction where the error was jurisdictional.¹¹⁷ The majority observed that the principles identified in *Kirk* ‘were not appreciated’ when the *1991 PSA Case* was decided.¹¹⁸ The failure of the High Court to appreciate the principles in *Kirk* in 1991 was understandable: *Kirk* represented a special application of, and a significant development from, constitutional principles that were first accepted by the High Court (after the enactment of the 1994 Act) in 1996 in *Kable*.¹¹⁹ The holding in *Kable* was itself revolutionary.

The High Court’s conclusion in the *2012 PSA Case* appears to assume at least two propositions. First, a provision may be read down to conform to a development in constitutional law that had not been authoritatively identified at the time of enactment.¹²⁰ Second, the provision, even though it replaced a

¹¹⁴ Ibid 581 [98].

¹¹⁵ Ibid 581 [100].

¹¹⁶ (2012) 289 ALR 1, 10 [29]–[30] (French CJ), 17 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 24 [86] (Heydon J).

¹¹⁷ Ibid 11 [35] (French CJ), 18 [66] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also at 24–5 [88] (Heydon J).

¹¹⁸ Ibid 17 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹¹⁹ (1996) 189 CLR 51. Although Gageler J has perceived some anticipation of *Kable* in *Leath v Commonwealth* (1992) 174 CLR 455: see *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 687 [184].

¹²⁰ This assumption is different to the interpretive technique authorised by Dixon J in *Hume v Higgins* (1949) 78 CLR 116, where his Honour observed that statutes and regulations might be read down as the defence power wanes. Dixon J did not identify the source of that reading down as the waning of the defence power. Rather it was the implication, into a ‘statutory provision obviously addressed to a particular state of facts [eg, a war]’, of ‘a restriction upon its operation confining it to those facts’: at 134. The ambulatory nature of the provision here

statutory provision with identical text which had received an authoritative High Court construction at the time of enactment, may be read down so that it has a meaning departing from that authoritative High Court construction. The effect of these propositions can be described in the following way: courts should presumptively ascribe a meaning to a statutory provision which renders the provision valid according to constitutional law as it is authoritatively identified by the High Court from time to time even if the meaning thereby ascribed departs from a meaning that otherwise would have been strongly indicated by ordinary principles of construction.¹²¹

This outcome could arguably be defended on declaratory theory of law grounds. The argument would go this way. The presumption of valid meaning provides that statutes should be read to conform to the *Constitution properly understood*. The *Constitution* has only one meaning, even if prior courts may have misapprehended that meaning. That is, the *Constitution* always contained the principles in *Kable* and *Kirk*, whatever prior High Courts may have appreciated. It therefore misunderstands the position to say that the presumption of valid meaning gives statutes an ambulatory meaning. Those statutes have only one, unchangeable meaning: their meaning read in conformity with the *Constitution properly understood*. It is incorrect to say that evolved interpretations of the *Constitution* ‘change’ the law; at most, they correct previous heresies.¹²²

This argument has some appeal, but, in my view, four points suggest it is not decisive. First, the premise of the argument is that the presumption of valid meaning means that the meaning of a statute should conform to the *proper construction* of the *Constitution*. It suggests that such a meaning should be ascribed to the statute even if the ‘proper construction’ of the *Constitution* departs markedly from understandings of constitutional law at the time of enactment and is not identified by the High Court until many years later in substantially changed circumstances. It therefore suggests that that meaning should be ascribed to the statute even if reading the statute to conform to the *Constitution* might result in the statute having a substantially different meaning from that which Parliament reasonably could be taken to have

comes not from changing constitutional law but from changing extra-constitutional facts and exists only where the provision is ‘obviously addressed’ to the subsistence of certain facts.

¹²¹ Including, relevantly, the principle that a provision incorporating text with an authoritative judicial construction may ordinarily be taken to have a meaning conforming to that construction.

