DEFINING THE LIMITS OF SECTION 117 OF THE *CONSTITUTION*: THE NEED FOR A THEORY OF THE ROLE OF STATES

DANIEL REYNOLDS*

Since the 1989 High Court decision in Street v Queensland Bar Association ('Street'), it has been recognised that section 117 of the Australian Constitution, which prohibits discrimination on the basis of state residence, is not absolute in its operation. For example, states may limit voting in state elections to their own residents. However, no consensus was reached in Street as to how the limits to section 117 are to be defined, nor since. This article argues that the resolution of this issue will require the Court to develop a theory of the role of states, which will involve identifying the functions that states are constitutionally expected to perform. The article proceeds to explore how such a theory might be developed, having regard firstly to the text, purpose and history of section 117, and then to those constitutional sources that shed light on what it is that states are supposed to do.

I INTRODUCTION

Section 117 is a curiously under-litigated provision of the *Australian Constitution*. There was a ready explanation for this up until 1989, when the High Court delivered judgment in the seminal case of *Street v Queensland Bar Association* ('*Street*'),[1] overruling earlier authority that had given the provision an unduly narrow scope. Since *Street*, however, there have been only two further High Court cases in which the provision has been directly invoked.[2]

Broadly speaking, section 117 protects residents of one state, who are for the time being in another state, from being treated less favourably than local residents of that other state. The section provides '[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'.

* Barrister, Eleven Wentworth; LLB (Hons), BInst (UNSW). I would like to thank Rosalind Dixon, Amelia Simpson and Brendan Lim for their helpful comments on an earlier draft of this article. All views are my own.

1 (1989) 168 CLR 461 ('*Street*').

2 *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 ('*Goryl*'); *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

It is not for a want of available targets that section 117 is so rarely invoked. In fact, there are a surprisingly high number of laws and executive policies that, at least arguably, might fall foul of the constitutional proscription. These include:

- the *Voluntary Assisted Dying Act 2017* (Vic), which limits access to voluntary assisted dying to people 'ordinarily resident in Victoria';[3]
- section 82A(2) of the *Criminal Law Consolidation Act 1935* (SA), which has the effect that a woman may not lawfully terminate her pregnancy in South Australia unless she has resided there for at least two months prior to the termination;
- adoption and surrogacy laws that prevent a state court from making an adoption or surrogacy order in favour of an applicant unless the applicant resides in that state,[4] or which prevent adoption services providers from providing services to people not resident in the state;[5]
- laws permitting only residents to be employed by particular state agencies,[6] or to hold particular appointments, such as justice of the peace, public officer of an association, or managing director of Bankwest;[7]
- laws requiring particular mining and infrastructure operators to use the services of contractors and employees who are residents in the state to the extent that it is reasonable and economically practicable to do so;[8]
- laws permitting only residents to change their names,[9] or to register a de facto relationship, and thus to have the benefit of financial adjustment and maintenance orders should the relationship end;[10]
- laws permitting only residents to obtain a licence to own a firearm,[11] or to work as a real estate or business settlement agent;[12]

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3 *Voluntary Assisted Dying Act 2017* (Vic) s 9(1)(b)(ii).

4 See, eg, *Adoption Act 2000* (NSW) s 23(2)(b); *Adoption Act 2009* (Qld) ss 92(1)(g), 196(g)(iii), 200(f)(iii); *Adoption Act 1988* (SA) s 8(2)(b); *Adoption Act 1988* (Tas) s 6(1)(a)(i); *Adoption Act 1984* (Vic) s 7(1)(a)(i); *Adoption Act 1994* (WA) s 65(1)(b); *Adoption (General) Regulations 2018* (SA) regs 9(1)(a), 3(a); *Adoption Regulations 2016* (Tas) reg 15(1)(b)(i); *Surrogacy Act 2010* (NSW) s 32.

5 See, eg, *Adoption Regulation 2015* (NSW) sch 1 cl 2.

6 See, eg, *Adoption Regulations 2016* (Tas) reg 6(1)(a).

7 See, eg, *Justices of the Peace Act 2005* (SA) s 4(8)(b); *Associations Incorporation Act 2009* (NSW) s 34(2); *Bank of Western Australia Act 1995* (WA) ss 23(1)(d), 42G; *Gas Corporation (Business Disposal) Act 1999* (WA) s 10(1)(c); *State Financial Institutions and Metway Merger Act 1996* (Qld) s 64(1)(b).

8 See, eg, *Barrow Island Act 2003* (WA) sch 1 cl 15(1)(b); *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) sch 10 cl 4(7)(12)(b); *Mineral Sands (Cooljarloo) Mining and Processing Agreement Act 1988* (WA) sch 1 cl 13(1)(b); *Dardanup Pine Log Sawmill Agreement Act 1992* (WA) sch cl 9(1)(b); *Tailings Treatment (Kalgoorlie) Agreement Act 1988* (WA) sch cl 10(1)(b).

9 See, eg, *Births, Deaths and Marriages Registration Act 2003* (Qld) s 7(2)(b)(i); *Births, Deaths and Marriages Registration Act 1999* (Tas) ss 23–4; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 26(1)(b)(iii); *Births, Deaths and Marriages Registration Act 1998* (WA) ss 30–1.

10 See, eg, *Relationships Act 2003* (Tas) s 11(1)(a); *Family Court Act 1997* (WA) s 205X(b).

11 See, eg, *Firearms Act 1996* (NSW) s 11(3)(d); *Firearms Act 2015* (SA) s 15(1)(i)(ii); *Firearms Act 1996* (Vic) s 17(1)(ab).

12 See, eg, *Settlement Agents Act 1981* (WA) ss 27(1)(d), 29(1)(d)(iii).

- laws limiting the amount of child-related work that can be carried out by interstate visitors;[13]
- laws empowering courts to make orders for the management of the property of aged or infirm persons residing in the state;[14] and
- benefits made available to residents only, whether by law, such as photo cards,[15] or by executive policy, such as subsidised transport and health benefits.[16]

And, most recently, we have witnessed the emergence of border closure laws aimed at controlling and suppressing the spread of COVID-19, one of which has already been the subject of constitutional litigation before the High Court (though not on section 117 grounds).[17]

Given the proliferation of laws and policies affording differential treatment on the basis of state residence, there is significant potential for section 117 to be the subject of more frequent litigation in future years.

If and when that occurs, the Court will need to engage with a large and unanswered question in the jurisprudence on section 117: what are its limits? Each of the seven judgments in *Street* accepted that the operation of section 117 cannot be absolute: at the least, it could not prevent states from providing that only residents may vote in state elections. But how far does the states' immunity from the operation of section 117 extend? This is a question to which each of the seven judgments in *Street* gave a different answer, and which, 30 years later, remains unresolved.

The argument of this article is that this question cannot be answered in a merely instinctive way, that is by identifying 'natural' subject matters which states should be able to regulate free of the constraints of section 117. A more analytically robust approach is needed; one that articulates and examines its underlying premises. In this context, such an approach must at least grapple with the question 'what are states *for*?'. Or to put it another way, 'what is the ultimate objective of a State?'.[18] Without a constitutionally based theory of what functions states are expected to perform, the attempt to define a carve-out to section 117 will remain an exercise in intuition.

