

THE HIGH COURT'S MINIMALISM IN STATUTORY INTERPRETATION

ABSTRACT

According to some, the High Court of Australia believes itself able to stipulate the law of any statute. According to others, the Court believes no such thing. The Court — on this alternative view — takes the laws of statutes to reside in the stable and interpreter-independent linguistic meanings of statutory texts. Here I offer a third view: that the Court tentatively indicates its commitment to both of these positions, so as to avoid strong commitments to either. This strategy — a form of minimalism — is intended to solve a difficult problem: the problem of justifying the courts' interpretive practices within a value-pluralist society. However, the strategy encounters certain difficulties. After surveying these difficulties, I argue that a different strategy ought to be adopted. The Court should either develop its theoretical position in earnest, or commit to a stronger form of minimalism, thus avoiding high-level theories more completely.

I INTRODUCTION

A 'theory of statutory interpretation' is a theory of what determines the laws of statutes. For example, according to one theory — textualism — the law of a statute is determined by the linguistic meaning of the statute's text.¹ According to another theory — intentionalism — a statute's law is determined by the apparent subjective intentions of legislators.² Yet another theory — perfectionism — holds a statute's law to be that which shows the statute in its best moral light,

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¹ Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997) 23–9.

² Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) ch 9. I do not distinguish between intentionalism and purposivism, because I agree with Goldsworthy and Ekins that it is difficult to draw a principled distinction: see Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intention' (2014) 36(1) *Sydney Law Review* 39, 57–8.

all things considered.³ These are just some of the theories that, today, compete for our acceptance.⁴

In Australia, the High Court has not committed to textualism, intentionalism, perfectionism, or any other established theory of statutory interpretation. Nor has the Court ventured to craft its own interpretive theory. With increasing frequency, however, the Court has made passing statements regarding what determines the laws of statutes. These meagre statements of theory — usually a passage or a paragraph long — serve as indicators of what the Court's broader theory might be.

In recent times, there have been two separate attempts to collate these terse statements of theory, and to then — on the basis of these collations — demonstrate the Court's commitment to some broader theory of interpretation. Interestingly, the articles containing these attempts have disagreed in their conclusions. The first article, authored by Jeffrey Goldsworthy and Richard Ekins, argues that the Court is committed to a 'sceptical' theory, according to which judges are able to 'stipulate' what the law of any statute is, and to thereby exercise strong discretion over the laws of statutes.⁵ The second article, authored by Dale Smith, argues that the Court is committed to an opposite theory. The Court, according to Smith, is committed to textualism.⁶ That is to say, the Court takes the laws of statutes to be expressed by the objective linguistic meanings of statutory texts, thus leaving judges with no discretion over a statute's law.

In this article, I will advance a third, and quite different account of the Court's theoretical approach. According to my account, the Court's various statements of theory are intended to permit the very kind of disagreement that occurred between Goldsworthy and Ekins, and Smith. The Court's various statements of theory are drafted so as to be heterogenous and indeterminate, and to thereby allow different spectators to come to different conclusions regarding the Court's theoretical commitments.

Insofar as the Court does avoid publicly committing to any one interpretive theory, the Court can be said to partake in a form of minimalism. By 'minimalism', I mean a

³ Cass R Sunstein, 'Second Order Perfectionism' (2006) 75(6) *Fordham Law Review* 2867, 2868; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) ch 9.

⁴ Other theories include Posner's pragmatism, Vermeule's operating level formalism, Eskridge's dynamic interpretation, and Shapiro's planning theory. See Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003) ch 2; Adrian Vermeule, *Judging Under Uncertainty* (Harvard University Press, 2006); William Eskridge Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994); Scott Shapiro, *Legality* (Harvard University Press, 2013) ch 13.

⁵ Ekins and Goldsworthy (n 2) 67.

⁶ Dale Smith, 'Is the High Court Mistaken About the Aim of Statutory Interpretation?' (2016) 44(2) *Federal Law Review* 227, 253, although Smith prefers to term that theory 'the meaning thesis'.

particular judicial practice and ethic, brought to popular attention by Cass Sunstein.⁷ Broadly speaking, minimalism entails that judges err on the side of giving fewer rather than more reasons for decisions.⁸ More specifically, however, minimalism counsels against the giving of deeper reasons for decisions, such as reasons of political and moral theory, legal philosophy, or grand explorations of the constitution's scheme of government and authority⁹ — 'heroic flights of theoretical fancy'.¹⁰

In taking a minimalist approach to statutory interpretation, the High Court perhaps aspires to achieve the benefits commonly associated with minimalism. By prescind-ing from deep theories of interpretation, the High Court might, for example, aspire to decrease the complexity of the interpretive task, or reduce the contentiousness of the judiciary's interpretive decisions. Furthermore, the Court might intend to defer the most vexing questions of theory and constitutional principle, so that they may be answered in the fullness of time, through the sustained, collective efforts of many minds in the judiciary and the polity more broadly, rather than be answered by the error-prone manifesto of any one group of judges. In the literature at least, these are the stated aspirations of the minimalist tradition.¹¹

The High Court, however, practises an untraditional form of minimalism, and — as I will argue — the approach is without prospect of achieving the 'aspirations of the minimalist tradition' just adverted to. What renders the Court's approach unusual is that the Court does not simply omit to give deep theoretical reasons for its interpretive practices. Rather, the Court circulates conflicting and tentative statements of theory in support of its interpretive practices. The Court thus avoids committing to an interpretive theory not through silence, but through the maintenance of plural and incompatible positions. The Court does not practice minimalism simpliciter, but instead practices 'mirrors minimalism', as I shall call the approach.

Against that background, this article has three principal aims. The first, pursued across Parts III and IV, is to describe the Court's practice of mirrors minimalism, and to explain the powerful reasons that the Court may have for engaging in the practice. The second principal aim, pursued in Part V, is to critically assess mirrors minimalism,

⁷ See Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999).

⁸ *Ibid* 9–10.

⁹ *Ibid* 8–14. Sunstein originally defined minimalism as entailing not only shallowness of judicial reasons (in the sense of avoiding theory), but narrowness of judicial reasons (in the sense of avoiding the establishment of *ex ante* legal rules that will bind future decisions). Later Sunstein described a leaner version of minimalism whereby the judge's reasons are not narrow — the judge is not rule-averse — but they are shallow; Cass Sunstein, *Constitutional Personae: Heroes, Soldiers, Minimalists and Mutes* (Oxford University Press, 2015) ch 3. In this paper I use minimalism in its latter, simpler sense, where it merely denotes the avoidance of theory.

¹⁰ Jeremy Waldron, 'On the Supreme Court Battlefield' (2016) 63(5) *New York Review of Books* 23.

¹¹ See below Part V(A).

and to demonstrate that the approach, though well-motivated, is ultimately undesirable and unlikely to achieve the aspirations of the minimalist tradition.

The article's final aim, pursued in Part VI, is to identify two alternative and superior strategies for publicly justifying the Court's interpretive practices. The first of these strategies would be to pursue a simpler form of minimalism. The second strategy would be to follow in that American tradition — threaded through the works of Holmes, Easterbrook, Scalia, Breyer and Posner among others — of entertaining questions of theory in earnest, and developing a clear theoretical position from the bench.

Before visiting any of these subjects, I will lay out some necessary theoretical foundations. That is the task of Part II, to which I now turn.

II THEORIES, BELIEVERS AND SCEPTICS

Moments ago, I observed that there is a great diversity of established interpretive theories, all with their own monikers, and their own proponents and opponents in the academy and judiciary. For all the diversity in the interpretive theories, however, the theories may be categorised as falling either side of a single cleft. Some theories, I will say, are believer's theories. Others are sceptical theories. In this very brief Part, my aim is to stake out the differences between these two general varieties of interpretive theory. Though the discussion will be abstract, the distinctions and classifications I make will set the stage for the coming Parts. In those Parts, I will argue that the High Court's approach to interpretive theory is to equivocally support both believer's and sceptical theories.

A Believers and Sceptics

When I speak of a believer's theory in this article, I speak of a theory that purports to describe what 'interpretation just is'.¹² In other words, a believer's theory (as I am here defining it) is not offered as describing merely one interpretive method among many credible alternatives; nor is it argued for on the grounds that the theory, if adopted, would have better consequences than if other theories were adopted. Rather a believer's theory is argued for on the grounds that it is the singularly correct theory — a description of the one way in which judges may legitimately determine the laws of statutes. The theories mentioned earlier — textualism, intentionalism and perfectionism — are all typically expounded as believer's theories.¹³

Believer's theories have two hallmarks, the first of which is that the theories attempt to establish their own correctness from within legal discourse, rather than by direct

¹² A phrase I borrow from Cass Sunstein, *A Constitution of Many Minds* (Princeton University Press, 2009) ch 1.

¹³ See Cass Sunstein, 'There Is Nothing That Interpretation Just Is' (2015) 30(2) *Constitutional Commentary* 193, 194–207.

appeal to exogenous normative criteria, such as justice, fairness or utility. So, for example, a textualist such as Scalia, or an intentionalist such as Ekins, will not defend their theory on the bare political ground that the theories will leave society better off. Rather, each will insist that their theory is correct on the grounds that the theory is uniquely required by the constitutional grants of legislative and judicial power, and various aspects of the nature of law and law-making.¹⁴ Accordingly, believer's theories have a distinctively absolutist and legalistic tenor.¹⁵ They are characterised not by unalloyed claims about what is politically 'just', 'best' or 'right',¹⁶ or by economic analyses concerning which interpretive methods will bring about the best results. Rather, believer's theories are characterised by resort to distinctively legal concepts — 'the act of law-making', 'authority', 'constitutional bounds', 'lawmaking intention', 'sovereignty' — and claims about what lawmaking and interpretation 'is and is entitled to be'.¹⁷

The second and, for us, most important hallmark of a believer's theory is that, according to such a theory, statutes necessarily have objective and stable laws, such that judges cannot exercise discretion over what the law of a statute is. Believer's theories necessarily reach this conclusion, for upon committing to the view that one interpretive method is uniquely legitimate, one also commits to the view that a statute's law is that which is yielded by applying this uniquely legitimate interpretive method. A perfectionist will therefore say that the law of a statute is, and is only, that which shows the statute in its best light.¹⁸ A textualist will instead say that a statute's law is, and is only, that which is communicated by the statute's text and so on.¹⁹ Because a believer's theory does not afford discretion to judges regarding what the law of a statute is, believer's theories deny to judges the power that would attach to such discretion.²⁰

To recapitulate, then, I define a believer as someone who believes that there is something that interpretation just is; that this 'something' is fully determined by the

¹⁴ See Scalia (n 1) 22–3; Ekins (n 2) ch 9. Compared to textualists and intentionalists, perfectionists focus less on the constitution's prescriptions, and more on the nature of interpretation: Dworkin (n 3) ch 2.