¹²² See *Sinkovich v A-G (NSW)* [2013] NSWCA 383 (18 November 2013) [10]–[11] (Basten JA). Bathurst CJ, Beazley P and Price J agreed with Basten JA’s judgment: at [1], [3] and [80] respectively.

predicted at the time of its enactment. It also ascribes that meaning to the statute even if it entails that the statute is given a meaning which could not be said to have been predictable by those subject to its commands. There is at least a defensible argument that Parliament ought not to be ascribed such a preference or purpose.

Secondly, a statute can have a relevantly ‘ambulatory’ operation in two different ways. It can have an ambulatory operation because its ‘correct’ meaning is ambulatory. Alternatively, it can have an ambulatory operation because it is applied by courts in ways that give it an ambulatory operation, even if its ‘correct’ meaning is static. Rule of law predictability and continuity values are at least as concerned with the latter kind of ambulatory operation as the former. As Lord Reid observed, in a sense, ‘the law is what the judge says it is’.¹²³ The vast majority of statutory construction is undertaken by courts below the High Court. *Stare decisis* principles mean that those courts must apply prevailing High Court constitutional doctrine. This is so despite any notional ‘correct’ meaning of the *Constitution*. It is also so even if constitutional doctrine appears to have moved on, in a way suggesting that the High Court might revisit prevailing authority.¹²⁴ This means that the two assumptions underlying the decision in the *2012 PSA Case* necessarily entail that, in the vast majority of cases, statutes will be construed to conform to constitutional law as it has been expressed by the High Court from time to time. This means that, even if it could be argued that a statutory provision has only one, constant meaning — the meaning that conforms to the *Constitution*, properly understood — in substance, statutory provisions will be applied in an ambulatory way. A change in High Court constitutional doctrine will ripple through the constructions given to statutes by lower courts — and that ripple effect will remain until the High Court again develops doctrine at which point it will be replaced by a new ripple. This can be seen to exact distinct costs on the values of predictability and continuity even if strictly the statute has only one static meaning.

Thirdly, even if there is only one ‘correct’ meaning of the *Constitution*, the High Court has made it clear that that meaning itself can be ambulatory. For example, the constitutionally prescribed system of representative government is dynamic.¹²⁵ Statutes read to conform to that constitutional system as

¹²³ Lord Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

¹²⁴ See *Ravenor Overseas Inc v Readhead* (1998) 152 ALR 416, 416 [3] (Brennan CJ).

¹²⁵ See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ), 186–7 [45] (Gummow, Kirby and Crennan JJ).

‘correctly understood’ will therefore be read in a dynamic way. The point is that an objection based on the declaratory theory cannot avoid dynamism in the correct meaning of statutes.

Finally, the fifth rationale for reading down — that identified in *Macleod* and discussed above — directs attention to the observation that Parliament legislates on the basis of ‘well-known’ and ‘well-considered’ limitations. This rationale appears to direct attention to *understandings* of the *Constitution* rather than *correct meanings* of the *Constitution*.

The result in the *2012 PSA Case*, and the assumptions on which it was based, appear to have impaired rule of law values in predictability and continuity. I do not, however, suggest that the case would have been decided differently if the High Court had expressly had regard to rule of law values in ascribing meaning to a statute. Predictability and continuity are not the only values associated with the rule of law. Another is effectuating the courts’ jurisdiction to ensure government ‘act[s] within the law’.¹²⁶ An important feature of the provisions at issue in the *2012 PSA Case* was that the ambulatory meaning given to the provisions arguably helped advance the rule of law by ensuring that the statute validly authorised the Supreme Court to supervise the exercise of South Australian executive and judicial power. The developments in constitutional law which saw the 1994 Act take on a new meaning in the *2012 PSA Case* worked in favour of the rule of law.

However, rule of law values may have cut wholly in the other direction if constitutional law were, for example, to develop in a way that wound back existing constitutional ‘rights’. For example, the scope of the implied freedom of political communication recognised by the High Court in 1992 in *Australian Capital Television Pty Ltd v Commonwealth*¹²⁷ was arguably broader than that recognised five years later in *Lange v Australian Broadcasting Corporation* (‘*Lange*’).¹²⁸ If statutes burdening freedom of political communication were read down to conform to constitutional law as identified from time to time by the High Court, those subject to those statutes may have needed to predict the outcome in *Lange* to assess whether their conduct was prohibited by statutory provisions read in light of the presumption of valid meaning. This suggests that, if rule of law values have a role to play, they could have a heightened role

¹²⁶ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ).