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13 See, eg, *Working with Children (Criminal Record Checking) Regulations 2005* (WA) sch 1 cl 12; *Working with Children Act 2005* (Vic) s 32(1).

14 See, eg, *Aged and Infirm Persons' Property Act 1940* (SA) s 4(3).

15 See, eg, *Western Australian Photo Card Act 2014* (WA) s 4(a).

16 See, eg, the Senior Savers Card Scheme (available only to permanent residents of NSW); the Spectacle Supply Scheme, and the Medical Aids Subsidy Scheme (available only to permanent residents of Queensland); the Patient Travel Assistance Scheme (available only to permanent residents of Tasmania); the South Australian Transport Subsidy Scheme (available only to permanent residents of South Australia); and the WA Spectacle Subsidy Scheme (available only to permanent residents of Western Australia).

17 *Palmer v Western Australia* (2021) 95 ALJR 229.

18 Genevieve Ebbeck, 'The Future for Section 117 as a Constitutional Guarantee' (1993) 4(2) *Public Law Review* 89, 93.

The structure of this article is as follows:

1. Part II considers the High Court's decision in *Street*, and offers a categorisation of the approaches taken by each of the seven judges to the question of how to define the limits to section 117. The Part concludes by explaining why, on any of the seven views, a theory of the role of states is needed.
2. Part III examines (relatively briefly, as this is ground that has been traversed elsewhere), the text, purpose and history of section 117, and considers the extent to which these illuminate the nature and scope of the provision's limits.
3. Part IV considers the position and function of states in the *Constitution*.
   (a) In the first instance, this Part considers those textual provisions that deal with states expressly.
   (b) Secondly, this Part considers contemporaneous constitutional commentary that provides further insight into the question.
   (c) Lastly, this Part considers the potential for constitutional values to inform the function of states, having regard in particular to government accountability and federalism as examples.
4. Part V offers a conclusion.

Lastly, a disclaimer: this article does not purport to, nor is it intended to, offer a definitive *answer* to the question of what function(s), if any, states are constitutionally expected to perform. As will appear, the question is highly indeterminate, and moreover, has not yet been the subject of sustained analysis. It is therefore considered more productive at this stage of the debate to do two things: first, to explain *why* this question is one that courts will need to address in future section 117 cases; and secondly, to explore *how* the question might be approached and the factors that might inform its resolution.

II CURRENT AUTHORITY ON THE LIMITS TO SECTION 117

A *Street v Queensland Bar Association*

In *Street*, the High Court breathed new life into the long-dormant section 117, holding that it requires attention to the *substantive* impact that a law or measure has on a person by virtue of their out-of-state residence, rather than a merely *formal* analysis of whether the law or measure, in its terms, subjects out-of-state residents to discrimination or a disability on that basis alone.

Each of the seven justices gave separate reasons. All seven agreed on one point: section 117 cannot be without limits. The paradigm example of a necessary exception to section 117, endorsed in most of the judgments, was a law limiting the right to vote in state elections to state residents.[19] Beyond this, however, there

19 *Street* (1989) 168 CLR 461, 512–13 (Brennan J), 528 (Deane J), 546, 548 (Dawson J), 559 (Toohey J), 570 (Gaudron J), 584 (McHugh J).

was little consensus as to the question of how the limits of section 117 are to be defined.

The various approaches taken by the justices in *Street* can be categorised by reference to two variables.

(a) Breadth of permitted functions: The first variable is how broadly the justices define the category of functions that states are constitutionally permitted to perform notwithstanding section 117.

At one extreme is a minimalist view, which goes no further than preserving the ability of states to perform those functions that are necessary for their continued existence.

Moving further along the range of possibilities, there is a more expansive view, which defines permissible state functions to include those functions that states normally or naturally perform.

Finally, at the other extreme is a still broader and more permissive view, which holds that states may perform any functions that are *not incompatible* with the *Constitution*.[20] The breadth of this last view means that it could not apply in an absolute form, that is, as *always and categorically* excluding from the operation of section 117 *any* law 'not incompatible' with the *Constitution*, as this would swallow up section 117 in its entirety. Rather, this view requires there to be a role for proportionality.

(b) Role for proportionality: The second variable is the extent to which the justices allow a role for proportionality.

At one extreme are those views that appear to define the limit to section 117 in a categorical way, that is, as conferring upon states an absolute freedom to perform particular functions free of the burden of section 117.

At the other extreme are those views that hold that defining the permitted functions of states is only the first question, and that one then needs to proceed to ask whether the state's pursuit of that function is proportionate.

It can thus be seen that the two variables are not entirely independent. Rather, the realistic scope for proportionality to play a role depends upon a judge's view of the breadth of the permitted functions. For those judges for whom proportionality is the dominant framework for analysis, there is little need for any narrow conception of permitted functions, because concerns about undue derogation from the constitutional guarantee can be addressed in assessing whether a given law is legitimate, suitable and adequate in the balance, rather than in a blanket way at the outset by reference to its subject matter. Conversely, for those judges who eschew a role for proportionality, the need for a narrowly bounded definition of permitted functions becomes more acute, lest the constitutional guarantee be deprived of all its force.

20 Akin to the 'legitimacy testing' stage of structured proportionality analysis used in implied freedom of political communication cases: *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

The following summary attempts to identify and summarise each justice's view on these two variables:

1. Mason CJ
   (a) *Permitted functions*: Mason CJ's view was neither minimalist nor permissive, but somewhere in between. His Honour's formulation was in terms that

   > [t]he preservation of the autonomy of the States demands that the exclusion of out-of-State residents from the enjoyment of *rights naturally and exclusively associated with residence in a State* must be recognized as standing outside the operation of s 117.[21]

   On his Honour's view, this included the provision of state welfare benefits to assist the indigent, the aged or the ill; and the restriction of hotel licences to people who reside on the premises.[22]

   (b) *Proportionality*: Although the above definition of a state's permitted functions was stated in categorical terms, his Honour proceeded to recognise a role for proportionality in relation to functions falling outside this formulation. Taking the example of excluding out-of-state residents from participation in professional activities open to residents of the legislating state, his Honour considered that this would offend section 117

   > unless the exclusion could be justified as a proper and necessary discharge of the State's responsibility to the people of that State, which includes its responsibility to protect the interests of the public.[23]

   In Mr Street's case, however, there was no such 'compelling justification'.[24]
2. Brennan J
   (a) *Proportionality:* Brennan J dealt with proportionality first, and so it is appropriate to follow that order here. His Honour considered that

   > if there is *a rational and proportionate connexion* between the condition and some objective other than the subjecting of protected persons to different treatment because they are out-of-State residents, s 117 does not apply.[25]

   (b) *Permitted functions:* Embedded in the above formulation was an answer to this question. Provided that a law is proportionate to '*some objective*' other than deliberately discriminating against out-of-state residents, a state will be pursuing a legitimate objective. Brennan J endorsed in this context the earlier example of laws regulating the licensing of victuallers.[26]

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21 *Street* (1989) 168 CLR 461, 492 (emphasis added).
22 Ibid (Mason CJ).
23 Ibid (emphasis added).
24 Ibid 493.
25 Ibid 511 (emphasis added).
26 Ibid.