¹⁵ See, e.g., Scalia (n 1) 22 'the text is the law, and it is the text that must be observed'.

¹⁶ See Dworkin (n 3) ch 9. Perfectionism, it must be mentioned, does entail 'alloyed' appeals to notions of justice and fairness. That is to say, for perfectionists, the law is not determined by the conceptions of justice and fairness subscribed to by the judge, but the conceptions of justice and fairness that happen to best explain and justify the statutory text, as well as established practices, such as the practice of respecting legislative supremacy.

¹⁷ All of these phrases are drawn from Richard Ekins, 'Interpretive Choice in Statutory Interpretation' (2014) 59(1) *American Journal of Jurisprudence* 1, 19.

¹⁸ Dworkin (n 3) 313.

¹⁹ Scalia (n 1) 22. See also Andrei Marmor, *The Language of Law* (Oxford University Press, 2014) 12: 'What the law says is what the law is'; Ekins (n 2) 246: '[I]ntended meaning is the central object of statutory interpretation'.

²⁰ See Scalia (n 1) 16–23; Ekins (n 2) 246; Dworkin (n 3) 338–43.

constitution or some timeless fact about the nature of law and law-making; and that statutes do have determinate laws, such that judges are bound by these laws and will either interpret them correctly or incorrectly.

The sceptic, by comparison, holds a different constellation of positions.²¹ The sceptic does accept that a judiciary ought to have a theory of interpretation. That is to say, the sceptic accepts that the judiciary ought to have some stable and known criteria for determining the laws of statutes. But for the sceptic, these criteria are not fixed by the constitution²² or the nature of law and law-making.²³ As far as the sceptic can see, a judiciary *may* identify the law of the statute with legislative intentions *or* with the text's meaning *or* with the proposition of law that would show the statute in its best moral light (or with something else). But nothing about the constitution or the law more generally entails that interpretation will involve one of these methods to the exclusion of all others. In short, 'there is nothing that interpretation just is'.²⁴

That being so, the judiciary must *choose* its theory of interpretation, according to the sceptic.²⁵ Theories of interpretation are thus to be looked upon as alternative available methods of interpretation, and not as different candidate descriptions of what interpretation just is and ought to be. Furthermore, if settling upon a theory of interpretation is an exercise in choice — as is the sceptic's contention — then we can only go about that choice as we would any other. For any choice, be it a choice between theories of interpretation or TV channels, the choice can only be rationally made on the basis of some evaluative criteria.²⁶ For a judge choosing between interpretive theories, then, they ought to make their choice based upon the criteria appropriate for evaluating the actions of any public institution; namely, the criteria of justice, fairness and utility.

Sceptical theories of interpretation are theories that take the above assumptions for granted. The more popular of these theories have been assigned various and daunting titles: pragmatism, operating-level formalism, and dynamic interpretation.²⁷ Rather than describing the details of these particular theories however, we can serve our modest purpose — to know a sceptical theory when we see one, in the High Court's jurisprudence especially — by noting what is distinctive about these theories, and about sceptical theories in general.

²¹ What I am here calling a sceptic, others would call a pragmatist. See Dworkin (n 3) ch 5.

²² Sceptics observe that constitutions are too semantically diffuse to mandate a specific interpretive approach: see Cass Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101(4) *Michigan Law Review* 885, 908–10.

²³ Sunstein (n 12) ch 1. See also Richard Posner, *Law, Pragmatism and Democracy* (n 4) 11–13.

²⁴ Sunstein (n 12) 19.

²⁵ Vermeule (n 4) 66.

²⁶ *Ibid* 76–86.

²⁷ *Ibid* 6–41.

The first of these distinctive features is that a sceptical theory will typically be supported not by legal or legal-philosophical propositions, but by propositions regarding the valuable consequences that the theory will have once adopted. So for example, one well-known sceptical theory — operating-level formalism — recommends that judges give close effect to the clear meanings of statutory texts, and that they avoid the use of interpretive canons and legislative history, and defer to the interpretations of agencies where statutes are unclear.²⁸ More to the point, the theory recommends this interpretive approach solely on the grounds that it will reduce the costs of litigation and the workloads of judges, and reduce the rate of judicial errors.²⁹ While such terrestrial considerations are at home in the sceptic's consequentialist line of reasoning, they could have no place in the principles-based theory of a believer.

A second and related feature of sceptical theories is that their validity is *contingent* upon their having good consequences. So for example, it is implicit in the theory of operating-level formalism that if the data came in, and interpretive canons, judicial creativity, and the use of legislative history were all found to drastically improve interpretive outcomes (by some agreed measure), reduce litigation costs, and so on, the theory would cease to be valid.³⁰

A third feature of the sceptic's theory is that, because their theory is offered on the grounds that it will have the most desirable consequences, we may require the sceptic to give reasons for why the predicted consequences of their theory *are* desirable. Pushed to the wall, then, the sceptic must locate the ultimate foundation for their theory in political and moral convictions — in claims about what is valuable, and about how power ought to be distributed to the different institutions of government, all things considered. This is quite unlike the believer who, chased to the logical end of their reasoning, finds themselves in the realm of constitutional interpretation and perhaps legal philosophy.

A final feature of sceptical theories is that they do not see statutes as having objective and determinate laws. There being nothing that interpretation 'just is', there can be nothing that the law of a statute 'just is'. And so the sceptic will say that the law is what judges decide it to be. That 'the prophecies of what the courts will do in fact, and nothing more pretentious, are ... the law'.³¹ Or, as another sceptic writes: 'law is not a thing [that judges] discover; it is the name of their activity'.³²

²⁸ Vermeule (n 4) 1.

²⁹ *Ibid* 5.

³⁰ *Ibid*.

³¹ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 461.

³² Richard Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990) 225.

III MIRRORS MINIMALISM — IN THE HIGH COURT

In recent times, two believers, Goldsworthy and Ekins, have accused the High Court of adopting a stance of scepticism. These two authors have written:

The emergence of [a] new sceptical view [on the High Court] threatens to recast the practice of statutory interpretation, tacitly authorising the courts to stipulate the meaning of Parliament's enactments ... This mode of 'interpretation' is proscribed by the constitutional grant of legislative authority...³³

But here things get puzzling. Another of our most respected theorists has claimed the opposite. According to Dale Smith's recent article, the High Court is the truest of believers.³⁴ Indeed, the Court not only equates the law of a statute with the meaning of the statute's language, but the Court does so *to a fault*. The High Court, according to Smith, makes the 'claim that the ultimate aim of statutory interpretation is to ascertain the meaning of the words contained in the provision being interpreted'.³⁵ Smith labelled this claim the 'meaning thesis' and proceeded to give reasons for why the thesis should be rejected.³⁶

How could different theorists, reading the same cases, come to such diametrically opposed understandings of the Court's theory of interpretation? The answer, I think, has not to do with any glaring mistake made either by Smith or by Goldsworthy and Ekins. Rather it has to do with the protean nature of the Court's statements themselves. As I will argue in this Part, the Court's theory of interpretation cannot be discerned for two reasons. Firstly, when the Court makes a statement of interpretive theory, the statement will typically have a probable meaning, but will also have some other possible meaning that contradicts the statement's probable meaning. For the Court, this creates a level of plausible deniability regarding what the statement means. Secondly, the probable meanings of the Court's different statements will often conflict: some statements seem to commit the Court to a believer's theory, others to a sceptical theory. This creates a second order of plausible deniability.

As I will later argue, the Court is unlikely to have pursued this strategy consciously. It is more likely that that the strategy is a so-called 'emergent strategy':³⁷ a strategy born not of thorough plans, but of reflexive responses to exogenous constraints (see Part IV). Either way, the strategy's upshot is the same: it is to erect a hall of mirrors, in which the Court cannot be seen to certainly commit, or not commit, to any particular theory of interpretation. It is this approach to interpretive theory which I call mirrors minimalism, and which I will now describe in some detail.

³³ Goldsworthy and Ekins (n 2) 67.

³⁴ Smith (n 6).

³⁵ Ibid 228.

³⁶ Ibid 235–53.

³⁷ Henry Mintzberg and James Walters, 'Of Strategies, Deliberate and Emergent' (1985) 6(3) *Strategic Management Journal* 257, 257–9.

A *The High Court as Believer*

Soon we will consider the hall of mirrors from the outside, as it were, paying particular attention to its architecture and possible functions. But first, let us experience it from the inside. We can do this by journeying with Smith in his attempt to prove the Court's commitment to one particular believer's theory of interpretation — 'the meaning thesis'.

When Smith claims that the High Court accepts the meaning thesis, he simply means that 'we can ascribe to the Court the view that a provision's legal effect is equivalent to its linguistic content'.³⁸ By now we will appreciate that this view — the meaning thesis — could only be the nub of a more complete theory, for while the meaning thesis claims there to be an identity between a statute's law and its linguistic meaning, the thesis itself provides no extensive reasons for why that claim is true. Still, although the meaning thesis is a nub, it is distinctively the nub of a *believer's* theory. As Smith makes clear, the meaning thesis is a theory about what interpretation just is and must be. Smith writes:

[T]he Court believes that a provision's linguistic content *determines* its legal effect, in the sense that the contribution that the provision makes to the content of the law is a function of the meaning of the words contained in the provision. This explains why the Court claims that the ultimate aim of statutory interpretation is to ascertain the meaning of those words.³⁹

Turning our attention more directly to Smith's plight, it is significant that the High Court has never made the claims or expressed the beliefs that Smith, in this last paragraph, attributes to the Court. Indeed, Smith is clear that his claims regarding the Court's position are based, not in mere reports of the Court's statements, but in searching interpretations of them.⁴⁰

The judicial statement central to Smith's case was given in *Project Blue Sky*.⁴¹ Though the statement itself was made some 20 years ago, it has since been continuously endorsed by the High Court and the wider judiciary.⁴² The statement, which I will simply refer to as the *Project Blue Sky* statement, reads as follows:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of

³⁸ Smith (n 6) 232.

³⁹ Ibid 233 (emphasis in original).

⁴⁰ Ibid 230–4.

⁴¹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*').

⁴² See below n 58 and accompanying text for a discussion on the quantity of judicial references to *Project Blue Sky*. For one recent citation in the High Court, see *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] ('*Lacey*').

the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁴³

Smith offered the above dictum as sufficient evidence for the following claim: ‘according to the High Court, the role of a judge when interpreting a statutory provision is to ascertain the meaning — ... the “linguistic content” — of that provision’.⁴⁴ If we now look closely at the wording of the *Project Blue Sky* statement, we will see why Smith comes to the interpretation that he does. But we will also see why his interpretation necessarily lacks a solid foundation.

We should start by re-reading the first sentence of the *Project Blue Sky* statement. That sentence is amenable to the following two interpretations, one probably correct, the other possibly so:

- (1) *Probable believer's meaning*: The duty of a court is to give the words of a statutory provision the meaning that the legislature *objectively appears to* have intended them to have.
- (2) *Possible sceptical meaning*: The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken — *by the judiciary, and on grounds chosen by the judiciary* — to have intended them to have.

The reason that the sentence is amenable to the second of these meanings is that the sentence says that a statute's words are to bear the meaning that the legislature is ‘taken’ to have intended: yet the sentence does not state the *permissible grounds* upon which a judge may ‘take’ the legislature to have intended to communicate one meaning or another.

Now consider the remainder of the *Project Blue Sky* statement. In particular, note how it carries and keeps alive both divergent threads of meaning identified in the dicta's first sentence. On the one hand, and as Smith stresses, the second half of the *Project Blue Sky* statement can be seen to reinforce the ‘probable believer's meaning’ of the first sentence, and accord with a believer's theory that the law of the statute is the statute's apparently intended linguistic meaning.⁴⁵ After all, why would the statute's legally relevant meaning ‘ordinarily ... correspond with the grammatical meaning’ of the statute, if not because the statute's linguistic meaning was its law? As for the justices' suggestion that ‘the context... [and] the purpose of the statute’ may cause the statute's legal meaning to be other than its literal meaning, that also

⁴³ *Project Blue Sky* (n 41) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

⁴⁴ Smith (n 6) 232.

⁴⁵ *Ibid* 230–2.

fits with Smith's interpretation of the passage. For, as any linguist would volunteer, the meanings of utterances are informed by their context and apparent purpose.⁴⁶

But then, the justices give a further reason for why the literal or grammatical meaning of a statute may not convey the statute's law; and here, what they say seems to signal scepticism, and align more with our second, sceptical reading of the statement's first sentence. The justices say that 'the canons of construction may require the words of a legislative provision' to be read other than literally or grammatically.⁴⁷ If this is to say that the legal meaning of a statute may be partially determined by a canon of construction, then it could not be that the Court's true position is that the law of a statute is identical to its linguistic meaning. For, as Smith himself argues at length, the canons typically determine the laws of statutes on bases other than the statute's linguistic meaning.⁴⁸ What is more, if the *Project Blue Sky* statement communicates that a statute's legal meaning is directly determined by canons of construction, then *Project Blue Sky* expresses a sceptical theory. Superior court judges profess to have the power to reassess and revise the canons of construction they use.⁴⁹ It would therefore follow — on the present reading of *Project Blue Sky* — that judges have the power to choose what counts as the law of a statute.

B *The High Court as Sceptic*

Our interpretation of the *Project Blue Sky* statement will support the following, modest conclusion. If we assume that *Project Blue Sky* definitively expresses the Court's theory of interpretation — that is, if we pay no regard to other judicial statements of interpretive theory — then we might be justified in saying that the Court is probably a believer, but possibly a sceptic.

Of course, we cannot rest with this conclusion, for the High Court has made many statements of theory since *Project Blue Sky*, and they too should inform our understanding of the Court's position. Many of these recent statements have joined the *Project Blue Sky* statements in probably signifying a believer's theory, but possibly signifying a sceptical theory.⁵⁰ However, many of the Court's recent statements have had precisely the inverse complexion. These statements are such that they probably signify a sceptical theory, but possibly signify a believer's theory. Perhaps unsurprisingly, these were the statements that Goldsworthy and Ekins took as their target.⁵¹

⁴⁶ See, eg, Herbert Clark, *Using Language* (Cambridge University Press, 1996) ch 4.

⁴⁷ *Project Blue Sky* (n 41) 384 [78].

⁴⁸ Smith (n 6) pt IV.

⁴⁹ *Probuild Constructions Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 221, 239 [58] (Gageler J); see also *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322 (Brennan J) ('*Yuill*').

⁵⁰ See Part III C below.

⁵¹ Goldsworthy and Ekins (n 2) 41.

One of these apparently sceptical statements — made by five justices in *Zheng v Cai*⁵² — has reached the heights of *Project Blue Sky* in its importance, such that it and *Project Blue Sky* now stand together as Australia's axioms of statutory interpretation.⁵³ Let us use *Zheng v Cai*, then, as our main working example of an apparently sceptical statement of theory. Below is the relevant passage from *Zheng v Cai*, and then an elaboration of that passage, given by six Justices in *Lacey* two years later. We can refer to these collectively as 'the *Cai* statements':

[J]udicial 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 ... [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.⁵⁴

Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.⁵⁵

The *Cai* statements clearly do not embody a comprehensive sceptical theory. The statements do not, for example, provide an account of the non-objectivity of legal propositions, or of the need for interpretive theories to be chosen on moral and political grounds. However, the *Cai* statements do appear to be the nub of such a theory. That is because the *Cai* statements bear the characteristics that we know to be distinctive of sceptical theories generally (and that we described in Part II A).

Firstly, the *Cai* statements appear to justify an approach to interpretation not on the grounds that the approach will retrieve the statute's true and objective law (if there is such a thing), but on the grounds that the approach, when implemented, will have other valuable consequences. The approach is not held out as yielding the correct results, or the correct construction, but the 'preferred results' and the 'preferred construction'. The statements suggest that a construction or result will be 'preferred' on the basis of being reached by rules of interpretation 'accepted by all arms of government in the system of representative democracy'; again, not on the basis that the construction or result is uniquely correct.⁵⁶

⁵² (2009) 239 CLR 446 ('*Cai*').

⁵³ The relevant passage has been endorsed in, eg, *Dickson v The Queen* (2010) 241 CLR 491, [32]; *Lacey* (n 42) 591–2 [43]; *Momcilovic v The Queen* (2011) 245 CLR 1, 83–7 [146], 95–6 [183] (Gummow J), 207 [534], 210 [545], 235 [638] (Crennan and Kiefel JJ) ('*Momcilovic*'); *Plaintiff S10 v Minister for Immigration* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). It has now also been cited countless times in the lower courts.

⁵⁴ *Cai* (n 52) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

⁵⁵ *Lacey* (n 42) 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁶ *Ibid*; *Cai* (n 52) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

Secondly, the validity of the offered approach appears to be made contingent on it achieving the desired consequence: the acceptance of the judiciary's practices in the context of a representative democracy. Our evidence for this is that we apparently can draw from the *Cai* statements the following inference: if the current rules of interpretation cease to be accepted by the arms of government in a representative democracy, then those rules will no longer yield the preferred construction.

Thirdly, the interpretive approach outlined in the *Cai* statements would most naturally be defended by resort to statements of moral and political theory. So, for example, if we asked the Court why we should prefer interpretations produced by rules accepted by the arms of government, the only intelligible responses would seem to be of the following kind: 'because, that way, the will of the people — through the acceptance of their elected representatives — figures in the way that we interpret and apply the people's laws, and that is valuable', or 'because, in a setting of value pluralism, it is appropriate to choose interpretive methods that can be endorsed by an overlapping consensus of different people with different outlooks'.

But for all this evidence that the *Cai* statements signify a sceptical theory of interpretation, we cannot say conclusively that the statements do have this significance. For the *Cai* statements also contain just enough resources and equivocations to allow a reader to plausibly make the opposing case. The Court says, after all, that findings of legislative intent 'are an expression of the constitutional relations between the arms of government'.⁵⁷ From this, one could infer that statutory interpretation is governed by the constitutional doctrine of legislative supremacy, and so does entail judicial obedience to a statute's apparently intended meanings. Moreover, when the Court says that the 'preferred results' follow from rules 'accepted ... in the system of representative democracy' the Court does not explicitly draw a *causal* link between the fact of any rules' acceptance, on the one hand, and its legitimacy on the other. Indeed, the Court might have been making the moot observation that, *as simply happens to be the case and for whatever reason*, the customary rules of interpretation are accepted by the arms of government and do yield the preferred results. Of course, it seems unlikely that the Court intended this meaning, but the possibility is not foreclosed by the text of the *Cai* statements.

C *Rows of Mirrors*

We have come to see that, when the Court makes a statement of interpretive theory, the statement may come in different forms. In *Project Blue Sky*, the Court's statement signified that the Court is probably a believer but possibly a sceptic. From now, let us refer to any such statement as a '~believer's statement' (where the ~ stands in place of the word 'probable'). In the *Cai* statements, on the other hand, the Court's statements signified that the Court is probably a sceptic but possibly a believer. We can now call this type of statement a '~sceptical statement'.

⁵⁷ *Cai* (n 52) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

The *Project Blue Sky* and *Cai* statements are the most important examples of ~believer's and ~sceptical statements, for they appear to be the most cited in the modern High Court and in the judiciary more widely.⁵⁸ But they are not the only ~believer's and ~sceptical statements that the High Court has made. Indeed, the same duality of positions runs throughout the High Court's jurisprudence. Soon, we will follow through with Smith's thesis and see what finally becomes of it. But first, let us survey some of the further ~sceptical and ~believer's statements just averted to.

1 *Statements on Legislative Intention*

In the decade just passed, the High Court has made a series of statements defining the term 'legislative intention'. These definitional statements ought to be significant indicators of the Court's interpretive theory, for the Court has traditionally accepted that the ultimate aim of statutory interpretation is to effectuate the 'legislative intention'.⁵⁹ However, in what should now strike us as a pattern, the Court's definitional statements have been of two kinds. Some statements have suggested that 'legislative intentions' are what one would naturally expect; the apparently intended meanings of statutory texts. Those statements — though equivocal in various respects — have indicated that legislative intentions and purposes are something 'objective',⁶⁰ and discernible by 'objective criteria',⁶¹ that they are something not constructed by the judge, but 'expounde[d] [from] the meaning of the statutory text',⁶² 'revealed'⁶³ to and not invented by the judge; something that does not 'exist outside the statute [but] resides in its text and structure',⁶⁴ such that the judge must be 'guide[d] to' it by 'the language [of the statutory text]'.⁶⁵

On other occasions — though sometimes on the same occasions — the Court has made statements suggesting that there is *no* necessary connection between 'legislative intention' and the meaning of the statute's text. These statements, which echo the *Cai* statements, have further suggested that legislative intentions are not objective or interpreter-independent, but are in fact judge-made. Legislative intentions are here

⁵⁸ As at the time of writing, a search of AUSTLII shows that *Project Blue Sky* (n 41) has been cited in 4,728 cases. *Zheng v Cai* (n 52) — a much later judgment — has already been cited in 103 cases.

⁵⁹ The cases are well collected in Ekins and Goldsworthy (n 2) 40.

⁶⁰ *Momcilovic* (n 53) 136 [327] (Hayne J).

⁶¹ *Ibid* 83–7 [146] (Gummow J).

⁶² *Taylor v The Owners – Strata Plan 11564* (2014) 253 CLR 531, 556–7 [65] (Gageler and Keane JJ).

⁶³ *Momcilovic* (2011) (n 53) 133–4 [315] (Hayne J).

⁶⁴ *Lacey* (n 42) 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁵ *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555, 581 [70] (Crennan and Kiefel JJ); see also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) ('*Alcan*') approved in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [23] (French CJ and Hayne J) ('*Certain Lloyd's*').

said to be ‘the *product of* [the processes of interpretation]’,⁶⁶ to be a ‘conclusion reached about the proper construction of the law in question and *nothing more*’⁶⁷; ‘a statement of compliance with the rules of construction, common law and statutory’.⁶⁸ What renders these statements somewhat mysterious — and certainly equivocal — is that they at once endorse the notion that the object of interpretation is the legislative intention, and suggest that the term ‘legislative intention’ refers to an interpretive process unconnected to the intentions of legislatures.⁶⁹

2 *Statements on the Canon of Natural Justice*

In recent years, the High Court has also made various statements regarding the normative foundations of its canons of construction. Again, these statements have implicated two different positions — one sceptical, the other not.

For example, consider the justifications given for the principle of natural justice: an interpretive canon requiring statutes to be interpreted such that they require executive officials to give fair hearings prior to making certain decisions. In *Saeed v The Minister for Immigration*, five High Court Justices endorsed the following justification for the canon:

[W]hen the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that ‘the justice of the common law will supply the omission of the legislature’. The true intention of the legislation is thus ascertained.⁷⁰

This is a ~sceptical statement. The statement at first makes the sceptical claim that the judge-made canon of natural justice determines the statute’s law on the authority of the ‘justice of the common law’. But the statement then retreats somewhat, stating that the process just mentioned ascertains ‘the true intention of the legislation’; an odd proposition, but one that narrowly permits the passage to be interpreted as being non-sceptical.

Later in their Honours’ judgment, the same Justices make a further statement on the justification for the canon, only this time it is a ~believer’s statement. It is said that the canon of natural justice ‘proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that [the canon] apply...’.⁷¹ Quite unlike the statement above, this statement suggests that the operative legislative

⁶⁶ *Certain Lloyd’s* (n 65) 389–90 [25] (French CJ and Hayne J) (emphasis added).

⁶⁷ *Momcilovic* (n 53) 141 [341] (Hayne J) (emphasis added).

⁶⁸ *Lacey* (n 42) 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁹ A point made by Ekins and Goldsworthy (n 2) 49.

⁷⁰ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (*‘Saeed’*), quoting *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J) (*‘Kioa’*).

⁷¹ *Saeed* (n 70) 258–9 [12].

intention consists not in the outcome of applying the canon of natural justice, but in a real, genuine legislative intention — a subjective state of ‘aware[ness]’ presumably on the part of legislators — that stands apart from the canon, and justifies the canon’s use. Not that we can defend this interpretation with any certainty, for we will recall that the meaning of the term ‘legislative intention’ — on which our interpretation here relies — has been problematised by the Court in other judgments.

Notably, the statements in *Saeed* are only the Court’s most recent synthesis of the two alternative justifications for the natural justice canon. The same two justifications have been surfacing and resurfacing in the Court’s jurisprudence for some years.⁷²

3 *Statements on the Principle of Legality*

Finally, we should briefly note the Court’s recent statements regarding the principle of legality: the principle that a statute should be interpreted so as not to infringe fundamental liberties unless the statute explicitly requires that result. As Brendan Lim has recognised, two competing types of rationale have been given for this principle, some ‘positive’ and the others ‘normative’.⁷³ The positive rationales are believer’s rationales, and they claim that the principle of legality is a wholly standard instance of giving effect to the apparently intended meaning of the statutory text. According to this rationale, the so-called ‘principle of legality’ is short-hand for the following common sense proposition: legislatures can reasonably be assumed not to intend the infringement of fundamental liberties, and so the apparently intended meanings of statutory texts will tend not to communicate liberty-infringing laws.⁷⁴ The normative rationales, on the other hand, justify the principle on sceptical grounds. According to these rationales, the principle is truly a substantive common law canon of construction, and its purpose is to ‘enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights’.⁷⁵

⁷² The two justifications for the fair-hearing rule were originally posed by Brennan and Mason JJ as genuine alternatives: see Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39(2) *Monash University Law Review* 285, 286–9. However, in the recent era of mirrors minimalism, the two justifications have typically been raised or invoked together: see, eg, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352 [74]; *Plaintiff S10/2011 v Minister for Immigration* (n 53) 666 [97]; *Re Minister for Immigration; Ex parte Miah* (2001) 206 CLR 57, [89]–[90] (*Ex parte Miah*). In the lower courts see, eg, *Pulitano Pastoral Ltd v Mansfield Shire Council* [2017] VSC 421, 81–3 [92]–[97] (Garde J).

⁷³ Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) *Melbourne University Law Review* 372, 374.

⁷⁴ *Ibid* 382–9, and the cases surveyed there; *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J).

⁷⁵ *Coco v The Queen* (n 75) 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ) (*Coco*); The judgments drawing upon the normative rationale are surveyed in Lim (n 73), 389–94.

These two justifications are inconsistent, as Lim and Goldsworthy have noted.⁷⁶ However, members of the Court have continued to invoke both forms of justification within the same judgments.⁷⁷ In one case, two justices said that the normative rationale ‘reflect[s]’ the positive rationale, implying that the former derives from the latter.⁷⁸ In circumstances where two apparently inconsistent rationales are asserted to be both consistent and equally valid, the Court’s true position is rendered equivocal. Because statements of the ‘positive’ rationale also contain that black box term — ‘legislative intention’ — the Court’s position becomes yet less scrutable.

4 *What Becomes of Smith’s Claim?*

Given all this, what becomes of Smith’s claim that the Court is a believer? When we first considered Smith’s claim, we saw that if we only considered ~believer’s statements, like *Project Blue Sky*, we could be persuaded that the Court was probably, though not certainly, a believer. Now, we can see what occurs if we widen our attention to encompass the Court’s ~sceptical statements too. In a setting where the Court has made ~believer’s and ~sceptical statements, a spectator such as Smith can indeed make a persuasive case that the Court is a believer. To do this, he will point to the ~believer’s statements and, if ever confronted with the Court’s ~sceptical statements, he will point to the possible believer’s meanings of those statements. However, we can now see that the opposite case may be made just as persuasively. To argue that the Court is a sceptic, another spectator may point to the ~sceptical statements and, when confronted with the Court’s ~believer’s statements, she may point to the possible sceptical meanings of those statements. The end result? Neither Smith’s claim, nor its negation, are provable or disprovable.

IV THE LOGIC OF MIRRORS MINIMALISM

A *A Clean Slate*

The last few sections have been relentlessly exegetical. Our aim, however, has not been to advance any particular conception of the Court’s theory of interpretation. Our aim has instead been to get a first-person view of what it is like to advance such a conception under the special circumstance that the Court makes both ~sceptical and ~believer’s statements of interpretive theory. Our efforts have yielded two insights.

⁷⁶ Lim (n 73) 381–2, 394; Jeffrey Goldsworthy, ‘The Principle of Legality and Legislative Intention’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46–71.

⁷⁷ See, eg, *Coco* (n 75) , 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581–2 [11] (French CJ, Kiefel and Bell JJ); *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309, 328–9 [19]–[21] (Gleeson CJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 264 [171] (Kiefel J, Hayne and Bell JJ agreeing) (‘*Lee*’).

⁷⁸ *Lee* (n 77) 309 [310] (Gageler and Keane JJ).

The first is that, under this special circumstance, one is both able to construct a persuasive argument that the Court is a believer, and construct a persuasive argument that the Court is a sceptic. Our second insight has been that neither argument can be conclusively proven or disproven. Putting these insights together, we can now identify the Court's overall approach as engendering a roundabout form of minimalism: by making a parallel series of ~sceptical and ~believer's statements, the Court avoids strong commitments to high-level philosophical and constitutional theories.

Let us now lift ourselves from the first-person view, and the phantasmagoria it has presented us. From here on, we will look upon the phenomenon of mirrors minimalism from a greater distance. The task now is to assess whether the approach can be rationalised. In doing this, we will proceed by identifying the underlying problem for which mirrors minimalism is probably an emergent solution: namely, the problem that certain of the judiciary's interpretive practices are potentially controversial, and are thus difficult to justify to the satisfaction of all. Having identified this problem, we will consider whether mirrors minimalism is the best solution.

B *The Problem of Controversial Practices*

The problem which, I will contend, explains and motivates mirrors minimalism, and which we will here describe, is that the courts engage in controversial practices. By controversial practices, we mean interpretive practices that will not be endorsed by all or nearly all defensible theories of interpretation. Controversial practices are to be contrasted with uncontroversial practices: practices that *will* be endorsed by all or nearly all defensible theories of interpretation.

In describing the problem, it should first be observed that the Court's standard interpretive practice is an uncontroversial practice. The Court's standard practice (as we will continue to call it) is to give legal effect to 'the ordinary and grammatical sense of the statutory words ... having regard to their context and [the] legislative purpose'.⁷⁹ Absent special circumstances, when a court engages in this standard practice, different individuals with quite different theories of interpretation will agree on the practice's legitimacy.⁸⁰ At one end of the spectrum, conservative believers such as Ekins, Goldsworthy and Scalia — individuals who believe a statute's law to be fully determined by the contextually enriched meaning of the statute's language — will endorse the practice, for the practice is one of giving legal effect to the statute's linguistic meaning. But at the other end of the spectrum, sceptics of all persuasions will also endorse the standard practice. Sceptics, after all, can only judge a practice's legitimacy on grounds of justice and fairness; yet the judicial practice in question will be justified on any defensible conception of justice and fairness. That is because the standard practice is what allows for 'the law to be what the law says'; the practice is therefore indispensable to democratic self-government and the rule of law.⁸¹

⁷⁹ *Alcan* (n 65) 31 [4] (French CJ).

⁸⁰ Thomas Lee and Stephen Mouritsen, 'Judging Ordinary Meaning' (2018) 127(4) *Yale Law Journal* 788, 792.

⁸¹ Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010, Cambridge University Press) 228.

While the standard practice is uncontroversial, other of the Courts' practices do not have an unambiguous majoritarian rationale, and are controversial. These interpretive practices typically proceed in two steps. First, they identify certain rights and liberties that are said to be owed to individuals. Then, they protect these rights and liberties through non-standard practices of interpretation, in cases where the standard practice of interpretation would lead to infringements of the identified rights and liberties.⁸² Quite overtly, these non-standard practices give expression to a liberal-democratic conception of justice, which is to say a belief that individuals should have certain basic rights and liberties that are protected from interference by the decisions of the political majority.⁸³ Call these non-standard practices 'liberal practices'.

Australian courts maintain two major liberal practices, and the first of these is the principle of legality. The principle of legality requires that, 'in the absence of express language or necessary implication to the contrary', courts must not interpret statutes as infringing individuals' fundamental rights and liberties.⁸⁴ The rights and liberties protected by the principle include rights of property,⁸⁵ the right to a fair hearing,⁸⁶ fundamental common law rights,⁸⁷ freedom from penalties under retrospective laws⁸⁸ and, potentially, rights established under the major human rights treaties.⁸⁹

The courts' second major liberal practice consists of the use of certain common law principles of interpretation to constrain discretions that statutes confer upon executive officials. In particular, I have in mind those common law principles that saddle executive discretion with fair hearing requirements⁹⁰ and conditions of reasonableness.⁹¹ We may simply refer to these practices as 'judicial review', though the term usually has a broader meaning.

Were judicial review and the principle of legality explicitly mandated by the *Constitution*, then those two practices could not be controversial. For in that situation, all or nearly all rationally defensible theories of interpretation would endorse an

⁸² Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7, 24.

⁸³ John Rawls, *A Theory of Justice* (Belknap Press, 1971) 52–7.

⁸⁴ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Hoffman LJ).

⁸⁵ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619–20 [43]–[44] (French CJ).

⁸⁶ *Saeed* (n 70) 256 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁸⁷ *Bropho v Western Australia* (1990) 171 CLR 1, 18.

⁸⁸ *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194.

⁸⁹ Chief Justice Robert French, 'Oil and Water? International Law and Domestic Law in Australia' (Brennan Lecture, Bond University, 26 June 2009) 21.

⁹⁰ See *Kioa* (n 70); Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) ch 8.

⁹¹ See *Minister for Immigration v Li* (2013) 249 CLR 332; Aronson and Groves (n 90) Ch 5.

interpretation of the *Constitution* that permitted — indeed, mandated — the two practices. The reality, however, is that neither of the controversial practices are explicitly mandated by the *Constitution*. With regards to judicial review, the *Constitution* does explicitly vest the High Court with jurisdiction in all matters where certain writs (i.e. administrative law remedies) are sought against federal government officials;⁹² however, the *Constitution* ‘says nothing about the grounds upon which those writs may be issued.’⁹³ With regards to the principle of legality, its strongest connection to the *Constitution* is that the principle is said to be ‘an aspect of the rule of law’⁹⁴, while the rule of law is said to ‘form an assumption’ of the *Constitution*.⁹⁵ However, if that is taken as an argument for why the principle of legality is constitutionally mandated, then the argument will not be endorsed by all (or nearly all) defensible theories of interpretation. A textualist or an intentionalist, for example, would observe that the principle of legality is itself not communicated by the apparently intended meaning of the *Constitution*’s text, and so — the argument would go — it is not a constitutionally mandated practice.⁹⁶ One can then think of numerous sceptical theories that would instead offer political reasons against constitutionalising the principle of legality.⁹⁷

So the two practices — judicial review and the principle of legality — are not rendered uncontroversial by the text of the *Constitution*. But nor can they follow the path of the standard practice, and be rendered uncontroversial by an overwhelming democratic justification. The reason for this is that judicial review and the principle of legality can each be seen as constraining and attenuating the law-making capacities of the democratically elected legislature. Both invoke what Bickel memorably termed ‘the counter majoritarian difficulty’.⁹⁸

The principle of legality invokes the counter-majoritarian difficulty because it may prevent the law from being that which is conveyed by the apparently intended meaning of the statute’s text.⁹⁹ Take for example the case of *X7 v Australian Crime Commission*.¹⁰⁰ That case concerned a statute that conferred powers of compulsory examination upon the Crime Commission. The question was whether a person who had been charged with offences could be summoned for compulsory examination. Although the statute did not limit who could be summoned, and in one section

⁹² *Constitution* s 75(v).

⁹³ Matthew Groves and H P Lee, *Australian Administrative Law* (Cambridge University Press, 2012) 10.

⁹⁴ *Saeed* (n 70) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁹⁵ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon CJ).

⁹⁶ See Goldsworthy (n 81).

⁹⁷ See, eg, Vermeule (n 4) 198–202: Vermeule’s theory of ‘operating level formalism’, argues against the use of canons generally.

⁹⁸ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 2nd ed, 1986) 16–23.

⁹⁹ Lim (n 73) 399–400.

¹⁰⁰ (2013) 248 CLR 92.

contemplated that ‘a person who has been... charged’ might be summoned,¹⁰¹ it was held that the statute did not authorise the summoning of a person who had been charged, for so much was not explicitly stated.¹⁰² The ultimate outcome was that the statutory text stated that the Crime Commission may conduct an examination of a person, the Crime Commission did seek to conduct an examination of a person, and still the statute was found not to authorise that action.

For similar reasons, the principles of judicial review also invoke the counter-majoritarian difficulty. Consider again, for example, the case of *Saeed*. In that case, the question was whether the *Migration Act 1958* (Cth) excluded the judicially imposed condition that a fair hearing (as defined by the courts) be granted to a visa applicant.¹⁰³ The section of the statute that conferred the Minister’s discretion simply provided: ‘the Minister... if satisfied that [certain conditions are met] is to grant the visa; or... if not so satisfied, is to refuse to grant the visa.’¹⁰⁴ The statute was intentionally drafted so as to prevent the courts from conditioning the exercise of this discretion upon the provision of a fair hearing, as defined by the courts. To this end, the statute stipulated its own fair hearing requirements under a subdivision whose head provision was entitled ‘[e]xhaustive statement of natural justice hearing rule’.¹⁰⁵ The Minister’s second reading speech explained:

The purpose of this [B]ill is to make it expressly clear that particular codes in the Migration Act do exhaustively state the requirements of the natural justice or procedural fairness hearing rule. This will have the effect that common law requirements relating to the natural justice or procedural fairness hearing rule are effectively excluded.¹⁰⁶

But still, the Court held that the statute did not exclude the judicially imposed requirement of a fair hearing.¹⁰⁷ The Minister’s decision to refuse a visa was found not to meet this requirement, and so was held to not be authorised by the statute.¹⁰⁸ In this case, as in other cases where the principles of judicial review apply, the ultimate result was that the apparently intended meaning of the text was defeated. Simply, the text said that the Minister, if satisfied that certain criteria are not met, must refuse a visa; the Minister was satisfied that the criteria were not met and did refuse the visa; and still, the Minister’s decision was held not to be authorised by the statute.

Because judicial review and the principle of legality cause such departures from the statutory text, the two practices are counter-majoritarian. This is a problem, but

¹⁰¹ Ibid, 110 [25]–[27] (French CJ and Crennan J).

¹⁰² Ibid, 128–9 [75]–[76] (Hayne and Bell JJ).

¹⁰³ *Saeed* (n 70) 256 [1] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹⁰⁴ Ibid 269 [51].

¹⁰⁵ Ibid 256 [3].

¹⁰⁶ Ibid 264 [30].

¹⁰⁷ Ibid 271 [59].

¹⁰⁸ Ibid [60].

we must now be careful in explaining why it is a problem. The problem is not that the two practices are necessarily without a strong rationale. The practices do lead judges to depart from the standard practice of interpretation, and so from the safety of the standard practice's majoritarian rationale. But judicial review and the principle of legality may be given alternative, non-majoritarian rationales. For example, we could argue that the practices are each justified because they do justice, or because they promote the rule of law, or because they uphold the best interpretation of the *Constitution*. In the case of the principle of legality, a further common justification is (we have seen) that it promotes public deliberation regarding the importance and status of rights.

Where the problem truly lies is in the contentiousness of these alternative, non-majoritarian rationales. In a heterogeneous society, people are liable to have different conceptions of justice, of the rule of law and of the proper constitutional function of the judiciary. These diverse conceptions might produce an overlapping consensus as to the validity of certain judicial behaviours, but any such consensus is apt to be narrow and fragile. As we saw, the standard practice of interpretation does fall within an overlapping consensus of the kind just mentioned. But as soon as we start to justify the principle of legality, for example, on the grounds that it promotes public deliberation, justice, the rule of law, or the *Constitution's* proper interpretation, we will have stepped outside of the overlapping consensus; we will already have offended various views of what justice, the rule of law, and the *Constitution* require.¹⁰⁹

C *The Emergent Solution of Mirrors Minimalism*

The Court, it seems, faces a problem in publicly justifying its controversial practices. Now, I will consider how the strategy of mirrors minimalism might have emerged in order to solve this problem. In doing so, my intention is not to give a textured account of how the various judicial personalities, historical forces and happenstances have converged to make up the Court's present approach to interpretive theory. My purpose is the more modest one of identifying the reasons why the Court, acting rationally in its circumstances, might fall into a pattern of mirrors minimalism. Such reasons, if they can be identified, would surely have a central place in a more textured historical explanation for how the Court's approach to interpretive theory has developed. More importantly, however, upon rationalising mirrors minimalism, we will be able to identify the potential value of the approach, allowing us to evaluate whether the approach should be maintained or abandoned going forward.

¹⁰⁹ For views of justice, the rule of law, and the *Constitution* that would, respectively, deny that certain of the courts' interpretive canons are justified by the requirements of justice, the rule of law, or the *Constitution*, see Jeremy Waldron, 'The Core Case Against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346; Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93(2) *Law Quarterly Review* 198; Goldsworthy (n 81) 304–18.

As we now proceed in this direction, we must make an assumption. The assumption is that, in making statements of theory, a judiciary will have certain aims, and will be under a certain constraint.

The judiciary's immediate aim — the assumption goes — is to make the statements that will maximise the perceived legitimacy of the judiciary's interpretive practices, among an audience consisting of executive and legislative officials, lower court judges, lawyers, academics and the public more widely, over an extended period of time (the 'audience'). In seeking to maximise the perceived legitimacy of its practices, the judiciary seeks to achieve a higher-order aim of ensuring the effectiveness of the law as a mechanism for authoritatively settling disputes.¹¹⁰

In attempting to achieve its aims, the judiciary's constraint is that the judiciary does not know the 'relevant values' of its audience.¹¹¹ By 'relevant values' we mean those values that will determine whether a given audience member will respond to a given statement of theory favourably (thus perceiving the courts' controversial practices as legitimate) or unfavourably (thus perceiving the controversial practices as illegitimate). These relevant values will of course include any well-developed theories of interpretation that an audience member might have. A statement of intentionalist theory, to give an example, will be received unfavourably by any individuals who defend non-intentionalist theories. But the relevant values will also include political values. So, for example, if the Court justifies the judiciary's controversial practices on the grounds that these practices protect rights from a counter-majoritarian threat, an audience member who subscribes to the maxim 'the majority's will must always prevail' will respond to the court unfavourably, whereas an individual with a more liberal politics might react more favourably.

In addition to political and theoretical values, we can think of two further values of relevance. The first is what we can call 'interest': meaning, an audience member's tendency to take an interest in the judiciary's interpretive practices, and to form independent views as to the legitimacy of those practices in light of the judiciary's statements of theory. The second is what we can call 'credulity': meaning, an audience member's disposition to accept the courts' statements of theory as accurately representing the nature of the judiciary's practices.

If we assume the Court to have the above-mentioned aims and constraints, then the Court will face a risk no matter what strategy it takes. Suppose, for example, the Court makes a strong claim that the meaning thesis is true: that all of the Court's practices, even the controversial practices, consist in the courts giving effect to the apparently intended meanings of statutory texts. If the audience were uniformly and highly credulous, then the audience would uniformly respond favourably: they would all accept the Court's 'controversial practices' to in fact be mere instances of the

¹¹⁰ See Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1998) Ch 6.

¹¹¹ Game theorists will notice that I am here framing an identification problem. See Thomas Schelling, *The Strategy of Conflict* (Harvard University Press, 1980) 139–42.

courts' standard practice, and to therefore be perfectly democratic and legitimate on any view. But the Court does not know that its audience *is* uniformly credulous. Moreover, if the Court makes its statement, and some portion of its audience eventuate to be both interested and *incredulous*, those audience members will be apt to criticise the Court (as did Smith) on grounds that the Court's statement is simply false.¹¹² Call this the 'criticism from incredulity'.

To avoid this possible criticism, the Court might instead make a strong statement of sceptical theory. The Court could say, for example, that the courts determine the laws of statutes according to judge-made principles that serve various ends, some democratic, but others rights-protecting. Again, it is possible that this will be the best strategy; certainly, it will be if the audience eventuates to be highly incredulous (such that they would have rejected the meaning thesis), sceptically-minded liberals. But again, the Court cannot depend on its audience having this composition. Indeed, if it eventuates that a proportion of the audience both are interested and are either believers or are conservative in their judicial politics, then those audience-members will be apt to criticise the Court (as Goldsworthy and Ekins did) on the grounds that the Court's controversial practices – as now described by the Court – are in breach of democratic norms and the constitutional separation of powers, and are thus unlawful and undemocratic.¹¹³ Call this the 'criticism from conservatism'.

The Court, it seems, is hemmed between two lines of potential criticism: the criticism from incredulity (Smith's criticism), and the criticism from conservatism (Goldsworthy and Ekins' criticism). It is in this setting that an approach of mirrors minimalism might emerge as the natural and obvious path of least resistance, given the Court's aim of maximising the perceived legitimacy of its own practices. The overall effect of mirrors minimalism, recall, is to make it arguable both that the Court is a conservative believer (in satisfaction of the criticism from conservatism) *and* that the judiciary is a rights-defending sceptic (in satisfaction of the criticism from incredulity). By making this the case, mirrors minimalism affords the Court a boost and a defence as it goes about maximising the perceived legitimacy of its practices.

The Court is given a boost because it can rely on the more credulous and less interested of its audience — inevitably in the public and the non-judicial arms of

¹¹² Smith (n 6) Parts IV and V. The criticism from incredulity has often been close to the surface in discussions of the Court's accounts of its interpretive canons. See, eg, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36] (McHugh J); Justice John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85(5) *Australian Law Journal* 273, 288. The same can be said for foreign jurisdictions: See, eg, Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57(1) *Cambridge Law Journal* 63, 67–8.

¹¹³ Goldsworthy and Ekins (n 2). The criticism from conservatism has also emerged in other jurisdictions, eg, in the context of the British *ultra vires* debate. See Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review' (1996) 55(1) *Cambridge Law Journal* 122; See also Scalia (n 1).

government — to find in the courts' jurisprudence an account of statutory interpretation that will tally with their (the audience members') diverse political values.

But against the more incredulous and interested of its audience — lawyers, judges, academics, drafters, legislators — mirrors minimalism will be a defence. And so we saw earlier that a confluence of ~sceptical and ~believer's statements left each of Smith's and Goldsworthy and Ekins' criticisms of the Court without solid foundation, and to that extent impotent.

V THE HIGHER ASPIRATIONS OF MINIMALISM

In the way just described, mirrors minimalism is a potential solution to a problem: the problem of publicly justifying controversial practices to an audience with plural values. But is mirrors minimalism the best solution?

In this final Part, we will begin by stating the traditional aspirations of minimalism: the long-discussed and widely-understood reasons a judiciary may have for avoiding strong theoretical commitments. It will then be argued that mirrors minimalism does not hold or meet these lofty aspirations; whereas the traditional aspirations of minimalism are for the genuine settlement of controversies surrounding a judiciary's practices, mirrors minimalism can only hold the lower aspiration of evading or delaying such controversy. With so much acknowledged, I will finally argue that, when the ledgers are balanced, and mirrors minimalism's various costs and benefits are weighed, it becomes clear that the approach should be retired.

A *The Traditional Aspirations of Minimalism*

Putting mirrors minimalism aside momentarily, let us now ask the following, general question. Why might we want judges to engage in any kind of minimalism? That is, why should we ever want judges to avoid strong theoretical commitments, and so leave untheorised the limits of the judiciary's powers?

Fortunately, we are not the first to ask. Various judges and scholars have discussed these matters, and through their discourse two persuasive rationales for minimalism have emerged. The first rationale is given by the tradition of legal formalism, and it emphasises the need for judges to avoid political considerations, and to be constrained by black-letter legal rules. The second arises from the works of Sunstein, and it emphasises the need to leave space for public consensus-making and democratic deliberation regarding the legitimate functions of public institutions. Both of these rationales — the formalist and the consensus-making — share an initial assumption, which is that individuals in society do not widely share the same political and moral outlook. Let us therefore reflect upon that assumption, before addressing minimalism's two traditional rationales more directly.

1 *The Assumption of Reasonable Pluralism*

The assumption that I have in mind finds its classic expression in *Political Liberalism*, a major work by John Rawls.¹¹⁴ In that book, Rawls observed that, within any democratic society, different people have different world-views, where each world-view consists of a distinct system of inter-supporting beliefs about what is true, good and right, and what is false, bad and wrong. Rawls called these world-views ‘comprehensive doctrines’, such that, for Rawls, society contains a ‘diversity of reasonable comprehensive religious, philosophical and moral doctrines’.¹¹⁵ Rawls called this feature of free societies ‘reasonable pluralism’, and insisted that it was ‘not simply the upshot of self- and class interests’, but ‘the work of free practical reason within a framework of free institutions’.¹¹⁶ Because Rawls therefore saw reasonable pluralism as inherent to any free society, he also argued that the institutions of government need to accommodate, rather than take sides within, society’s reasonable pluralism of world-views. For Rawls, this meant that public institutions should be designed, and should function, so as to be endorsable by ‘an overlapping consensus of reasonable comprehensive doctrines’, such that all individuals, with their disparate world-views, could endorse the institutions ‘from [the individuals’] own point of view’, and for each individual’s own reasons.¹¹⁷ It is through such an overlapping consensus that democracies achieve political stability, or so Rawls wrote.¹¹⁸

2 *The Formalist Rationale*

What does Rawls have to do with our subject? To begin, the formalist rationale for minimalism follows hard on the heels of the above Rawlsian picture.

The formalist rationale for minimalism is that, if judges make legal decisions on the grounds of clear and stable rules — and not on the grounds of high-level theories that may justify those rules — then the judges’ decisions are more likely to be broadly accepted in a setting of reasonable pluralism, and to thereby facilitate political stability. This contention is rooted in the tradition of legal formalism — a tradition which flourished in the 19th and 20th centuries, was then banished by the critical legal studies movement, and has since enjoyed something of a renaissance.¹¹⁹

According to the legal formalist tradition, the reason that judges should deduce legal decisions from rules rather than from theories is that legal rules are more serviceable

¹¹⁴ John Rawls, *Political Liberalism* (Columbia University Press, 1993).

¹¹⁵ *Ibid* 36.

¹¹⁶ *Ibid* 36–7.

¹¹⁷ *Ibid* 36–7.

¹¹⁸ *Ibid* 143.

¹¹⁹ For a sense of the history, see Brian Leiter, ‘Legal Formalism and Legal Realism: What is the Issue?’ (2010) 16(2) *Legal Theory* 111; For the ‘renaissance’ see, eg, Lawrence Solum, ‘Pluralism and Public Reasoning’ (2006) 15(1) *William and Mary Bill of Rights Journal* 7.

as ‘neutral principles’:¹²⁰ principles from which judicial decisions may be derived as a matter of objective and universally acceptable logic, rather than as ‘the local triumph of some particular point of view’.¹²¹ According to the formalist tradition, the reason that rules serve as the better neutral principles is that they are expressed in words, and the meanings of words are a source of objectivity.¹²² If a judge disposes of a case based upon a high-level theory, a citizen could usually find some entry point into disputing the theory’s correctness, for such is the nature of theory. But on the other hand, if a judge disposes of the case by applying a rule that she is legally bound to apply, and whose linguistic meaning is clear, the citizen may be denied an entry point into disputing the decision, lest the citizen deny the plain meaning of words, or the authority of the law altogether. By rendering judicial decisions less disputable in this way, a close fidelity to rules can, in the formalist’s contention, allow judges to leave unignited the incendiary potential of reasonable pluralism, and to ‘negotiate the differences that would [otherwise] prevent us from living together.’¹²³

3 *The Consensus-Making Rationale*

The formalist rationale, then, insists that fidelity to rules and the avoidance of theory will promote political stability, not because rule-abiding judges can hope to procure wide acceptance of the *content* of legal-rules, but because the *form* of legal rules are such as to make the act of their application impartial: the formalist judge thus avoids controversy with the refrain: ‘these are the rules and, legally, I must apply them’.

The consensus-making rationale, on the other hand, is more ambitious. According to this rationale, minimalism may be justified on the grounds that it promotes genuine consensus regarding the legitimacy of the *contents* of legal rules, and of judicial powers and decisions. According to Cass Sunstein — the originator of this rationale — minimalism can promote such a consensus through two mechanisms.

On the one hand, minimalism may promote consensus by leaving room for an overlapping consensus (or an ‘incompletely theorised agreement’, as Sunstein prefers to say) over judicial practices and decisions.¹²⁴ Here, Sunstein’s argument is little more than an application of the Rawlsian logic described earlier. According to Sunstein, individuals may reach ‘agreements on concrete particulars amid disagreements or uncertainty about the basis for those concrete particulars...’.¹²⁵ In such cases, the argument continues, it can be fruitful for individuals to partake in a ‘conceptual descent’, whereby they agree on certain concrete particulars without ever agreeing

¹²⁰ Herbert Wechsler, ‘Toward Neutral Principles of Constitutional Law’ (1959) 73(1) *Harvard Law Review* 1.

¹²¹ Stanley Fish, *There’s No Such Thing as Free Speech: And It’s a Good Thing, Too* (Oxford University Press, 1994) 121.

¹²² *Ibid.*

¹²³ *Ibid* 179.

¹²⁴ Sunstein (n 7) 4–5, 11–14, 23–45.

¹²⁵ *Ibid* 11.

on their basis.¹²⁶ In the context of judicial practices, Sunstein suggests that this conceptual descent may be brought down to the level of particular rules — the level occupied by formalists.¹²⁷ However, Sunstein observes that his rationale for minimalism may motivate a descent even further, such that the ‘concrete particular’ to be agreed upon is not even a particular rule, but the reasonableness of a particular outcome in a particular case.¹²⁸

One way that minimalism allows for consensus, then, is by ferreting out the potential for agreement on concrete propositions and outcomes, when an equivalent agreement on higher-level reasons would be impossible. As Sunstein notes, however, there is a second mechanism by which minimalism may promote consensus: namely, through showing deference to democratic deliberation.¹²⁹ After all, reasonable pluralism is real, but so is unreasonable pluralism. That is to say, people in society, including judges, do have false and mistaken beliefs, and the correction of these false beliefs might be another method for improving the degree of consensus within a society. In a democracy, our principal method for curing misbeliefs and improving consensus is public deliberation.¹³⁰ And so, the argument goes, the courts may be wise not to pass final judgement on the most fundamental constitutional issues, because such judgments may later be found mistaken, and discordant with some future consensus reached within the democracy, through deliberations among judges, other government officials, and the public; ‘law and life may outrun seemingly good rules and seemingly plausible theories’.¹³¹ Minimalism, then, may be justified out of a judiciary’s sense of humility, and of respect for the democracy’s collective wisdom and capacity for learning.¹³²

B *The Case Against Mirrors Minimalism*

Though the rationales just given may be persuasive, none could support the claim that judges always and everywhere should adopt a policy of minimalism. The rationales disclose the *benefits* of minimalism, but — before a judiciary commits to minimalism — these benefits must be weighed against the potential *costs* of minimalism. The potential costs of minimalism are as follows. Firstly, insofar as a judiciary’s legal decisions are not coordinated by unifying principles and reasons, the judiciary’s decisions will likely become less predictable, and litigants will therefore be treated less equally before the law. Secondly, under the same conditions, lower court judges will increasingly have to develop their own novel reasons for disposing of cases, thus increasing the costs of decision-making system-wide. Thirdly, insofar

¹²⁶ Ibid 11–12.

¹²⁷ Ibid 8–9.

¹²⁸ Ibid 13.

¹²⁹ Ibid 24–8.

¹³⁰ Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) ch 2.

¹³¹ Sunstein (n 7) 41.

¹³² Ibid 39–41.

as judges are unconstrained by authoritative theories and principles, they will be left a greater latitude to decide cases according to their own personal will.¹³³ These potential costs of minimalism — costs in predictability, resources and legality — will be realised to different extents by different forms of minimalism.

The approach of mirrors minimalism should be rejected, I will now argue, because the approach fails cost-benefit analysis. On the one hand, it seems an especially costly form of minimalism. On the other hand, it tragically fails to realise the potential benefits of minimalism, imagined by minimalism's formalist and consensus-making rationales.

1 *The Costs of Mirrors Minimalism*

Karl Llewellyn, a leader of the legal realism movement, once observed that the American courts maintained two parallel sets of interpretive canons.¹³⁴ As Llewellyn demonstrated, the effect was that there were 'two opposing canons on almost every point',¹³⁵ each canon leading in 'happily variant directions'.¹³⁶ Judges could thus pick and choose the canons that would lead to the preferred results. Mirrors minimalism is undoubtedly a related phenomenon. What marks mirrors minimalism as different, however, is that it provides the courts not with pairs of inconsistent canons, but with pairs of inconsistent justifications for a single, relatively stable regime of canons.¹³⁷ Therefore, to the extent that mirrors minimalism does introduce costly uncertainty into the law, that uncertainty will pertain to how judges use and develop the existing canons.

Revisit, for example, the principle of legality. While a formulation of that principle was given earlier, we ought now to admit that the principle has no single and agreed formulation. In a number of respects, the requirements of the principle are fundamentally contested. Consider the following inconsistent pairs of statements, each of which pertain to some unresolved aspect of the principle of legality, and each of which represent divergent positions that have been supported by different judges

¹³³ These are loosely the three problems identified by Scalia J as flowing from rule-avoidance (a more acute form of minimalism than is discussed here) in Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56(4) *University of Chicago Law Review* 1175.

¹³⁴ Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3(3) *Vanderbilt Law Review* 395.

¹³⁵ *Ibid* 401.

¹³⁶ *Ibid* 399.

¹³⁷ It may be argued that the courts' interpretive canons are formally inconsistent, and so can be marshalled strategically to achieve desired results if not organised under an interpretive theory: Goldworthy and Ekins (n 2) 43. That argument seems to discount, however, the fact that canons such as the principle of legality and the grounds of judicial review are relatively well defined at common law, as are the circumstances of these canons' application.

in different cases. Within each pair, the first statement expresses a position that is relatively uncooperative with the legislature, and the second expresses a position that is relatively cooperative with the legislature:

Uncooperative position: The principle of legality only permits statutes to infringe fundamental liberties where to interpret the statutes otherwise would render ‘the statutory provision...inoperative and meaningless’.¹³⁸

Cooperative position: The principle of legality also permits legislative infringements of liberty where to deny such infringements would merely ‘hamper’ or ‘frustrate’ the legislative scheme in achieving its object.¹³⁹

Uncooperative position: The principle of legality only permits statutes to infringe fundamental liberties where the statute unambiguously states that the statute will infringe fundamental liberties.¹⁴⁰

Cooperative position: The principle of legality also permits legislative infringements of liberties where the statute unambiguously requires some action to be performed that incidentally would infringe fundamental liberties.¹⁴¹

Uncooperative position: The principle of legality may protect certain fundamental liberties against a statute, even where those liberties were not considered fundamental at the time that the given statute was passed.¹⁴²

Cooperative position: The principle of legality only protects those rights known by the parliament to be protected at the time that the relevant statute was passed.¹⁴³

A highly significant feature of these dyads is that the choices they present may each be made on grounds of interpretive theory. A judge who adopts the ‘positive’, believer’s rationale for the principle of legality will understand the principle to be essentially an exercise in cooperation with the legislature. Presented with any of the above dyadic choices, such a judge would thereby have most reason to choose the cooperative option. By contrast, a judge who accepts the ‘normative’, sceptical rationale for the principle should be more inclined to choose the uncooperative options, for they are

¹³⁸ *Coco* (n 75) 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹³⁹ *Yuill* (n 49) 327, 333. On the continuing controversy between these positions, see Francis Cardell-Oliver, ‘The Strength of the Principle of Legality’ (2017) 41(1) *Melbourne University Law Review* 30, 36–48.

¹⁴⁰ *Coco* (n 75) 436–7 (Mason CJ, Brennan, Gaudron and McHugh JJ)..

¹⁴¹ *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 [33], [35], 661 [298], 643 [241], 662 [303]. See further Cardell-Oliver (n 139) 49–54.

¹⁴² *Yuill* (n 49) 322–3.

¹⁴³ *Daniels Corporation International v ACCC* (2002) 213 CLR 543, 571. See further Dan Meagher, ‘The Principle of Legality and *Contemporanea Exposition est Optima et Fortissima in Lege*’ (2017) 38(1) *Statute Law Review* 98, 110–14.

the options that will better protect liberties and induce public scrutiny of liberty-infringing legislation.

It is against this backdrop that mirrors minimalism may exact its costs. Rather than prescinding from higher-level interpretive theories, mirrors minimalism grants tentative authority to two alternative theories. Judges have then been able to tentatively use either available theory in justifying either cooperative or uncooperative outcomes, much as a judge in 1950s America could strategically choose between Llewellyn's canons. And so we have often seen uncooperative decisions supported by ~sceptical statements of theory,¹⁴⁴ and cooperative decisions supported by ~believer's statements.¹⁴⁵ A separate but related phenomenon is that judges will occasionally endorse or mention both available theories, and then leave unclear the true basis for their decision. This latter strategy has most frequently been adopted in cases considering whether statutes have excluded fair hearing requirements.¹⁴⁶

The inevitable cost of this — of mirrors minimalism — will be the continuing existence of controversies concerning the contents and functions of interpretive canons. Such controversies, we saw, not only afflict the principle of legality, but also sundry other departments of the Courts' interpretive practices, including the grounds of judicial review,¹⁴⁷ and the use of extrinsic materials.¹⁴⁸ Of course, if the Court left questions of theory unaddressed, these controversies might be solved on more pragmatic grounds (see Part VI below). If the Court instead addressed questions of theory earnestly, and with the aim of attaining answers, the controversies might be solved that way. But by merely stoking questions of theory, as mirrors minimalism does, we should expect the controversies of interpretive method to also only be stoked. The continuing existence of controversy and ambiguity in the Courts' interpretive methods must result in the familiar concrete costs: decreased predictability in judicial decisions, expenses in time and effort incurred by lower courts in navigating the ambiguities, and decreased rule-boundedness of judicial decisions.

¹⁴⁴ See, eg, *Coco* (n 75) 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *R v Ioannidis* [2015] SASFC 158, [131]–[133], [136] (Peek J); *Coshott v Prentice* (2014) 221 FCR 450, 472–3 (Siopis, Katzmann and Perry JJ); *Director General Department of Family and Community Services v FEW* [2013] NSWSC 1448, [21]–[25] (Fullerton J).

¹⁴⁵ See, eg, Brennan J citing the principle of legality's positive rationale in coming to a cooperative decision in: *Yuill* (n 49) 322; see also *Ex parte Miah* (n 72) [30]–[33] (Gleeson CJ and Hayne J); *Arnold v Hickman* [2016] TASSC 55, [14], [16], [27] (Pearce J); though it is a more complex example, see also *McLeod-Dryden v Supreme Court of Victoria* [2017] VSCA 60 [33]–[35] (Priest, Santamaria and McLeish JJA).

¹⁴⁶ *Plaintiff M61/2010E v Commonwealth* (n 72) 352 [74]; *Plaintiff S10/2011 v Minister for Immigration* (n 53) 666 [97]; *Ex parte Miah* (n 69), [89]–[90].

¹⁴⁷ See, eg, the differing and often indeterminate opinions on the scope and nature of unreasonableness review in *Li* (n 91), well discussed in: Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43(1) *Federal Law Review* 59, 74–7.

¹⁴⁸ See Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42(2) *Federal Law Review* 333, pt IV.

2 *The Foregone Benefits of Minimalism*

These costs might be sufferable *if* mirrors minimalism brought the compensating benefits usually associated with minimalism: a greater consensus over the legitimacy of the Courts' practices, and the further entrusting of important constitutional questions to democratic deliberation and the wisdom of many minds. But alas, there are strong reasons to doubt that the approach can deliver these benefits.

Firstly, mirrors minimalism proceeds not by furnishing a concrete statement of the Courts' practices, over which an overlapping consensus may form. It instead proceeds by giving varying accounts of the Courts' practices, such that different members of the Court's audience might develop different understandings of what the judiciary's interpretive practices are. The best outcome under this approach is that two separate and contradictory consensus form: one that takes the Courts' practices to be legitimate on the assumption that the practices consist in the courts' standard practice of effecting statutes' apparently intended linguistic meanings; and another that deems the practices legitimate on the assumption that the court does depart from that standard practice, but for legitimate reasons of justice and fairness. If that is mirrors minimalism's highest achievable aspiration, the approach cannot aspire to foster any genuine overlapping consensus regarding the legitimacy of the Courts' interpretive practices.

Secondly, mirrors minimalism does not leave a clear space for democratic deliberation regarding the appropriate methods of interpretation. By potentially promoting disagreement and confusion as to what the Courts' interpretive practices are and why they are so, mirrors minimalism may deprive deliberants of a plateau of consensus from which to deliberate. On the whole, mirrors minimalism views officials and the public as being mostly credulous spectators who are to be appeased, rather than as potential partners in a continuous process of sounding-out, clarifying and optimising the Courts' interpretive practices.

VI CONCLUSION – TWO PATHS FORWARD

One suspects that, twenty years from now, we will look back upon the practice of mirrors minimalism as marking the unsettled mid-point of some larger transition in the Court's approach to interpretive theory. Or so we might hope. Mirrors minimalism would come at too great a cost to legal certainty, and the integrity of the Court's doctrines, to be a permanent method for publicly justifying the Court's interpretive practices.

But if the Court is to depart from the approach, what alternative approach should the Court depart for? I can conceive of two feasible destinations.

On the one hand, the Court might retreat to a more robust form of minimalism — one that is better placed to achieve the aspirations of permitting consensus-building and of yielding the fruits of democratic deliberation. In practice, this would entail a greater degree of formalism in the application and development of the Court's

canons of construction. In the formalist tradition, the canons would be developed through a process of practical reasoning, as opposed to theoretical reasoning. Rather than airing questions regarding the canons' fundamental justifications, the judiciary would take for granted the canons' authority as principles of law. Their development may then proceed in the practical fashion that is characteristic of the common law with reference to 'prior dicta, arguments by analogy [and] arguments seeking to avoid incoherence [with existing law]'.¹⁴⁹ That is, rather than reasoning the content of the canons from general theories of interpretation and of the nature of law, the canons' contents may be reasoned anew from established 'neutral principles', such as principles of parliamentary supremacy, procedural fairness, and common law rights and freedoms. The theorist will complain: 'but, if the Court does not provide theoretical justifications for its interpretive practices, the justifications for those practices will be incomplete'. The minimalist will respond: 'so much is desirable, for it may be conducive to social stability'.¹⁵⁰

On the other hand, the Court might eschew minimalism. Following Bickel's advice, the Court might become a 'leader of opinion, not a mere register of it'.¹⁵¹ On this approach, High Court Justices would seek to develop a coherent and monolithic theory of interpretation, as have various American judges before them.¹⁵² In doing this, the Court would leave the safety of minimalism, and open the Court's practices up to criticism on theoretical and, perhaps, political grounds. However, if successful, the Court's rewards would be a greater logical integrity and consistency in its interpretive practices, and the reduction in reasonable controversies over the contents of the Courts' canons.

¹⁴⁹ *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, [55] (Heydon J); for more comprehensive defences for, and explanations of, this mode of legal development, see Edward Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, 1949); Ronald Allen and Ross Rosenberg, 'Legal Phenomena, Knowledge and Theory: A Cautionary Tale for Hedgehogs and Foxes' (2001) 77(2) *Chicago Kent Law Review* 683; Sunstein (n 110).

¹⁵⁰ To which the theorist will reply 'yes, but at what cost to the integrity of our legal doctrines?' – and so the argument will continue.

¹⁵¹ Bickel (n 98) 239.

¹⁵² See, eg, Oliver Wendell Holmes, 'The Theory of Legal Interpretation' (1899) 12(6) *Harvard Law Review* 417; Holmes (n 31); Frank Easterbrook, 'Text, History and Structure in Statutory Interpretation' (1994) 17(1) *Harvard Journal of Law and Policy* 61; Scalia (n 1); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Oxford University Press, 2005); Richard Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2005).