¹²⁷ (1992) 177 CLR 106.

¹²⁸ (1997) 189 CLR 520.

where constitutional doctrine has moved in the direction of reducing constitutionally protected liberties.¹²⁹

B *Vague and Unnatural Meanings: Wainohu v New South Wales*

In *Victoria v Commonwealth* ('*Industrial Relations Act Case*'),¹³⁰ the High Court appeared to distinguish between reading down laws to conform to a positive head of power,¹³¹ on the one hand, and reading down to conform to a constitutional limitation, on the other. The majority said:

The limitation by reference to which a law is to be read down may appear from the terms of the law or from its subject matter. Thus, a law which is 'clearly made with the intention of exercising the power to make laws with respect to trade and commerce' can be read down 'so as to limit its application to inter-State and foreign trade and commerce'. Similarly, where a law is intended to op-

¹²⁹ I do not argue that giving a statute an ambulatory operation is constitutionally proscribed. There is authority consistent with the view that it is not. For example, it is accepted that s 68 of the *Judiciary Act 1903* (Cth) has an ambulatory operation so that it picks up and applies in federal jurisdiction laws of a State or Territory as they are from time to time: see, eg, *R v Gee* (2003) 212 CLR 230, 240 [6]–[7] (Gleeson CJ). It is also accepted that federal statutes may use terms the content of which is determined by the common law as it is from time to time: *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 548–9 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ). Further, the High Court has not recognised a constitutional proscription on laws having an ambulatory meaning so that their meaning varies in accordance with prevailing constitutional doctrine. For example, in *Sportsbet Pty Ltd v New South Wales* (2012) 286 ALR 404, the High Court accepted that the application of the 'free interstate trade' provision of the *Northern Territory (Self-Government) Act 1978* (Cth) (s 49) could vary in accordance with prevailing doctrine regarding s 92 of the *Constitution*: at 408 [9] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *AMS v AIF* (1999) 199 CLR 160, 175–6 [35]–[36] (Gleeson CJ, McHugh and Gummow JJ). There is a big difference, however, between identifying a constitutional proscription on ambulatory meanings and identifying a parliamentary intent in a given case that a provision should have an ambulatory meaning the application of which varies in accordance with prevailing understandings of constitutional law. My argument is that rule of law values of predictability and continuity counsel against ascribing such an intention to Parliament.

¹³⁰ (1996) 187 CLR 416.

¹³¹ Although the High Court's subsequent approach in *R v Hughes* (2000) 202 CLR 535 may suggest a similarly relaxed approach to reading down to conform to positive powers. There, the High Court appeared to read down a generally-expressed conferral of power to confer 'functions and powers in respect of matters within the legislative powers of the Parliament of the Commonwealth': at 557 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (citations omitted). Graeme Hill has argued that *R v Hughes* did not effect a fundamental rupture with prior jurisprudence regarding positive heads of power: see Graeme Hill, 'R v Hughes and the Future of Co-Operative Legislative Schemes' (2000) 24 *Melbourne University Law Review* 478, 494–5.

erate in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation.¹³²

The High Court applied that observation in the *Industrial Relations Act Case* to construe a section of the *Industrial Relations Act 1988* (Cth) in light of the implied federalism-protective constitutional limitation first identified in *Melbourne Corporation v Commonwealth*.¹³³ That implication protects the states against various kinds of interference by the Commonwealth. Section 6 of the *Industrial Relations Act 1988* (Cth) provided that the Act 'binds the Crown in right ... of each of the States'. The Court read that part of s 6 so that it only bound the states

to the extent that the provisions of the Act do not prevent them from determining the number of persons they wish to employ, the term of their appointment, the number and identity of those they wish to dismiss on redundancy grounds and the terms and conditions of those employed at higher levels of government.¹³⁴

It goes without saying that the meaning thereby given to s 6 departed markedly from the ordinary meaning of the provision's text and involved several vague concepts, such as the class of persons 'employed at higher levels of government'.