Separately, his Honour then proceeded to describe what he called '[t]he exception of necessity'.[27] Some laws, his Honour considered, were beyond the 'borders of the Alsatia created by s 117', because they were *necessary to the existence of the institutions of state government and the protection of their functions*.[28] Whether the exception of necessity is a categorical exclusion from section 117 to which proportionality does not apply, or whether on the other hand, proportionality was not mentioned in this context because it will always be satisfied in the case of laws protecting the existence of state institutions, was not made clear.

3. Deane J

Deane J's view is difficult to categorise. The difficulty arises from a metaphor used seven times in his Honour's reasons, being that of disadvantages 'flow[ing]' or 'flow[ing] naturally' from one of three permitted sources. Those sources are: the structure of the particular state, the limited scope of its legislative powers or the nature of the particular right, privilege, immunity or other advantage or power to which it relates.[29]

The metaphor of 'flowing' may be understood as involving either a test of characterisation or a test of proportionality. It is submitted that on a complete reading of his Honour's reasons, the latter view is correct. That understanding emerges most clearly from the example his Honour gives of medical or legal professional qualification requirements that represent '*no more than regulation of a kind necessary* to protect the public'.[30] 'Such regulation', his Honour continued, '*flows naturally* from what is involved in the practice of medicine or law and the obvious need to protect the public from unqualified and incompetent practitioners'.[31]

'[N]o more than … necessary' is the language of proportionality. Later in his Honour's reasons he restates this test, in upholding as valid other provisions requiring that aspiring interstate barristers exclusively pursue that profession for a year prior to application, in terms that those requirements 'represent no more than a reasonable professional qualification or safeguard'.[32]

These two examples aside, his Honour does not use the language of proportionality when describing other examples of laws that 'flow naturally' from legitimate state functions, such as laws providing financial assistance to disadvantaged tenants, and restricting the franchise to state voters. However, it is submitted that these references to the same metaphor should be understood in light of his Honour's subsequent explanations that they involve a test of proportionality.

27 Ibid 512 (Brennan J).
28 Ibid 512–13.
29 Ibid 528 (Deane J).
30 Ibid 529 (emphasis added).
31 Ibid (emphasis added).
32 Ibid 533.

Understood in this way, his Honour's view can be summarised as follows.

(a) *Permitted functions:* A state is prima facie permitted to perform any functions that arise from, or are compatible with, 'the structure of the particular State' or 'the limited scope of its legislative powers'.[33]

(b) *Proportionality:* A measure with respect to any such function will not offend section 117 provided that it 'flows naturally' from its pursuit, meaning that it is no more than necessary or reasonable to achieve that end.

4. Dawson J

(a) *Permitted functions:* Dawson J recognised that section 117 does not deny 'the separate responsibilities of the States which, together with the Commonwealth, make up the Australian federation'.[34] States are permitted, his Honour considered, to exercise functions causing a disability or discrimination to out-of-state residents where the basis for that treatment is '*the ordinary and proper administration of the affairs of that State*'.[35]

(b) *Proportionality:* His Honour proceeded to hold that a measure will be valid if its '*true purpose and effect*' is '*capable of being seen*' as something other than the illegitimate purpose of imposing a disability or discrimination upon non-residents.[36] Later, his Honour said that practising conditions designed to ensure that an applicant was suitably qualified would be valid 'if they were *genuinely directed* towards the maintenance of proper professional and ethical standards'.[37] These tests involve similar questions to those asked at the 'suitability' stage of structured proportionality analysis in the context of the implied freedom of political communication.[38] His Honour did not go further and advert to any notion of balancing, but rather stated the view that 'no more precise expression of the limits of s 117' was possible at that stage, and that the limits would emerge with greater precision on a case-by-case basis.[39]

5. Toohey J

Toohey J considered that the circumstances of the case before the Court did not require the limits to section 117 to be spelt out and that it would be unwise to attempt such an exercise.[40] However, his Honour made the following limited observations.

33 Ibid 528.
34 Ibid 548.
35 Ibid (emphasis added).
36 Ibid (emphasis added).
37 Ibid 550 (emphasis added).
38 *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).
39 *Street* (1989) 168 CLR 461, 548.
40 Ibid 559.

(a) *Permitted functions:* His Honour considered that the limits to section 117 'are to be found in the implications to be drawn from the *Constitution*, in particular the capacity of the States to regulate their own affairs within a federal system'.[41] His Honour then stated that legislation will not fall foul of section 117 if it is '*aimed at protecting the legitimate interests of the "State community"*'.[42]

(b) *Proportionality:* His Honour did not indicate a position on this issue.

6. Gaudron J

Gaudron J drew upon the lessons of anti-discrimination law in other contexts, and considered that a measure would not offend section 117 if it involved 'different treatment appropriate to a relevant difference'.[43]

(a) *Permitted functions:* Her Honour did not suggest any limit to the kind of functions the performance of which might fall outside of the protection of section 117. Rather, her Honour's approach appears to entail the view that *any objective* is prima facie legitimate (except discrimination against non-residents for its own sake), provided that it satisfies a test of proportionality.

(b) *Proportionality:* Her Honour considered that '[t]he more difficult question is whether, there being a relevant difference, the different treatment accorded to that difference is appropriate to it'.[44] That question of appropriateness may be answered, her Honour continued, by asking 'whether it is *reasonably capable of being seen as appropriate and adapted to that purpose*'.[45]

7. McHugh J

(a) *Permitted functions:* Of the seven judges, McHugh J's view of the permitted functions falling outside the operation was the narrowest. In his Honour's view,

> the 'structural logic' of the *Constitution* indicates that there are some subject-matters in respect of which an interstate resident is not entitled to equality of treatment with State residents in identical circumstances.[46]

It necessarily followed that some subject matters were the 'concern only of the people of each State'.[47] Such subject matters included 'the franchise, the qualification and conditions for holding public office in the State, and conduct which threatens the safety of the State or its people'.[48]

His Honour continued by noting that the exclusion of such subject matters from the scope of section 117 was the necessary consequence of a federal system in which each state exercises independent powers

41 Ibid 560.
42 Ibid (emphasis added).
43 Ibid 572.
44 Ibid.
45 Ibid 573 (emphasis added).
46 Ibid 583.
47 Ibid.
48 Ibid 584.

and functions within its territory for the peace, order and good government of that territory.[49] It followed that the exceptions 'must be confined to the extent of the need for them'.[50] The test, therefore, was 'whether, *by necessary implication, the matter is so exclusively the concern of the State and its people that an interstate resident is not entitled to equality of treatment in respect of it*'.[51]

(b) *Proportionality:* His Honour considered that *proportionality has no role to play* in the context of section 117, and considered the presence of 'disability' in section 117 to be a powerful reason for not confining 'discrimination' to 'unjust', 'undue' or 'unreasonable' discrimination.[52]

B The Need for a Theory of the Role of States

There is thus an array of views on the limits to section 117. It remains as true today as it was in 2008 that a 'clean-up of the area is overdue'.[53] It is sufficient for present purposes to observe that the subsequent cases of *Goryl v Greyhound Australia Pty Ltd* ('*Goryl*')[54] and *Sweedman v Transport Accident Commission*[55] did not resolve these differences of opinion, save that in *Goryl*, Deane and Gaudron JJ indicated in a joint judgment that they considered that their two views expressed above did 'not differ greatly',[56] while Dawson and Toohey JJ jointly stated, albeit without explanation, that the difference between the approaches above was 'probably a difference in approach rather than principle'.[57] This partial assimilation of some of the varying views has not resolved the uncertainty, partly because it was effected by some judges only and in qualified terms, and because a 'difference in approach' requires resolution just as much as a 'difference in principle', as it may yield conflicting results in a case where the difference matters.