One interpretation of the *Industrial Relations Act Case* is that the High Court authorised the exercise of a greater degree of interpretive choice when reading down statutory provisions to conform to constitutional limitations than when reading provisions down to conform to positive heads of power. A relaxed approach to constitutional limitations would have been consistent with the language in prior authorities such as *Wilcox Mofflin Ltd v New South Wales*, where it was said that 'wide general words conferring executive and administrative powers should be read as subject to s 92'.¹³⁵ The basic effect of this technique is that it allows Parliament to confer generally-expressed discretionary powers, leaving it to those who must apply and comply with the law to fill in the gaps as to the limitations on power.

¹³² (1996) 187 CLR 416, 502–3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (citations omitted).

¹³³ (1947) 74 CLR 31.

¹³⁴ *Industrial Relations Act Case* (1996) 187 CLR 416, 503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹³⁵ (1952) 85 CLR 488, 522 (Dixon, McTiernan and Fullagar JJ). See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613–14 (Brennan J). Section 92 of the *Constitution* prohibits certain infringements of freedom of interstate trade, commerce and intercourse.

The High Court appeared to apply a very relaxed approach to reading down statutory provisions to conform to constitutional limitations in *Wainohu v New South Wales* ('*Wainohu*').¹³⁶ One of the issues in *Wainohu* was the validity of provisions of the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The Bill which led to that Act¹³⁷ was described by Nathan Rees, then Premier of New South Wales, as being designed to respond 'to an escalation in violent crime involving outlaw motorcycle gangs that [had] spilled into public places, and [was] threatening the lives and safety of innocent bystanders'.¹³⁸

Section 19(1) of the Act authorised the Supreme Court of New South Wales to make a 'control order' in relation to a person. It provided:

- (1) The Court may make a control order in relation to a person on whom notice of an interim control order has been served ... if the Court is satisfied that:
 - (a) the person is a member of a particular declared organisation, and
 - (b) sufficient grounds exist for making the control order.

One effect of the making of a control order was that the person was prohibited from associating with certain other persons.¹³⁹ Under ss 19(6) and (7), the Court was given the power partially to lift this prohibition. Those provisions stated:

- (6) The Court may, on making a control order in relation to a person, make any consequential or ancillary orders it thinks fit.
- (7) Without limiting subsection (6), an order may be made, if in the opinion of the court the circumstances of the case require:
 - (a) if the person satisfies the Court that there is a good reason why he or she should be allowed to associate with a particular controlled member — exempting the person from the operation of section 26 to the extent, and subject to the conditions, specified by the Court ...

¹³⁶ (2011) 243 CLR 181.

¹³⁷ *Crimes (Criminal Organisation Control) Bill 2009* (NSW).

¹³⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14440. The Premier also advised that the laws were 'backed by ... advice, which says that they are well protected against any future High Court appeals': at 14440. Ultimately, in *Wainohu*, the High Court found the Act invalid, through a novel application of the *Kable* principle: (2011) 243 CLR 181.

¹³⁹ *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 26.

This scheme was challenged as infringing implied freedoms of either political association or communication. The Court rejected this challenge. Central to the reasoning was the following observation:

If in the opinion of the Supreme Court the circumstances of the case require, a person may be exempted from the prohibition upon association imposed by s 26 to the extent and subject to the conditions specified in the control order pursuant to s 19(7). The provision in s 19(7) permits the restriction of control orders so as not unreasonably to burden freedom of political communication; the power of the Supreme Court to make a control order should be construed conformably with the implied freedom so as to render reviewable for error any particular order which exceeded the limit of the implied freedom.¹⁴⁰

This meant that the power to make control orders in s 19(1) was read as if it in effect stated: 'The Court may make a control order ... if the Court is satisfied that (a) ..., (b) ..., *unless the order would, if it were a statute, be invalid by reason of the implied freedom of political communication*'. This appears to be a simple application of the principle expressed in the *Industrial Relations Act Case* that generally-expressed powers may be construed to be 'subject to' a constitutional limitation. In these cases, the High Court has effectively authorised a construction of general powers so they authorise the exercise of power 'up to constitutional limits' so long as the limit is a positive limitation rather than a mere restriction on positive power.¹⁴¹