The continued uncertainty may thus be taken as a given. It is not the objective of this article to argue for or against any of the seven approaches explained above. Rather, the objective of this article is to make the point that, on *any* of the tests above, it will become necessary in future cases for the Court to develop a 'theory of the role of states', meaning, in very broad terms, a theory of what states are *for* in our constitutional system. How that question might be more precisely expressed is itself a question with which the Court will need to grapple in developing a theory

49 Ibid.
50 Ibid.
51 Ibid (emphasis added).
52 Ibid 583.
53 Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32(2) *Melbourne University Law Review* 639, 641.
54 (1994) 179 CLR 463.
55 (2006) 226 CLR 362. See the judgment of Nettle JA in *Transport Accident Commission v Sweedman* (2004) 10 VR 31. For an excellent analysis of this decision, see Amelia Simpson, '*Sweedman v Transport Accident Commission*: State Residence Discrimination and the High Court's Retreat into Characterisation' (2006) 34(2) *Federal Law Review* 363.
56 *Goryl* (1994) 179 CLR 463, 479.
57 Ibid 485.

of the role of states, but for the purposes of this article the following formulation will be used: 'what functions are states constitutionally expected to perform?'.

A theory of the role of states is needed on any of the seven views summarised above:

1. In the case of those tests that involve *categories* of permitted functions that are excluded from section 117 in an absolute way, a theory of the role of states is needed to define the scope of the category.

   To say, as Mason CJ, Dawson J and McHugh J did, that the category is defined by what is 'naturally' or 'exclusively' or 'ordinarily' or 'properly' the function or concern of the state, is necessarily to beg the question of how such functions are to be identified. What functions are states expected to perform?

   And to say, as Toohey J did, that the category is defined by reference to the 'legitimate interests' of the state, is necessarily to beg a similar question. What interests are legitimate?

2. As for those approaches involving a test of *proportionality*, a theory of the role of states is a necessary reference point for the application of the test.

   To adopt, as Brennan J, Deane J and Gaudron J did (as did Mason CJ, in relation to those measures falling outside his Honour's primary test), a test that assesses the validity of a measure by reference to whether it is proportionate to the achievement of a legitimate objective, is necessarily to beg the question, what objectives are legitimate? In the same way that 'compatibility testing' in the context of the implied freedom of political communication has required the Court to begin stating explicitly whether particular legislative purposes are compatible with the maintenance of the constitutionally prescribed system of representative government, 'compatibility testing' in this context may require the Court to identify whether particular functions may be performed by States consistently with their place in the constitutional scheme.

   That question would likely involve a more permissive range of subject matters being left to states than would be seen upon the application of an approach that proceeds by categories alone, without reference to proportionality. It would likely involve asking the question, 'what functions are states *permitted*' – rather than 'expected' – 'to perform?'. But that question is still one that will require, although perhaps less acutely, the articulation of a theory of the role of states.

A theory of the role of states is thus necessary if a clear appreciation of the limits to section 117 is to be found. That is not to say that the Court must spontaneously announce a 'grand theory' that defines the role of states in an exhaustive way; on the contrary, one might expect that the theory will be developed incrementally and on a case-by-case basis. But we must squarely recognise what it is that the Court will be doing in these cases: whether it says so or not, it will be developing a theory of the role of states.

The remaining Parts of this article explore how such a theory might be developed.

III TEXT, PURPOSE AND HISTORY OF SECTION 117

A Text

The natural place to start in determining the limits to section 117 is the text of the section itself. As noted earlier, it provides: 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'.

It is ironic that the *Constitution*'s sole anti-discrimination provision assumes that the residents who will enjoy its protection will be men. Of course, the drafting is a product of the worldview prevailing among the men who drafted the *Constitution* over the final decade of the 19th century,[58] and it failed to anticipate the fundamental paradigm shifts that would occur in Australia and globally over the following 120 years.

It also failed to anticipate, at least in its terms, that section 117 would lead to drastic and surprising consequences if it were to apply absolutely, for example, if it were to apply to confer on out-of-state residents an unqualified right to vote in the elections of other states. For that reason, the text of section 117 provides no direct guidance as to what its limits are. That it has limits at all is an implication that arises from the *Constitution* as a whole.

B Purpose

The purpose of section 117 has been considered in a number of academic publications, including by Clifford Pannam,[59] Michael Mathieson,[60] Denise Meyerson,[61] and in by far the greatest detail, Amelia Simpson.[62] Each of these writers have explored the question of whether section 117 has, on one hand, an individual rights-based purpose, or on the other, a federalism-based purpose. Unanimously, the latter view has been preferred, and rightly so.

As has often been observed, the framers of the *Australian Constitution* consciously departed from the American model of constitutionalism, featuring an enumerated and entrenched bill of rights, as they believed that the rights of Australians would be adequately protected by the common law and by the decisions of elected representatives made accountable to the people by our system

58 But see Helen Irving, 'Who Are the Founding Mothers? The Role of Women in Australian Federation' (Papers on Parliament No 25, Department of the Senate, Parliament of Australia, June 1995).

59 Clifford L Pannam, 'Discrimination on the Basis of State Residence in Australia and the United States' (1967) 6(2) *Melbourne University Law Review* 105.

60 Michael Mathieson, 'Section 117 of the *Constitution*: The Unfinished Rehabilitation' (1999) 27(3) *Federal Law Review* 393.

61 Denise Meyerson, 'Equality' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1053.

62 Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (n 53); Simpson, '*Sweedman v Transport Accident Commission*: State Residence Discrimination and the High Court's Retreat into Characterisation' (n 55); Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications, and Implications' (2007) 29(2) *Sydney Law Review* 263.

of representative and responsible government.[63] Section 117 was not intended to be an exception to this approach.