It again goes without saying that the meaning ascribed to s 19(1) departs significantly from the ordinary meaning of the statute's text. The departure is even more significant if it is correct (as it seems to be) that the approach adopted in *Wainohu* would also mean that s 19(1) was read so as to conform to *all* possible constitutional limitations, not only the implied freedom of political communication. So, for example, s 19(1) would also need to be read as if it contained the text, 'unless the order would, if it were a statute, be invalid by reason of the guarantees (a) of freedom of interstate trade, commerce and intercourse contrary to s 92; (b) against being subject to any disability or discrimination based on State residence contrary to s 117; (c) of

¹⁴⁰ (2011) 243 CLR 181, 231 [113] (Gummow, Hayne, Crennan and Bell JJ). See also French CJ and Kiefel J, who agreed that the challenge on the basis of the implied freedoms of political communication and association should fail: at 220 [72].

¹⁴¹ The United States Supreme Court has rejected this view of reading down: *Clark v Martinez*, 543 US 371, 384–5 (Scalia J for Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg and Breyer JJ) (2005).

the freedom against disqualification from universal suffrage unless there is a substantial reason¹⁴² and so on.

In addition to departing substantially from the ordinary meaning of the text of the statutory provision, this kind of reading makes it very difficult for government and individuals to assess the validity of any given or proposed control order. Take a control order which appears to effectively burden the freedom of political communication. Put yourself in the position of a judge deciding whether to make such an order, or a police officer deciding whether to enforce the law against a person breaching a condition of a control order,¹⁴² or a person subject to a control order deciding whether to comply with the order or deciding whether to ‘appeal’¹⁴³ against the decision to issue the order on given conditions. At least three very difficult issues would arise.

First, the High Court has made it clear that the freedom of political communication is not an ‘individual right’.¹⁴⁴ One consequence of this appears to be that, in identifying whether there is an effective burden on the freedom and in identifying the magnitude of that burden,¹⁴⁵ the relevant question is not the extent to which a particular individual’s speech is burdened, but the extent to which community-wide speech is burdened.¹⁴⁶ Take a statutory power construed (as in *Wainohu*) so as not to authorise particular exercises of power which would infringe the implied freedom. When the question is the validity of a *particular* exercise of such a general statutory power affecting an individual, but the degree of burden that particular exercise of statutory power inflicts on the constitutionally protected interest in freedom of political

¹⁴² It is not clear whether the decisions to issue a control order and to attach certain conditions to that order were subject to collateral attack.

¹⁴³ Section 24(1) of the *Crimes (Criminal Organisations Control) Act 2009* (NSW) conferred a right of appeal on a person subject to a control order of the Supreme Court of New South Wales against a decision of the Supreme Court in relation to the making of a control order.

¹⁴⁴ *Lange* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁴⁵ A question relevant to the second (proportionality) stage of the *Lange* analysis: see *Monis v The Queen* (2013) 249 CLR 92, 146–7 [124] (Hayne J), 212–13 [343] (Crennan, Kiefel and Bell JJ).

¹⁴⁶ See, eg, *Owen v Menzies* [2013] 2 Qd R 327, [71] (McMurdo P) (observing that the freedom is ‘not an individual right’ and that determining whether a provision burdens the freedom ‘involves a consideration as to how [the provision] may affect the freedom generally’); *Wotton v Queensland* (2012) 246 CLR 1, 31 [80] (Kiefel J) (‘*Wotton*’); *Monis v The Queen* (2011) 256 FLR 28, 40 [47] (Bathurst CJ). See also by analogy the High Court’s jurisprudence on s 92 of the *Constitution: Betfair Pty Ltd v Racing New South Wales* (2012) 286 ALR 221, 232–3 [42] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 238–9 [68]–[69] (Heydon J) (cautioning against the use of evidence of the effect on an individual trader because s 92 does not protect individual trading rights).

communication cannot be assessed at the level of that individual, it is very difficult, perhaps often impossible, for individuals to assess the validity of the exercise of power.