Rather, the generally accepted purpose of section 117 was to promote national unity by knitting together the people of the colonies into a single body of people sharing one identity: Australians. It 'recognized that a new common citizenship had been created'.[64] As Quick and Garran put it:

> The people of the Commonwealth are those people who are permanently domiciled within the territorial limits of the Commonwealth. Territorially such people may be called Australians … They do not lose their character as people of the Commonwealth by migrating from one State to another, any more than they lose their national character by migrating from one part of the Empire to another, or sojourning in foreign countries. Their privileges and immunities as people of the Commonwealth are secured and guaranteed to them, without regard to their residence in a particular State.[65]

The recognition that section 117 has this federalism-enhancing purpose sheds some, although perhaps not much, light on what the scope of its limits might be. Whereas if it were a deliberately rights-protecting provision it would stand almost alone in the *Constitution*, as a federalism-enhancing provision it operates alongside a number of other provisions in the *Constitution* directed to similar ends (such as section 92 and section 118).[66]

Thus, how relentlessly section 117 pursues its objective falls to be assessed having regard to how much work is left unfinished by the balance of the provisions of the *Constitution* with which it shares a similar purpose. The right of a state resident to move freely between, and trade on equal terms in, other states (section 92), and the recognition as valid of that resident's home laws in other states (section 118), each contribute significantly to the objective of ensuring that a state resident is not treated as a foreigner when travelling interstate. This factor tends to point against an overly grandiose reading of section 117 which recognises only those limits that are strictly necessary for the states' continued survival.

C History

While the clause that became section 117 was the subject of serious debate during the Third Session of the Australasian Federal Conventions held in Melbourne in January to March 1898, that debate sheds little light on what the *limits* to section 117 might be.[67] The debate was marked by significant confusion

63 See George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (University of New South Wales Press, 4th ed, 2017) 22, 182. See also Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965) 101–2.

64 Pannam (n 59) 106.

65 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1976) 957–8. See also *Toomer v Witsell*, 334 US 385, 395 (1948), where Vinson CJ said of the corresponding provision of the *United States Constitution*, art IV § 2: 'The primary purpose of this clause … was to help fuse into one Nation a collection of independent, sovereign States'.

66 As to which, see Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) pt 6.

67 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664–91; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1780–802.

and disagreement as to the import and effect of the clause, which was originally drafted by Andrew Inglis Clark, and which, drawing upon the model provided by the *United States Constitution* in Article IV, section 2, clause 1 (the Privileges *and* Immunities Clause) and the Fourteenth Amendment, section 1, clause 2 (the Privileges *or* Immunities Clause),[68] was in the following terms:

> A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.[69]

Two major controversies emerged about this form of words:

1. First, what was the meaning of 'citizen'? (The term was not defined elsewhere in the draft *Constitution* Bill.) Was there a risk that this might be interpreted in a way that would prevent states from discriminating against non-European immigrants, such as by restricting their employment opportunities, as they openly intended to do?
2. Secondly, would the provision have the effect that a state resident who travels to another state carries with him or her all of the privileges and immunities of the first state, placing him or her in a better position than residents in the second state?

These controversies were ultimately resolved by substituting 'subject of the Queen' for 'citizen', and by restating the clause negatively (as *preventing* the imposition of a disability or discrimination against a non-resident within a state that would not apply equally to a resident), rather than positively (as *securing* privileges and immunities to residents wherever they may go). In the process, the language of 'privileges' and 'immunities' was replaced with the language of 'disability' or 'discrimination'.

At no point in the debates, however, did the framers discern the difficulty that has since led to the recognition of an implied limitation on the operation of section 117, namely, that if applied absolutely, it would have far-reaching consequences upon the ability of states to take measures that discriminated against non-residents for legitimate purposes.

Nor can it be convincingly argued that this difficulty is one that was intended to be resolved by application of the doctrines that had grown up around the equivalent provisions in the *United States Constitution*. As for the Privileges *or* Immunities Clause, the present relevance of this provision was diminished by the Court's holding in the *Slaughter-House Cases* that that clause applies only to the rights that citizens have by virtue of being citizens of the United States, rather than the rights they enjoy as citizens of the individual states:[70] by contrast, however, section 117 is concerned with state-based discrimination, rather than the curtailment of rights enjoyed by Australian citizens at large.

As for the Privileges *and* Immunities Clause, a candidate for application to the present context is the 'substantial reason' doctrine, which holds that the clause is not absolute in the protection it confers, but rather, permits of disparity of treatment

68 As to which, see Quick and Garran (n 65) 953, 956.
69 Ibid 953.
70 83 US (16 Wall) 36 (1872).

where there is a 'substantial reason for the discrimination beyond the mere fact that they are citizens of other States'.[71] However, although three United States Supreme Court decisions on the Privileges and Immunities Clause were cited during the debate on the clause that would become section 117,[72] none of these refer to the 'substantial reason' doctrine or describe anything like it; and indeed, the doctrine was not recognised by the Supreme Court until some 50 years later.[73]

Rather, prior to the recognition of the substantial reason doctrine, the only real limiting factor on the scope of Privileges and Immunities Clause was the 'fundamentality doctrine', that is, the doctrine that only 'fundamental' privileges and immunities attract the protection of the clause.[74] The doctrine is still good law in the United States. For example, in *McBurney v Young*,[75] the Supreme Court analysed the constitutional validity of Virginia's *Freedom of Information Act* by considering its impact upon four privileges and immunities on which the petitioners relied: the opportunity to pursue a common calling, the ability to own and transfer property, access to the Virginia courts, and access to public information. Rejecting the petitioners' argument, the Court held that the first three of these were not abridged by the impugned law, while the fourth was not a fundamental privilege or immunity which the *Constitution* protects.[76] This mode of reasoning, however, is ill-suited to the *Australian Constitution*, of which it has been rightly observed: '[I]s only an instrument of government, and not a constitution of liberty, and makes no attempt, except at one or two minor points, to safeguard individual rights against the encroachment of the legislatures, as does the *Constitution* of the United States'.[77]

This difference between the characters of the *Australian Constitution* and its American counterpart makes ours an unpromising receptacle for the fundamentality doctrine. Thus, it is difficult to see how either the fundamentality doctrine, or the substantial reason doctrine which substantially post-dated it, could have been intended by the framers to operate as a limiting factor to section 117, especially given that they consciously rejected a form of words based on 'privileges' and 'immunities' at all.

Thus, neither the Convention Debates, nor American jurisprudence of which the framers can be taken to have been aware, offer much illumination on the limits of section 117.

D Conclusions on Section 117

In summary, the text and history of section 117 are each silent on the question of limits. However, the purpose of section 117, being to promote national unity,

71 *Toomer v Witsell*, 334 US 386, 396 (Vinson CJ) (1948).

72 *Slaughter-House Cases*, 83 US (16 Wall) 36 (1872); *Strauder v West Virginia*, 100 US 303 (1880); *Yick Wo v Hopkins*, 118 US 356 (1886).

73 *Toomer v Witsell*, 334 US 386, 396 (Vinson CJ) (1948).

74 See Gary J Simson, 'Discrimination against Nonresidents and the Privileges and Immunities Clause of Article IV' (1979) 128(2) *University of Pennsylvania Law Review* 379, 381–2.

75 569 US 221 (2013).

76 Ibid 226–34 (Alito J).

77 William Pitt Cobbett, *The Constitution and Government of Australia: 1788 to 1919*, ed Anne Twomey (Federation Press, 2019) 81 [4.4.3] (citations omitted).

tends to support, albeit weakly, a construction that would leave more latitude to states, as other federalism-enhancing provisions of the *Constitution* complement the work of section 117 and render it less necessary for section 117 to be construed in an absolute way.

It remains then to consider the broader question: what is the function of states in the *Australian Constitution*?