Second, the validity of the order then turns on whether it is proportionate to a legitimate end or, in the High Court's accepted language, 'reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government'.¹⁴⁷ The vagueness of this language is notorious.¹⁴⁸ The High Court's explication of those terms has been in a steady state of development for several decades and there remains no coherent articulation of their content. The effect of the reading down adopted in *Wainohu* appears to be that the constitutional concept of proportionality is in effect read into a statutory power to constrain the power's scope. That means that for an individual to assess the validity of a control order they must first understand the High Court's notion of proportionality (a Herculean task) and then identify how that understanding would apply in the particular circumstances. As in the *2012 PSA Case*, the constitutional notion of proportionality read into the statutory power would presumably be ambulatory as the High Court's understanding of proportionality itself develops.

Third, the High Court has made it clear that, where the exercise of a power is subject to the *Constitution*, then that exercise of power can only effectively burden the freedom of political communication if it is proportionate to serving a 'legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government'.¹⁴⁹ Other constitutional limitations, such as s 92 (free interstate trade), s 116 (free exercise of religion) and s 117 (guarantee against discrimination based on State residence) also involve questions of proportionality to a legitimate end. Identifying the end or ends which government conduct serves is an exercise in statutory construction.¹⁵⁰ The validity of government conduct burdening the freedom hinges on its proportionality to the end so identified. When the construction of a statutory power is expressed at the level of generality it was in *Wainohu*, those

¹⁴⁷ *Wotton* (2012) 246 CLR 1, 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁴⁸ See, eg, *Monis v The Queen* (2013) 249 CLR 92, 182 [246] (Heydon J), 213–14 [346] (Crennan, Kiefel and Bell JJ); *Coleman v Power* (2004) 220 CLR 1, 69 [234], 89 [292] (Callinan J); *Leask v Commonwealth* (1996) 187 CLR 579, 599 (Dawson J).

¹⁴⁹ *Wotton* (2012) 246 CLR 1, 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁵⁰ *Unions NSW v New South Wales* (2013) 304 ALR 266, 279 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92, 147–8 [125]–[126], 161 [175] (Hayne J), 205 [317] (Crennan, Kiefel and Bell JJ); *O'Flaherty v City of Sydney Council* (2013) 210 FCR 484, 495–6 [52] (Katzmann J).

subject to the law, including those who must enforce it, are left to guess what end or ends the law has, properly construed — and identifying those ends is a precondition to assessing the validity of any individual order.

In *Wainohu*, the majority appeared to hold that the relevant ‘end’ of the law was ‘protection against the activities of criminal organisations and their members’.¹⁵¹ The majority did not explain how it identified this end. There was no express objects clause declaring that to be the law’s end. The majority appears to have derived this object from two features of the *Crimes (Criminal Organisations Control) Act 2009* (NSW). First, the Act’s long title, which stated that it was ‘for the purpose of disrupting and restricting the activities of criminal organisations and their members ... and for other purposes’. Second, the preconditions to the making of an order that an organisation was a declared organisation, which included a satisfaction that the members of the organisation were associating for the purpose of serious criminal activity and that the organisation represented a risk to public safety and order in New South Wales.¹⁵² The majority appears to have inferred from these provisions that the Act had the general end of protecting against the activities of criminal organisations and their members.

Those subject to the law would face two difficulties in assessing the validity of a given order. First, they would need to assess what the law’s purpose was even if that purpose is not expressly stated and must be identified through a process of reading down. Second, they would need to render the vague language of ‘protection against the activities of criminal organisations and their members’ into something concrete enough that it can provide a sufficiently clear yardstick for assessing the validity of a given order.

These observations suggest that, in identifying the end of a law for the purposes of determining whether the law infringes a constitutional limitation, there will often be interpretive choices as difficult as those which face a court in determining whether Parliament has objectively intended to rely on particular positive heads of power when enacting a law. In the context of positive heads of power, that difficulty has often led the High Court to require that the Act furnish an express standard or test by which Parliament’s objective intention can be discerned. The existence of such an express standard or test makes it easier for those subject to the law to assess the law’s commands. The device accepted in the *Industrial Relations Act Case* seems to allow a far broader degree of interpretive leeway to a court. That interpretive leeway can

¹⁵¹ (2011) 243 CLR 181, 231 [113] (Gummow, Hayne, Crennan and Bell JJ).

¹⁵² *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 9(1).

undermine the law's predictability. Lacking from *Wainohu* was any express appreciation of the harm the construction thereby adopted can inflict to rule of law predictability values.

To be sure, there are sound reasons why courts should permit the device accepted in the *Industrial Relations Act Case* and applied in *Wainohu*. It is difficult, probably impossible, to provide express indications in a statute of all the ways in which a statute ought be read to conform to the various constitutional limitations. It follows that Parliament may reasonably be expected to have an objective preference or purpose that the conferral of broadly-framed powers not be rendered invalid merely because, if the power were exercised in accordance with the provision's facial and ordinary meaning, some exercises of the power would infringe a constitutional limitation. This provides a basis for taking a relatively flexible approach to the reading down of broadly-expressed powers. But the question is whether Parliament may be taken to have had an objective preference or purpose to permit that flexibility at all costs. A court cognisant of the risks to rule of law values that the device adopts may at some point decide the threshold has been reached where, because of the unnatural or vague meaning the reading down would entail, Parliament should be held to an invalid meaning.

The reading down adopted in *Wainohu* can be distinguished from the situation in *Wotton v Queensland* ('*Wotton*').¹⁵³ There, a statutory provision conferring powers on a parole board effectively burdened the freedom of political communication because it authorised the parole board to restrict a parolee's speech. But the statute there expressly identified the purposes of the relevant power (for example, 'to ensure the prisoner's good conduct' or 'to stop the prisoner committing an offence').¹⁵⁴ Further, the statute expressly identified a statutory 'proportionality-style' criterion: the parole board could only impose speech-restrictive conditions if the board 'reasonably' considered the conditions 'necessary' to achieving those express statutory purposes.¹⁵⁵ While the terms 'necessary' and "reasonably considers necessary" can be criticised for their vagueness, they have a long history of parliamentary use and judicial explication.¹⁵⁶ In *Wotton*, the statute contained express language capable of guiding those subject to its commands. The High Court seems to

¹⁵³ (2012) 246 CLR 1.

¹⁵⁴ *Corrective Services Act 2006* (Qld) s 200(2).

¹⁵⁵ *Ibid.*

¹⁵⁶ See, eg, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 199–200 [39] (Gleeson CJ) ('necessary'). See also, eg, *Thomas v Mowbray* (2007) 233 CLR 307, 330–3 [19]–[27] (Gleeson CJ) ('reasonably necessary').

have found it unnecessary to read down the statute in *Wotton*. If it had been necessary, that express language could arguably justify a court cognisant of rule of law values when reading down, ascribing to Parliament an available and valid meaning, even though it would depart somewhat from the provision's ordinary meaning. The express text would reduce the risk to predictability values.

C Suggested Interpretive Principles

What might a rule-of-law-conscious reading down approach look like? In this Part, I tentatively suggest some interpretive principles which a court might adopt.

- 1 Courts should exercise caution before departing markedly from a provision's ordinary, grammatical meaning. Consistent with French CJ's observations in *International Finance Trust*, a court may be reluctant to achieve validity only by giving a statute a strained or unnatural meaning. This is so even if that strained meaning is strictly 'open' or 'available'. Of course, this is only a presumption — if the text is clear, courts must give a statute its valid operation even if it would produce '[e]xtra-ordinary confusion and disturbance'.¹⁵⁷
- 2 Courts should exercise caution before giving provisions an ambulatory meaning. A court may be relatively more reluctant to read down a statute to conform to developments in constitutional doctrine authoritatively identified by courts only subsequent to a law's enactment. That reluctance may be stronger where the development was 'significant' or was not 'reasonably foreseeable' at the time of enactment. That reluctance may also be stronger where the development does not otherwise advance rule of law values such as the accountability of government to law.
- 3 Courts should exercise heightened caution before construing a statute to conform to developments in constitutional law expanding government power. Caution in giving statutes an ambulatory operation may be highest where developments in constitutional law would expand government power. The risk in those cases is that individuals may be subject to statutory liabilities which they could not have predicted. This seems to be materially

¹⁵⁷ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 378 (Dixon J) (severing provisions even though it might cause '[e]xtra-ordinary confusion and disturbance, if not worse').

different to developments in constitutional law which contract government power.¹⁵⁸ There, the harm to individuals is ordinarily not subjection to 'retrospective' sanction; the harm is that the individual may, fearing sanction, have foregone conduct for which they could not validly have been sanctioned.