IV THE FUNCTION OF STATES IN THE *AUSTRALIAN CONSTITUTION*

A Express References to States in the *Constitution*

The *Constitution* contains more than 300 references to a 'State' or 'States'. There would be little point in attempting to deal with them all (nor would it be possible in an article of this length). Rather, what follows is a survey of those provisions that shed some light on the functions that states might be thought to be constitutionally expected to perform.

The *Constitution* recognises two kinds of states: 'Original States' and 'New States'. The Original States are those six colonies that became part of the Commonwealth upon Federation,[78] and retained some of their pre-Federation character. As for New States, these may be admitted or established to the Commonwealth,[79] or formed out of existing states.[80]

The states shall have a constitution,[81] a Parliament,[82] a Governor,[83] an Executive Council,[84] ministers,[85] and courts,[86] including a Supreme Court.[87] They may have public service departments, save for those that have been transferred to the Commonwealth.[88]

The states have legislative power, which they may use to enact laws:

1. Prescribing the method of choosing federal senators for that state, including the times and places of elections of senators for the state;[89]
2. Disqualifying persons of any race from voting at state elections;[90]
3. Determining divisions for the election of members of the House of Representatives within each state;[91]

78 *Constitution* covering cl 6.
79 Ibid s 121. See generally Anna Rienstra and George Williams, 'Redrawing the Federation: Creating New States from Australia's Existing States' (2015) 37(3) *Sydney Law Review* 357.
80 *Constitution* s 124.
81 Ibid s 106.
82 Ibid ss 15, 107, 118.
83 Ibid ss 12, 15, 21, 110.
84 Ibid s 15.
85 Ibid s 44.
86 Ibid ss 51(xxiv)–(xxv), 77, 118.
87 Ibid s 73.
88 Ibid ss 69, 84.
89 Ibid s 9.
90 Ibid s 25.
91 Ibid s 29.

4. Prescribing the qualification of electors of members of the House of Representatives;[92]
5. Creating criminal offences;[93]
6. Referring matters to the Parliament of the Commonwealth;[94]
7. Providing for officers of a department of the public service to receive a pension, gratuity, retiring allowance, or other compensation;[95] and
8. Dealing with any of the subject matters over which it has concurrent legislative authority with the Commonwealth.[96]

States may participate in the fields of banking[97] and of insurance.[98] They may incur debts.[99] They may own property.[100] They may own railways,[101] for the construction and maintenance of which they may have financial responsibilities,[102] and they may decide whether to consent to railways being constructed and extended within their territory.[103] They may grant aid or bounties on mining for gold, silver or other metals, and on the production or export of goods.[104] They have the right to make reasonable use of the waters of rivers within their territory for conservation or irrigation.[105] They may impose levies on imports or exports to the extent necessary for executing their inspection laws.[106] They may regulate intoxicating liquids.[107] They must make provision for the detention in their prisons, and punishment, of persons convicted of Commonwealth offences.[108]

Overall, the picture painted by these provisions of the functions that states are constitutionally expected to perform is an incomplete one. Even compiled as they have been above, and read together as a whole, these provisions can scarcely be read as though they purported to codify the functions of states in any exhaustive way. Rather, they are scattered throughout the *Constitution*; are directed to a variety of purposes and concerns; and appear to deal with matters of state concern in a highly selective way. It appears that much of what states are expected to do has been left unexpressed. As will be seen, this was by design rather than by accident.

Before moving from the expressed to the unexpressed however, at least the following observations may be made about the provisions summarised above.

92 Ibid s 30.
93 Ibid s 44(ii).
94 Ibid s 51(xxxvii).
95 Ibid s 84.
96 Ibid s 51.
97 Ibid s 51(xiii).
98 Ibid s 51(xiv).
99 Ibid s 105.
100 Ibid ss 51(xxxi), 85.
101 Ibid ss 51(xxxiii), 98.
102 Ibid s 102.
103 Ibid s 51(xxxiv).
104 Ibid s 91.
105 Ibid s 100.
106 Ibid s 112.
107 Ibid s 113.
108 Ibid s 120.

First, many of the provisions above deal with the institutions and departments of states, such as those provisions relating to the states' executive, legislative and judicial branches. These provisions are silent as to what these state organs ought to be *doing* with their powers, but what they confirm is that the structures that make government possible are to continue in existence. These provisions provide some textual support for Brennan J's observation in *Street* that '[t]he necessity to preserve the institutions of government and their ability to function is an unspoken premise of all constitutional interpretation … for it is the necessity to preserve the *Constitution* itself'.[109] In the language of the question that this article is concerned with, these provisions show that one constitutional function of states is to continue existing and functioning effectively.

Secondly, but less directly, these provisions support a second possible function for states: the management of Crown lands. Such a purpose finds reflection in sections 91 and 100, which allow states to regulate mining for precious metals, and the management of rivers. It is consistent as well with the circumstance that a state will generally own lands within its territory, whether that is because it is an Original State that formerly owned the land as a colony, or because it is a New State to which territory was allocated upon its formation.

Thirdly, another candidate for a constitutional function of states which these provisions support is the maintenance of public order and safety. This is supported by the provisions that contemplate states having their own criminal laws (section 44(ii)) and prison systems (section 120). It is supported by section 113, which reserves to the states the right to regulate the consumption, sale and storage of intoxicating liquids. And it is supported by the recognition that states will have 'inspection laws' in respect of imports, exports, and goods passing into or out of the state (section 112), which Quick and Garran describe as

> those laws which a State may enact in the exercise of its police powers, providing for the official view, survey, and examination of personal property, the subjects of commerce, in order to determine whether they are in a fit condition for sale according to the commercial usages of the world.[110]

Other functions, more tenuously connected with the express provisions, might be added. State control over railways might imply a responsibility for transport and infrastructure. State insurance and banking perhaps suggests some responsibility for the performance of financial functions. Further examples might be imagined. But the more tenuous the connection an asserted state function has with the express provisions above, the greater the task of justifying why section 117 should give way when states are performing that function.

B Quick and Garran and the Unexpressed Functions

This brings us to the topic of those state functions that are unexpressed entirely. As already mentioned, it was not by accident that so much has been left unsaid in the *Constitution* about the functions that states are expected to perform. As Quick

109 *Street* (1989) 168 CLR 461, 513.

110 Quick and Garran (n 65) 943.

and Garran explain in the section of *The Annotated Constitution of the Australian Commonwealth* dealing with Chapter V (the States' Chapter):

> [T]he governing powers reserved to the States are not inferior in origin to the governing powers vested in the Federal Government. The States do not derive their governing powers and institutions from the Federal Government, in the way that municipalities derive their powers from the Parliament of their country … The States existed as colonies prior to the passing of the Federal *Constitution*, and possessed their own charters of government, in the shape of the Constitutions granted to them by the Imperial Parliament. Those charters have been confirmed and continued by the Federal Constitution, not created thereby … The Federal Government and the State Governments are in fact merely different grantees and trustees of power, acting for and on behalf of the people of the Commonwealth. Each of them has to exercise its powers within the limits and in the manner prescribed by the *Constitution*; each of them has different powers to be used in different domains for different purposes.[111]

Similarly, in their commentary upon section 106, Quick and Garran note that the *Constitution* 'withdraws powers and functions, but it does not abolish or interfere with any of the political institutions established in the States under their respective Constitutions'.[112] The states were therefore to 'retain their executive, legislative, and judicial departments as before, but shorn of some of their powers and functions'.[113]

However this again points us back to the starting question: what are the 'domains' in which, and the 'purposes' for which, states are expected to act? It is in their commentary upon section 107 that Quick and Garran go on to offer an intriguing answer. They first note, almost clairvoyantly, that

> [i]n the early history of the Commonwealth the States will not seriously feel the deprivation of legislative power intended by the *Constitution*, but as Federal legislation becomes more active and extensive the powers contemplated by the *Constitution* will be gradually withdrawn from the States Parliaments and absorbed by the Federal Parliament.[114]

They then explain the familiar distinction between the Federal Parliament's exclusive legislative powers under section 52, and the concurrent powers under section 51.

But, then, a third category of 'residuary legislative powers' is posited as follows:

> RESIDUARY LEGISLATIVE POWER – The residuary authority left to the Parliament of each State, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal, and social powers, including control over:
>
> *Agriculture* and the cultivation of the soil:
>
> *Banking* – State banking within the limits of the State:
>
> *Borrowing* money on the sole credit of the State:
>
> *Bounties* and aids on mining for gold, silver, or metals:
>
> *Charities* – establishment and management of asylums:

111 Ibid 928.
112 Ibid 931.
113 Ibid.
114 Ibid 933.

> *Constitution of State*: amendment, maintenance and execution of
>
> *Corporations* – other than foreign corporations and trading or financial corporations:
>
> *Courts* – civil and criminal …
>
> *Department of State Governments* – regulation of
>
> *Education*
>
> *Factories*
>
> *Fisheries* within the State:
>
> *Forests*
>
> *Friendly Societies*
>
> *Game*
>
> *Health*
>
> *Inspection* of goods imported or proposed to be exported in order to detect fraud or prevent the spread of disease:
>
> *Insurance* – State Insurance within the limits of the State:
>
> *Intoxicants* – the regulation and prohibition of the manufacture within the State of fermented, distilled, or intoxicating liquids:
>
> *Justice* – Courts:
>
> *Land* – management and sale of public lands within the State:
>
> *Licenses* – the regulation of the issue of licenses to conduct trade and industrial operations, within the State, such as liquor licences and auctioneers' licenses. Subject however to sec. 92.
>
> *Manufactures* – see factories:
>
> *Mines* and Mining:
>
> *Municipal* institutions and local government:
>
> *Officers* – appointment and payment of public officers of the State:
>
> *Police* – regulations, social and sanitary:
>
> *Prisons* – State prisons and reformatories:
>
> *Railways* – control and construction of railways within the State …
>
> *Rivers* …
>
> *Shops* …
>
> *Taxation* on order to the raising of revenue for State purposes …
>
> *Trade and Commerce* within the State …
>
> *Works* – construction and promotion of public works and internal improvements …[115]

A further list of 'restricted powers', being those powers reserved to the states subject to limitations in the *Constitution*, included bounties, naval and military forces, railways, rivers, taxation of federal property, and taxation generally.[116]

Similarly, in 1919, citing Quick and Garran, Cobbett offered the following compendious summary of what he variously described as the 'reserved' or 'residuary' powers of the States:

> Apart from the control by each of its own domestic organisation, they include the regulation of the administration of justice and police; municipal and local

115 Ibid 935–6.

116 Ibid 936.

> government; public health; education; poor relief; Crown Lands; woods and forests; water conservation and irrigation; pastoral, agricultural, mineral and manufacturing interests; railways; rivers and harbours; and the control and care of the Aborigines.[117]

Any student of Australian constitutional law trained after 1920 will, when reading through the above lists, immediately wonder what utility they can have in a post-*Engineers*[118] world where our law no longer recognises any 'reserved powers' doctrine, which would require a grant of federal legislative power to be interpreted in a way that does not intrude upon state reserved powers. But it is one thing to say that federal legislative power is to be construed broadly and without concern for any so-called reserved powers; it is another thing to say there can be no conception whatsoever of the functions that states are expected to perform. *Engineers* stands only for the former proposition. However, the latter proposition is the presently important one, because, as section 117 shows, a conception of natural or ordinary state functions may be relevant in constitutional settings that are entirely distinct from the question of how broadly sections 51 and 52 are to be construed. To recognise this is not to succumb to the 'whisper[s]' of 'pre-*Engineers* ghosts'.[119] It is simply to see that denying the existence of implied limitations on federal legislative power deriving from conventional conceptions of state functions does not require denying the constitutional relevance of those functions for all purposes.

Of course, even if it is accepted that there is an unstated premise of the *Constitution*, or an understanding that was accepted among the framers, that states would continue after Federation to discharge functions in relation the above subject matters, this would not conclusively answer the question of what the limits to section 117 are. There remains the question of how far section 117 must bend to permit the states to perform these functions. That depends in part on which of the seven approaches expounded in *Street* is to be accepted, and in part on which, if any, of the functions listed above should be recognised as a function that states are *constitutionally expected* to perform (as opposed to, for example, *conventionally understood* to perform).

But at the least, it is submitted that the above list is a starting point that cannot simply be dismissed out of hand. A number of the functions listed above – such as health, education and infrastructure – are not mentioned at all in the *Constitution*, and yet, whether on a 1900 view or a modern one, may have a strong claim to form part of a state's raison d'être.

To recognise the possibility of natural state functions of this kind existing, and being assigned some relevance in constitutional interpretation, may require something of an adjustment in current constitutional thinking. There is presently a debate as to whether a step in that direction was taken in *Spence v Queensland*, in which a majority of the High Court, in striking down a federal electoral funding law as invalid for lacking a sufficient connection with any head of legislative power, held:

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117 Cobbett (n 77) 463 [16.9.2] (citations omitted).

118 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

119 *Spence v Queensland* (2019) 93 ALJR 643, 654 [12] (Kiefel CJ, Bell, Gageler and Keane JJ).

> The section confers immunity from the application of State and Territory electoral laws that would otherwise limit the availability of funds to political entities to pursue a range of activities having no connection with federal elections. They include activities the regulation of which is within the heartland of State legislative power.[120]

This passage drew public remarks from Stephen Donaghue QC,[121] the Commonwealth Solicitor-General, at the CCCS Constitutional Law Conference held on 26 July 2019. The Solicitor-General confessed to his audience that he was unsure what precisely fell within 'the heartland of State legislative power', and that at a dinner with state and territory solicitors-general the previous evening, none had been able to offer a concrete answer. The Solicitor-General suggested that if the concept simply embodied '*Melbourne Corporation*-type ideas' – that is, that states should be protected from Commonwealth laws that significantly impair, curtail or weaken the capacity of states or state agencies to exercise their constitutional powers or functions[122] – then it is not to be feared, but that if it entails some thicker conception of particular functions being constitutionally reserved or assigned to states, then he might have more serious concerns with it. During question time, a state solicitor-general offered the alternative view that the concept of a 'heartland of State legislative power' had 'an appealing ring to it'. There is good reason to think that we are only at the beginning of this debate.

C Values

One final source of potential illumination as to the constitutional function of states is in the values and commitments that may be sourced in the *Constitution* more generally. The proposition that values may be discerned in the *Constitution* and then used as an aid in constitutional interpretation is one that has recently received greater attention in Australia owing in large part to the work of Professor Rosalind Dixon.[123] This 'functionalist' approach to interpretation has been described by Dixon as follows:

> [F]unctionalism, at its core, invites courts directly and openly to rely on substantive constitutional values, not simply more 'formal' legal sources. But in doing so, it insists that courts should also be able in some way to source the particular values they rely on in the text, history or structure of the relevant constitution. It thus offers a potentially attractive middle-path between the extremes of pure formalism and pragmatism or policy-oriented legal reasoning, which promises to combine the strengths of both – ie, transparency and predictability, and a strong commitment to the rule of law.[124]

While a functionalist approach to constitutional interpretation has not yet become mainstream, in the sense of being endorsed and applied by courts, there

120 Ibid 668 [80].

121 Whose permission to refer to these remarks in this article I am grateful to have obtained.

122 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

123 See generally Rosalind Dixon, 'The Functional *Constitution*: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455; Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018).

124 Dixon, 'The Functional *Constitution*: Re-reading the 2014 High Court Constitutional Term' (n 123) 456 (emphasis omitted).

are some signs that we may be edging in that direction. The High Court's recent decision in *Clubb v Edwards*,[125] which considered whether laws regulating protest outside abortion clinics impermissibly burdened the implied freedom of political communication – provides an example.

In the 'compatibility testing' stage of their analysis of the impugned laws, the plurality fastened upon the laws' tendency to promote dignity, and stated that

> a law that prevents interference with the privacy and dignity of members of the people of the Commonwealth through co-optation as part of a political message is consistent with the political sovereignty of the people of the Commonwealth and the implied freedom which supports it.[126]

Later, they observed that 'the burden on the implied freedom is justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom'.[127] Finally, in concluding, their Honours held that 'the justification of the prohibition draws support from the very constitutional values that underpin the implied freedom'.[128] Thus, this was not merely a conclusion that a particular legislative purpose was *not incompatible* with our constitutional system of government, but rather, an express recognition that particular values – the dignity of the individual and the sovereignty of the people – are themselves constitutional values, having consequences for how the *Constitution* is to be interpreted and applied. The decision suggests that a functionalist approach may yet find its place as one of the intellectual apparatuses used by courts in constitutional cases.

Returning to the present context, a functionalist approach directs attention to those particular constitutional values that might inform how we understand what states are expected to do. There are a number of constitutional values that might inform this question, although it must be noted that the content and existence of these values is inherently contestable.[129]

Sometimes, a relevant constitutional value will point more or less clearly in a single direction. One value potentially of this kind is government accountability,[130] which is secured politically through representative and responsible government (practically, by way of regular elections), and legally through the rule of law (practically, by way of judicial review). This value has been frequently affirmed by courts. Its acceptance as an animating idea of Australian constitutional law may yield particular answers to some questions as to the limits of section 117: to take just one example, it could plausibly point against a reading of section 117 that would allow states to charge differential court fees based on residence, as this would undermine the ability of out-of-state residents to seek judicial review remedies in relation to governmental decisions affecting them.

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125 (2019) 267 CLR 171.

126 Ibid 198–9 [60] (Kiefel CJ, Bell and Keane JJ) (citations omitted).

127 Ibid 204 [82].

128 Ibid 209 [102].

129 As Dixon acknowledges in Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3.

130 See Janina Boughey and Greg Weeks, 'Government Accountability as a "Constitutional Value"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99.

However, more often, a given value will not pull in one single direction, but multiple directions at once, especially where the value embodies within itself a tension between opposing forces. An example of this is the value of federalism. Federalism is a complex value which in turn involves a number of sub-values, including national unity, choice and competition (or 'democratic experimentalism'), localism (or 'government close to the people'), checks on government excess through decentralisation and distribution of powers, and greater opportunities for political participation. For this reason, federalism is perhaps better described as a 'commitment' or 'principle' rather than a 'value', given how many other values are nested within it. Federalism involves a recognition that in our system of government, states have a particular role to play that is distinct from that of the Commonwealth, and that that role may involve substantive functions such as the provision of particular essential services to state residents. As Amelia Simpson notes:

> Where, by implicit agreement, certain aspects of life in a federation are organised and administered at the sub-national level, one state's exclusion of outsiders can be seen as representing more than self-interest. Localism in that context represents a state's fulfilment of its part of the national compact, a gesture that does nothing to undermine national unity.[131]

But to observe the existence of this federalist dynamic is only to appreciate the backdrop against which the question must be considered; not to answer it. How the value of federalism informs the limits of section 117 in relation to a specific function putatively assigned to states must be determined on a case-by-case basis, and is likely to give rise to further questions still. For example, is the existence of a consensus between states as to the functions they ought properly perform within the federal framework relevant to the question of the constitutional limits to section 117? Is the fact that a particular service is paid out of the revenues raised by a state a legitimate basis for differential treatment, and is that answer any different in a post-*Uniform Tax Cases*[132] world where much of state revenue now depends upon Commonwealth grants?[133] Should the limits to section 117 be interpreted more expansively so as to discourage one state from 'free-riding' on the social services of other states, which might prompt a nationwide race to the bottom in service provision?[134] Should they be interpreted more expansively where a state has deliberately limited a benefit to its own residents because it was concerned to avoid, for reasons of comity with other states, encouraging inter-state benefit shopping and thereby undermining the policy of other states that have deliberately chosen not to confer that same benefit?

Again, the point of this article is not to attempt to resolve these systemic and value-laden questions, but rather to make the case for why, in an appropriate case calling for a clarification of the limits to section 117, the Court will need to engage with and answer them.

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131 Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (n 53) 664–5 (citations omitted).

132 *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575.

133 Mathieson (n 60) 419.

134 Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (n 53) 665.

V CONCLUSION

The argument of this article has been that the limits to section 117 cannot be discovered merely by intuition. To conclude that a function is one that 'naturally' or 'ordinarily' falls to be performed by states is to conceal the preceding step of the reasoning, in which judges necessarily form a view as to the functions that states are constitutionally expected to perform. To form such a view is to develop a theory of the role of states. Such a theory ought to be developed by courts, and it ought to be articulated and explained, rather than simply applied ad hoc.

In developing such a theory, some guidance may be derived from the text, purpose and history of section 117 itself. However, as the need for an exception to this provision was not noticed until comparatively recent times, these sources only provide so much assistance. Far more assistance is to be gained by considering those constitutional sources that shed light on what it is that states are constitutionally expected to do. These sources are highly open-textured, and are capable of supporting a variety of answers to the question of what the limits to section 117 are. That does not deny their usefulness for present purposes; rather, it simply reflects the broader indeterminacy that is so often a feature of constitutional reasoning. It will be for the courts to deploy these sources in order to arrive at a definition of the limits to section 117; the purpose of this article has simply been to show why this must be done, and how it might be.