- 4 Courts should be reluctant to draw generous inferences as to statutory purpose. The more that the court needs to rely on generous inferences from subject matter and structure to identify the statute's ends in order to assess its validity under a constitutional limitation which requires that the provision have legitimate ends, the greater is the risk to predictability. Accordingly, rule of law values may justify a court forming the view that the only purpose to be ascribed to a provision is its legal and practical operation, rather than some higher purpose in which that legal and practical operation is 'subsumed'.¹⁵⁹ This would make it less likely that a law, which in its legal or practical operation burdened a constitutionally-protected interest, could survive scrutiny — because the law could not be justified by asserting that it only burdened that interest in pursuit of some broader, legitimate purpose.
- 5 In extreme cases, courts justifiably decline to read down a general power to conform to a constitutional limitation. Conceivably, there could be circumstances in which the generality with which a power is expressed and the absence of textual and other guides to the statute's proper meaning entail that a statute should be ascribed a meaning which is invalid. Because of the practical need for broadly-expressed discretions, rule of law values alone may not justify ascribing such a meaning to a provision. However, rule of law values could bolster a construction otherwise justified by interpretive factors such as text, structure and purpose.¹⁶⁰

¹⁵⁸ Although note the discussion at above n 12 regarding reading statutes to conform to constitutional limitations in ways which may give them an *expanded* scope.

¹⁵⁹ The language of *Kruger v Commonwealth* (1997) 190 CLR 1, 133 (Gaudron J).

¹⁶⁰ If rule of law values could have the effect of holding Parliament to an invalid meaning, it would provide an alternative basis, and one applicable at the State level, for the High Court's observations in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 regarding the possible invalidity of broadly-expressed discretions. The majority suggested that a broadly-expressed discretion contained in a Commonwealth law may fail to be a law with respect to a positive power, may fail to constitute an exercise of legislative power, or may confer so much interpretive leeway on a ch III court that it would constitute a purported conferral of legislative power: at 512–13 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

V CONCLUSION

In this article, I have argued that the process of reading statutes down to conform to the *Constitution* can exact distinct costs on rule of law values. That process encourages courts to read statutes in ways that depart markedly from their ordinary meaning and give provisions meanings which are ambulatory or vague. It does so in circumstances where the government is already acting at the edge of constitutionally permissible powers. The High Court has unanimously observed that, just as the “task of statutory construction must begin with a consideration of the [statutory] text”, ‘[s]o must the task of statutory construction end’.¹⁶¹ Robust application of the presumption of valid meaning can entail that the task of statutory construction ends, not with the text of the statute, but with contemporary constitutional doctrine expressed in the volumes of the Commonwealth Law Reports.

In this context, I have made a case for two propositions. First, the rule of law values of predictability and continuity can play a role in statutory construction. Secondly, those values may have a special role to play when courts construe a statutory provision in circumstances where one available meaning of the provision would be constitutionally invalid. If courts were cognisant of rule of law values when reading down, this could provide a constraint on that process additional to that already recognised by the principle that, in reading down, courts cannot legislate. The prohibition on legislating focuses on the degree of interpretive choice available to courts and forbids courts from being given power to choose what the law means. But that principle does not directly focus on the particular costs arising where a law, though it technically has only ‘one’ meaning, has a meaning which is unnatural, vague or changeable. A rule-of-law-cognisant reading down process would pay attention to the costs which unnatural, vague and changeable meanings can inflict. In this article, I have argued that there is a role for considering those costs when reading down.

¹⁶¹ *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, 268 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ), quoting *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ).