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Neo-Elyian theory, therapeutic jurisprudence and the constitutional judgment

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Abstract

This paper seeks to understand modern comparative reflections on John Hart Ely's work through Comparative Political Process Theory or Comparative Representation-Reinforcing Theory, and how such approaches can be augmented through the lens of therapeutic jurisprudence. It argues that the legitimacy of courts' actions (or inactions) in such settings can be understood through their potential to strengthen democratic institutions rather than do them harm, acting as a re-set or recalibration of the democratic landscape. By buttressing representation-reinforcing approaches with therapeutic understandings, curial interventions designed to shift longstanding democratic impasses or blind spots are likely to carry much greater institutional legitimacy. By applying this lens to a series of case studies, the paper highlights the normative contribution that therapeutic jurisprudence can provide to representation-reinforcing action and to the design of such approaches.

Keywords: Comparative Political Process Theory; Comparative Representation-Reinforcing Theory; Therapeutic Jurisprudence; Legitimacy

I. Introduction

The 'counter-majoritarian difficulty'[1] posed by judicial review by constitutional courts is far from a new conundrum. Constitutional democracy inevitably results in an ongoing institutional tussle seeing courts trying to strike the balance between protecting against constitutional infractions or abuse of the democratic process while not over-stepping or

[1]AM Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press, New Haven, CT, 1986) 16. See also works such as, JH Ely, *Democracy and Distrust – A Theory of Judicial Review* (Harvard University Press, Cambridge, MA, 1980) 88; J Waldron, *Law and Disagreement* (Oxford University Press, Oxford, UK, 1999); CR Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, Cambridge, MA, 2001); R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, MA, 2004); M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, NJ, 2008); R Dworkin, *Justice for Hedgehogs* (Harvard University Press, Cambridge, MA, 2011) Chapter 18; R Doerfler and S Moyn, 'The Ghost of John Hart Ely' (2023) 75 *Vanderbilt Law Review* 769.

threatening the democratic legitimacy of majoritarian governments. As Kavanagh expounds this involves both assessments of capacity and legitimacy:

> The big question is which institutions are best placed to fix it, and how they can legitimately and effectively do so. No doubt, courts have a role in reinforcing the values of representative democracy. But we should be wary of presenting judges as the saviours of democracy, lest they replace rather than reinforce democratic government.[2]

This paper seeks to understand Comparative Representation-Reinforcing Theory or Comparative Political Process Theory and its approaches to 'representation-reinforcing'[3] judicial review and how the institutional legitimacy of such action can benefit from a therapeutic jurisprudential lens. This lens focuses on the degree to which a higher court's action or inaction in response to a democratic threat can be cast as a therapeutic or reverential moment re-setting or re-integrating the democratic landscape. It argues that the legitimacy of courts acting in representation-reinforcing settings, while inevitably shaped by the particular legal, political and cultural context, can be augmented through a conception of them operating as 'therapeutic agent[s]'[4] in this way. While the therapeutic lens is not a panacea for all post-Elyian concerns and while what constitutes the democratic well-being of the state is not an uncontested notion, the paper suggests that by casting representative-reinforcing court action through this lens (and being transparent about the challenges the judiciary faces in doing so), court action is likely to accrue greater legitimacy. This is because it has the potential to strengthen democratic institutions rather than do them harm or at least highlight the path for greater democratic integration in the future. The paper therefore seeks to foreground therapeutic jurisprudence approaches as buttressing the legitimacy of representation-reinforcing actions by constitutional courts and demonstrating this through some exemplar case studies. It therefore seeks to make a normative contribution to the question of 'how' representation-reinforcing action by the judiciary should proceed both in terms of its substantive remedial effect and the form that a representative-reinforcing judgment takes.[5]

In this burgeoning new field of scholarship, the terminology is ambulatory.[6] Post-Elyian scholarship, such as Gardbaum's[7] formative work, refers to 'Comparative Political Process Theory'. Dixon has developed this through the language of 'Comparative Representation-Reinforcing Theory'[8] or 'Responsive Judicial Review'.[9] This paper does

[2]A Kavanagh, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1483, 1489.

[3]Ely (n 1) 88.

[4]DB Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy and Law* 220.

[5]Kavanagh, 'Comparative Political Process Theory' (n 2) 1486.

[6]J Fowkes, 'Transformative Process Theory' (2024) *Global Constitutionalism* 1, n 10.

[7]S Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1429, 1431. See also S Gardbaum, 'Comparative Political Process Theory: A Rejoinder' (2024) 18(4) *International Journal of Constitutional Law* 1503; S Gardbaum, 'Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa' (2019) 9 *Constitutional Court Review* 1.

[8]See R Dixon, 'On Responsive Judging' (2024) *Judicature International*, available at <https://judicature.duke.edu/articles/on-responsive-judging/>

[9]R Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford, UK, 2023) 2, in which Dixon expressly aligns her work with this 'new emerging school'.

not seek to settle on the appropriate terminology but employs the term 'Comparative Representation-Reinforcing Theory' (or ***CRRT***) adopted in the Introduction to this Special Issue.[10] While the focus here is upon judicial review and the role of the courts, it is accepted[11] that CRRT does not foreclose or ignore the potential for actions by other players within the body politic and why it is that sometimes actions by courts are not what is required to unblock democratic processes.

Part II of the paper sketches out the CRRT scholarly landscape. Part III outlines the nature of therapeutic jurisprudence and how it can support the constitutional legitimacy of court action. Part IV seeks to examine a series of CRRT case examples from this therapeutic perspective. Part V concludes.

II. The Comparative Representation-Reinforcing Theory landscape

In John Hart Ely's renowned book, *Democracy and Distrust*, his dedication for Earl Warren claimed,

> *[y]ou don't need many heroes*
>
> *if you choose carefully.*

For CRRT, Ely, who died nearly 21 years ago, is very much the hero.[12] *Democracy and Distrust* took a footnote in *Carolene Products* and developed from this a rich but modest constitutional exegesis on judicial intervention by the Supreme Court of the United States fashioned on representative democratic lines. His participatory 'representation-reinforcing'[13] theory was based on 'malfunctioning' 'process' where the 'ins are choking off the channels of political change' to keep outsiders in their place or whether a 'minority' is being denied 'the protection afforded other groups by a representative system'.[14] For Ely, the Supreme Court of the United States have a special supervisory role to impartially monitor these classes of democratic failure. While Ely was clear that this process-based 'evaluation' would not be free of 'judgment calls', his renowned work has still been cavilled for not sufficiently acknowledging the unavoidably substantive assessments involved in such curial intervention.[15] As Kavanagh explains:

> Ely's book survived this devastating critique, in part, because the distinction between process and substance was not fatal to his central claim that courts should play a "representation-reinforcing" role when upholding rights. Moreover, despite the fact

[10]R Dixon, 'Courts and Comparative Representation-Reinforcement Theory' *Global Constitutionalism Special Issue (forthcoming).*

[11]Gardbaum (n 7) 1431.

[12]See, e.g., HH Kho, 'Choosing Heroes Carefully' (2004) 57 *Stanford Law Review* 723, 726, 'just think, even as I speak, there is a college kid or law student somewhere who is opening up *Democracy and Distrust* for the very first time.'

[13]Ely (n 1) 88.

[14]Ely (n 1) 103.

[15]See, e.g., LH Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063, 1064–5; M Tushnet, 'Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' (1980) 89(6) *Yale Law Journal* 1037–62; DR Ortiz, 'Pursuing a Perfect Politics: The Allure and Failure of Process Theory' (1991) 77(4) *Virginia Law Review* 721–46; JS Schacter, 'Ely and the Idea of Democracy' (2004) 57(3) *Stanford Law Review* 737–60.

> that the distinction between process and substance was roundly discredited, the process-orientation of Ely's theory nonetheless lent it an aura of democratic legitimacy which still hangs over it today.[16]

The comparative post-Elyian scholarship brushes off and polishes Ely's 'representation-reinforcing' handiwork to consider how it can be placed in a much broader and contemporary constitutional frame.[17] Consciously interdisciplinary and global in reach, this new comparative scholarship is progressively building a multi-layered and practically informed understanding of the opportunities and hazards of judicial review crafted to buttress democratic processes, at least once constitutional interpretivism is exhausted.[18] As Dixon recognizes:

> democracy is not the only value a constitutional court can, or should, consider in this context: other values include individual freedom, dignity … formal and substantive equality, and a commitment to the rule of law. And courts can and should play a role in enforcing these commitments.[19]

As a result of this, the new theoretical approach is much more expansive than Ely's scheme allowed. As Gardbaum's thought-leading work has delineated, the new Comparative Political Process Theory must extend to and understand a broad range of constitutional systems as well as 'what types of political process failures exist for courts (and others) to police, and (2) what types of judicial review (or other protective mechanisms) they may call for'.[20] It also is progressively cataloguing international examples of both judicial intervention and restraint as well as other democratic institutional breaks on systematic or transitory democratic dysfunction.[21]

The scholarship is continuing to develop in new ways. Dixon's 'responsive theory of judicial review' expressly aligns itself with this 'neo-Elyian'[22] CRRT approach by developing a toolbox for courts as to how to operate as a bulwark against democratic weaknesses and failings such as 'democratic blinds spots' and 'inertia'.[23] It casts courts as having the potential to be well placed to do this by paying attention to aspects such as their 'judicial voice' and 'narrative' and also to gaps in their fitness to act and the hazards of curial overreach.[24] While Dixon accepts that courts are not and should not be the sole

[16]Kavanagh, 'Comparative Political Process Theory' (n 2) 1484.

[17]While not comprehensive see e.g., Gardbaum (n 7); Kavanagh (n 2); R Gargarella, 'From "Democracy to Distrust" to a Contextually Situated Dialogic Theory' (2020) 18(4) *International Journal of Constitutional Law* 1466–73; R Dixon and M Hailbronner, 'Ely in the World: The Global Legacy of Democracy and Distrust Forty Years on' (2021) 19 *International Journal of Constitutional Law* 427; MJC Espinosa and D Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19(2) *International Journal of Constitutional Law* 548–68; See also papers in this Special Issue including: R Dixon and PJ Yap, 'Ely's Children? Courts and Comparative Representation-Reinforcement' (2024) *Global Constitutionalism* (forthcoming); Fowkes (n 6).

[18]Dixon, *Responsive Judicial Review* (n 9) 4–5.

[19]Dixon, *Responsive Judicial Review* (n 9) 5.

[20]Gardbaum (n 7) 1430.

[21]See e.g., S Jhaveri, 'Interrogating Dialogic Theories of Judicial Review' (2019) 17(3) *International Journal of Constitutional Law* 811–35.

[22]Dixon, *Responsive Judicial Review* (n 9) 2.

[23]Dixon, *Responsive Judicial Review* (n 9) 4.

[24]Dixon, *Responsive Judicial Review* (n 9). See also R Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' (2021) 59(2) *Columbia Journal of Transnational Law* 298–363.

institution tasked with democratic protection and that courts' and judges' appropriateness for the task is context dependent, she makes the case that they do possess 'institutional advantages' which can serve the cause of democratic safeguarding.[25] However, it is not necessarily the case that court action is always what is required. As Dixon notes, court action can represent a 'risk' to 'democratic responsiveness', something magnified by the fact that courts are typically impeded as to when and how they respond.[26]

One of the prime challenges for CRRT is determining the legitimacy and capacity for courts to intervene as a matter of 'constitutional morality'[27] within the democratic landscape of crisis and resolve, even with weak forms of responses, particularly within its broader comparative recognition of the sorts of threats that can arise. For this reason, the variableness of democratically responsive judging must be 'calibrated' to the particular constitutional culture and legal and institutional dynamics at play. Therapeutic jurisprudence does not claim to resolve the counter-majoritarian contest or be determinative of the judicial remedy or response. Instead, it provides a way to imbue court action within the inevitably entangled democratic thicket with greater constitutional legitimacy and institutional respect where it does occur.

III. Therapeutic jurisprudence and constitutional legitimacy

Therapeutic jurisprudence provides an interdisciplinary 'lens or heuristic' by which to study legal interactions.[28] It is designed around the notion that legal action cannot be separated from its role as a 'social force', which can have therapeutic or counter-therapeutic impacts on individuals or the community.[29] Applied to the CRRT context, therapeutic jurisprudence requires legal and constitutional imperatives to be abided by, while at the same time seeing the constitutional dispute as a potential opportunity for a democratic therapeutic moment. It therefore can aid positioning courts as having an established institutional claim for resolving the almost 'unresolvable' problems of the democratic state. This may involve action or inaction on the court's part but, importantly, can allow for a degree of post-dispute closure, in which elected representatives can continue the work of governing with a sense of the blockage or wrangle having been repaired or at least re-set.

The therapeutic judgment and judicial legitimacy

Having its origins in mental health law, in the writings of Wexler and Winick,[30] therapeutic jurisprudence is intentionally interdisciplinary and:

[25]Dixon, *Responsive Judicial Review* (n 9) 4, 182–5.

[26]Dixon, *Responsive Judicial Review* (n 9) 4, 182.

[27]Dixon, 'On Responsive Judging' (n 8); Kavanagh, 'Comparative Political Process Theory' (n 2) 1485–6.

[28]DB Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy and Law* 220, 221.

[29]D Wexler, ML Perlin, M Vols, P Spencer and N Stobbs, 'Editorial – Current Issues in Therapeutic Jurisprudence' (2016) 16(3) *QUT Law Review* 1.

[30]B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, Durham, NC, 2003); D Wexler and B Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, Durham, NC, 1996).

> examines the role of the law as a therapeutic agent and its enormous potential to heal. Therapeutic jurisprudence looks not merely at the law on the books but rather at the law in action-how the law manifests itself … The underlying concern is how legal systems actually function and affect people.[31]

As this suggests, its primary focus has tended to be on the more micro level of litigants and the psychological impact of legal interactions. As an interdisciplinary concept, it places a particular premium on curial process and procedural justice notions,[32] whereby litigants feel heard, respected and accorded dignity by the court.[33] It therefore mirrors in some senses the scholarship identifying process-based judicial review justifications such as that of Harel and Kahana.[34] However, therapeutic jurisprudence, as an overarching concept, is also substantively and consequentially focused, which can have much wider societal implications and, importantly, can feed back into strengthening the legitimacy of court action.

Even beyond the individual, it is the scope for therapeutic jurisprudence to operate at the societal level,[35] and particularly at the 'macro' level of the democratic system more broadly, which is most pertinent to the CRRT context. While the focus of this paper is on superior constitutional courts, courts at all stages in the judicial hierarchy can be uniquely placed as institutions to provide this respectful and even reverential type of decision-making. But within the power-grabbing sites of political–constitutional disputes, it has the potential to provide a more democratically educative and civil form of ratiocination. The therapeutic approach therefore ultimately means that the constitutional legitimacy and capacity of court action can be conceived through this heuristical frame.

The citizenry's faith in institutions, although changeable, is vital for an institution's action to be accepted and ultimately, obeyed. With courts it is no different but arguably even more important when their actions can attract counter-majoritarian concerns.[36] A therapeutic judgment, both in terms of its orders and how those are explained by the bench, can feed into perception of its legitimacy, in a multidimensional legal (and political), sociological and/or moral sense.[37] This is clearly also shaped by bundled perceptions of curial capacity, judicial independence and impartiality, which coalesce in a mutually reinforcing way.[38] For example, a judgment that violates separation of powers considerations will fail on both capacity and legal/political legitimacy lines. Similarly, while a decision that suggests partiality on behalf of a judge or judges will be

[31]D Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17, 20.

[32]See e.g., T Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, NJ, 1990).

[33]See, S Murray, '"A Letter to the Loser"? Public Law and the Empowering Role of the Judgment' (2014) 23(4) *Griffith Law Review* 545–68.

[34]Y Eylon and A Harel, 'The Right to Judicial Review' (2006) 92 *Virginia Law Review* 991–1022; A Harel and T Kahana, 'The Easy Core Case for Judicial Review' (2010) 2 *Legal Analysis* 227–56.

[35]D Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy & Law* 220, 224 accepting the potential for it to relate well beyond the instance of the individual.

[36]A Bickel, *The Least Dangerous Branch – The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, New Haven, CT, 1986).

[37]RH Fallon, 'Legitimacy and the Constitution' (2005) 118(6) *Harvard Law Review* 1781, 1787; Dixon, *Responsive Judicial Review* (n 11) 93.

[38]J Grossman, 'Review Essay: Judicial Legitimacy and the Role of the Courts: Shapiro's Courts' (1984) *American Bar Foundation Research Journal* 214, 215; P Nonet and P Selznick, *Law and Society in Transition – Towards Responsive Law* (Routledge, London, UK, 1978) 77. See also Dixon, *Responsive Judicial Review* (n 9) 175–6.

of questionable legitimacy on any number of these bases. There are however other influences at work. This means that the judgment itself can only go so far when it occurs within a complex web of historical, social and political forces. However, judgments fashioned to reflect upon this complexity and the institutional dynamics at play have a much greater chance of resonating with the body politic and even with the community at large.

Putting CRRT in a therapeutic frame

Therapeutic jurisprudence scholarship can contribute to CRRT a new frame by which to unpack the legitimacy of a representation-reinforcing action as a catalyst for greater social reconciliation or even democratic restoration in times of crises. It therefore can contribute a normative piece as to how representation-reinforcement can and should be conducted by courts and with a heightened claim for institutional legitimacy when it occurs.

From a CRRT perspective, the more respectful and in-tune a judgment is with societal–political tensions and relational challenges, even where it is far from a strong form of view, the greater the potential for it to legitimately resonate as a democratic-reinforcing or democratic-enervating response. This is however far from suggesting that the therapeutic lens is the same as advocating for a particular ideological objective or a definite form of curial response.[39] Inevitably, constitutional courts are the sites of conflicting claims with societal disagreements reflected in populist majority–minority skirmishes and discord. Democratic claims, whether brought by marginal or majority interests, should not be silenced or privileged by the judiciary, removed from their legal basis, under the CRRT veil. The benefit of applying the therapeutic frame is it allows for an appraisal of such action for what it is and as potentially compromising the court's independence and institutional legitimacy. This is not to suggest that such extreme examples would only be questionable through this lens, but it provides a mechanism to assess judicial review couched as representation-reinforcing in terms of its sustained beneficial impact on the democratic process and on the institutions that serve it. The obvious contention is that such a response that does not have this impact may fall short of being representation-reinforcing in the first place; however, this is not necessarily the case depending on how and when the court intervenes and the period over which the impact is assessed.

Instead, a therapeutic jurisprudence-informed approach to CRRT allows the court to embark on a representation-reinforcing action with due respect for the constitutional role it plays and the degree to which its action or inaction might in fact threaten long-term democratic stability.[40] It imbues courts with an appreciation of their role as a 'therapeutic agent' within the democratic system such that how and when they act can have significant implications for how political actors and the democratic community proceeds after a breach. The court, for example, might sensitively spotlight democratic process gaps or minority interests while acknowledging that the judicial arm cannot and should not always engage in a definitive form of intervention both from the perspective of their legitimacy and capacity to do so. When constitutional requirements necessitate a stronger form of response, it can respectfully highlight the boundary that has been crossed while emphasizing the importance of the legislature's role without unduly shaming or

[39]Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (n 28) 220.
[40]Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (n 28) 224.

discrediting it. It therefore comes to intersect with Kavanagh's work on 'inter-institutional comity', which blends both inter-agency 'support' and 'self-restraint 'in the interests of 'just government'.[41] Therapeutic jurisprudence within the CRRT space aspires for courts to exist within constitutional bounds, as almost democratic peacekeepers, at least as far as courts can take this, knowing that 'wins' can only be pyrrhic if they are not attuned to the political–culture–legal landscape and the historical tensions and touchpoints that will long outlive any constitutional judicial determination.[42]

One of the prime challenges for CRRT has been legitimizing representation-reinforcing action by courts and delineating what should occur and when. Not all action cast as representation-reinforcing is necessarily consistent with judicial capacity or claims of its legitimacy. The risk is of course that separating out the work of democracy-stabilizing judges from 'ideological' 'contestation' or value-based choices is an impossible task.[43] What therapeutic jurisprudence does is allow for a crystallization of this awareness. It is live to the fact that courts will not always act in an authentically democratically 'therapeutic' sense but means that judicial review can be viewed as having therapeutic or anti-therapeutic impacts with any claim to legitimacy being augmented by the former over the latter. The shape this takes in a particular democracy will vary, but it does mean that judges need to be cognizant of the damage they can do to the political process if they overstep and that often erring on the side of the softer approach is likely to do less democratic harm. It means that both the *remedial response* and the *judicial explanation* need to be attuned to the democratic failure at hand and the particular context in which it has occurred.

The therapeutic jurisprudence lens as encompassing the representation-reinforcing *judicial explanation* resonates with Dixon's scholarship calling for a 'responsive judicial voice', referring not only to who writes an opinion but also the 'tone' and 'narrative' it adopts.[44] Dixon explains how:

> If courts make careful and sensitive choices about judicial authorship, tone, and narrative, therefore, they can actively enhance both the actual and perceived legitimacy of their decisions; whereas if they make those decisions indiscriminately, or without regard to these concerns, they will often find that their decisions lack sociological acceptance and legitimacy.[45]

Along these lines, Dixon advocates framing decisions so as to 'sho[w] a posture of respect towards the losing party', which is something therapeutic jurisprudence conceives as vital for 'procedural justice'. Procedural justice research suggests that court decisions are much more likely to be respected when they are designed to validate the losing party's experience and worded in a legally empathic tone.[46] Representation-reinforcing judgments which

[41]A Kavanagh, *The Collaborative Constitution* (Cambridge University Press, Cambridge, UK, 2024) 98–101.

[42]See, e.g., R Mann, 'Non-Ideal Theory of Constitutional Adjudication' (2018) 7(1) *Global Constitutionalism* 14–53. See also Y Tew, 'Strategic Judicial Empowerment' (2024) *American Journal of Comparative Law* 1; Kavanagh, *The Collaborative Constitution* (n 41) 102–3.

[43]Doerfler and Moyn (n 1) 811–12. Ely (n 1) 44.

[44]Dixon, *Responsive Judicial Review* (n 9) Ch 8.

[45]Dixon, *Responsive Judicial Review* (n 9) 235. See also Dixon, 'Strong Courts' (n 24) 326.

[46]J Thibaut, L Walker, S LaTour and P Houlden, 'Procedural Justice as Fairness' (1974) 26(6) *Stanford Law Review* 1271; T Tyler, *Why People Obey the Law* (n 32); T Tyler (ed), *Procedural Justice* (Routledge, London, UK, 2005); S Murray, *The Remaking of the Courts – Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (The Federation Press, Alexandria, 2014) 12.

acknowledge the impact of the dispute on both parties and emphasize that any losing party's case was genuinely heard and considered by the court are exactly what a therapeutic jurisprudence lens prioritizes. It means that the litigant and their supporters can begin to process the result with a heightened sense that their case has been given a genuine airing. Its effect may not be radical; not all wounds will readily heal. But it allows for a new democratic conversation as to where groups' interests stand and what resolution might be possible even it is provokes a degree of backlash. It can therefore importantly buttress CRRT action with greater constitutional legitimacy as a result of the social integrating power it may carry. In the same way, a decision may therapeutically misfire where it takes too strident a line or falls foul through its judicial tone, misjudging the frail nature of the democratic relationships at stake and having an unnecessarily deleterious impact on the political process as a result. But it is about substance and not just form as the sensitive tone that a judgment adopts cannot hope to overcome an asserted anti-therapeutic impact when this is the inevitable result of the court's remedial interference.

Allowing CRRT to operate as a site of 'therapeutic' action also means that the *remedial response* granted by the court is attuned to its democratic impact on the society more broadly. It may be that, during an intense political crisis, a decision which is weak remedially adopts strong but respectful and delicate language. This therapeutic approach may be designed to bring the political players to a better understanding of the moral elements at play and the commonality of their positions, gauging that a political response is likely to be the most effective in the circumstances. Or, a judgment that decides to delay intervening to addressing a longstanding constitutional issue may be influenced by particular political or institutional pressures operating at the time but may lay the groundwork for a stronger response when the time is right.[47] For this reason, the approach also resonates with Fowkes' recent work on 'transformative constitutionalism' and its blending into 'transformative process theory'.[48]

Boundaries and limitations

The therapeutic lens has some clear boundaries that are just as applicable to its work within the CRRT context. While therapeutic jurisprudence conceives of a court interaction as having the potential to positively or negatively affect societal or even democratic well-being, the prioritization of the positive effect is only a legitimate option when this can occur consistently with other legal or constitutional requirements. As Winick contends, '[w]hen therapeutic and other values served by law conflict, therapeutic jurisprudence cannot resolve the conflict. Rather, therapeutic jurisprudence helps to make this conflict more visible and sharpens the issues for further debate'.[49] For CRRT, this means that a therapeutic jurisprudential lens would only advocate the therapeutic crafting of a democratic-reinforcing remedial response, where this would accord with the state's constitutional guard rails. It may be that a party simply lacks standing before the court. In such an instance, the court's judgment can respectfully reflect through the judge or

[47]Dixon, 'Strong Courts' (n 24) 317–18. See also Mann (n 42) 49–50; R Dixon and S Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 683.

[48]Fowkes (n 6).

[49]B Winick, 'Therapeutic Jurisprudence: Enhancing the Relationship between Law and Psychology' (2006) 9 *Law & Psychology – Current Legal Issues* 30, 34. Note also Gardbaum's observation that Comparative Political Process Theory 'need not be justified as the exclusive, or even primary, mode of judicial review' ('Comparative Political Process Theory' (n 7), 1455).

judges' explanation as to why the interests cannot be heard at that time while clearly refraining from intervening further. The response, even if therapeutically crafted cannot, in the remedial form it adopts, trump other legal or constitutional imperatives and must stop at that point or risk being an illegitimate form of judicial review.[50] In the same way, it may be the constitutional strictures require a distinct curial intervention to unblock a particular process or strike down an invalid provision in spite of a degree of collateral institutional harm or relational impairment.

The therapeutic frame is a tool which may struggle to find its bearings in contests where the normative claim is elusive. In such settings, however, there needs to be an awareness of the complexity of a CRRT intervention. Sometimes courts are not the right actors to intervene in a political or constitutional crisis, and this will inevitability vary between different parliamentary democratic contexts. But it is also the case that curial capacity may be questionable when the resource differential between the parties means the court is not best placed to act as a therapeutic agent. As Jhaveri explains, 'the[ir] lack of democratic or technocratic credentials makes them unresponsive to public and political sentiments on constitutional issues'.[51] An awareness of this institutional disadvantage means that a representation-reinforcing intervention which may do more harm to democratic institutions may not be justifiable or, where it is, may magnify the tendency for a more temperate judicial approach.

It is also the case that therapeutic jurisprudence should not become a front by which tender judicial rhetoric becomes an artful way of boosting particular political interests.[52] Misappropriating it in this way risks disrupting the institutional legitimacy of courts and the rule of law more broadly. Instead, a therapeutic jurisprudential informed CRRT approach is about analysing the curial role with a kind of 'democratic empathy' to the nature of the dispute and the ripple effect it may have on the state at large. Accordingly, it also allows for a critical eye on judicial narratives which could in fact be masking underhanded or dubious motives.

Conclusions from a therapeutically informed CRRT

Ultimately, the therapeutic lens contributes to the positioning of a CRRT judgment, as a matter of process and substance, as potentially a positive or negative force on the democratic landscape, at least where this can be achieved without sidelining other values. While this is not to suggest that a therapeutic approach will be a panacea for all CRRT concerns, a democracy-reinforcing curial action (or inaction) viewed through this lens is more likely to be vindicated when it can genuinely operate to be facilitative of democratic repair, or where it is at least cast with an acute awareness of its potential to magnify democratic impasses or division. In the next Part, the paper explores how the therapeutic jurisprudential framing can be critically applied to the practical context of three selected CRRT case studies from Canada, the UK and Australia.

[50]See also Dixon, *Responsive Judicial Review* (n 9) 5.

[51]Jhaveri (n 21) 813–14. See also V Radmilovic, 'Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond' (2010) 43(4) *Canadian Journal of Political Science* 843, 851; Dixon, *Responsive Judicial Review* (n 9) 183.

[52]Dixon has equally recognized this as a risk with 'responsive judging' approaches: *Responsive Judicial Review* (n 9) 267–9.

IV. CRRT case studies within a therapeutic frame

This Part looks at three case studies from Canada, the UK and Australia. These common law system examples have been selected from broadly similar democracies as they provide instances of what could be perceived as representation-reinforcing actions in times of crisis (Canada and the UK) alongside a more quotidian type example (Australia) representing a spectrum of curial responses from advisory to strong action to inaction. While the case studies are inevitably limited, and showcase generalist apex courts rather than bespoke constitutional courts, the intention is to show how the legitimacy of constitutional court action in the CRRT context action can be conceived within a therapeutic jurisprudential frame in an applied sense.

Quebec Secession Reference

The classic example of the *Quebec Secession Reference*[53] saw the Supreme Court of Canada provide a unanimous advisory opinion on whether Quebec could unilaterally secede from the Canadian federation. While ultimately finding that unilateral secession was not constitutionally possible, the Court made it clear that its legal opinion was quite separate from and did not 'usurp any democratic decision that the people of Quebec may be called upon to make'.[54] It affirmed the multiple constitutional values of the Canadian state including the rule of law, minority interests and democracy as well as the importance of dissent being accorded a place.[55] The Court stated that:

> considerable weight [should] be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means.[56]

The Court went onto find that this would place a duty on key governmental stakeholders to go to the negotiating table with Quebec.[57] This was because of the imperative of properly hearing and responding to the 'the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada'.[58]

Importantly, it recognized that the Court had a particular legal role to play within the governmental structure, which meant that any negotiations were rightly to be the province of the political branch with repercussions or failures in this regard to be monitored by Canada's international reputation rather than the Court.[59] This acknowledgement contributed to the legal and political legitimacy of the decision as a mechanism to begin a process of state healing beyond the courts.

[53] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.
[54] *Reference re Secession of Quebec* (n 53) [27].
[55] *Reference re Secession of Quebec* (n 53) [48], [68].
[56] *Reference re Secession of Quebec* (n 53) [87].
[57] *Reference re Secession of Quebec* (n 53) [88].
[58] *Reference re Secession of Quebec* (n 53) [92].
[59] *Reference re Secession of Quebec* (n 53) [98], [100], [103, [153].

Canadian scholar, Des Rosiers, described the decision as 'therapeutic' in nature by the 'process-driven solution it offered'[60] and that it 'could be said to be a "letter to the loser", designed to explain why he or she lost but also to help the acceptance of the reality and the recognition that a transition must occur'.[61] It reinforced the legitimacy of the predicament of the Quebecois as a 'dissenting voice'[62] within the federation while hearing it with dignity and respect. The unanimity of the response joining all nine judges only strengthened this. Des Rosiers has explained that:

> In a constitutional context, people often come to court because they have not been heard elsewhere, or, at least, when they argue that they have not. The value of this process should not be underestimated … It is often a place where it could be said that democracy is enhanced by the confrontation of reasons why one group should prevail over another. The process in the courtroom also serves to foster public understanding and public discussions on the subject of the accommodation of the relationship. Truly listening to the position of the parties in all its complexity is important in constitutional law as it becomes part of the record of the relationship between the majority and minority.[63]

The case was inevitably highly controversial when Quebec did not accept the jurisdiction of the Court in the matter and the Court was required to appoint an amicus curiae on their behalf.[64] However the way the Court approached the constitutional quandary has been described as 'solomonic'[65] and as having the effect of leaving neither party feeling thwarted.[66] Therapeutic jurisprudence would identify this as stemming from the validation of the Quebecois' cause and also the acknowledgement that the claim did not come to an end at the point where the law ran out. Through the judgment, the Court recognized the need for a process of negotiation and dialogue with the Quebecois. It therefore allowed the decision to take on a democratic educative function in defending the importance of minorities being heard among the noise of the populace and the need for respect and dignity to be accorded to all players in mediating conflicting views and perspectives.[67]

While certainly complicated by Quebec's lack of direct case involvement, we see a clear assertion of the core values and norms that guided the Court as a decision-making body and also a distinct inter-institutional dialogue being set up recognizing the capacity and (legal) legitimacy of the Supreme Court's role. As Radmilovic notes, the Supreme Court also managed 'to avoid entanglements with political actors and to qualify judicial activism

[60]N Des Rosiers, 'From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts' (2000) *Spring Review* 54, 62.

[61]Des Rosiers, 'From Telling to Listening' (n 60) 56.

[62]Des Rosiers, 'From Telling to Listening' (n 60) 68.

[63]N Des Rosiers, 'From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes' (2000) 13(2) *Canadian Journal of Law and Jurisprudence* 171, 176.

[64]PJ Monahan, 'The Public Policy Role of the Supreme Court of Canada in the Secession Reference' (1999–2000) 10 *National Journal of Constitutional Law* 65; RS Kay, 'The Secession Reference and the Limits of Law' (2003) 10 *Otago Law Review* 327, 342–3.

[65]Kay (n 64) 327.

[66]Radmilovic (n 51) 859. See also, WJ Newman, 'Reflections on the Tenth Anniversary of the Supreme Court's Opinion in the Quebec Secession Reference', 22 August 2008, available at <http://www.thecourt.ca/reflections-on-the-tenth-anniversary-of-the-supreme-courts-opinion-in-the-quebec-secession-reference/>.

[67]See also, Murray, 'A Letter to the Loser'? (n 33) 563.

… from the matters it chose *not* to decide'.[68] It is therefore valuing the space accorded to the political process from which the Court must abstain. The Court held that:

> The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework … The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.[69]

While it is easy to see the *Quebec Secession Reference* as very weak form review, it requires a much more thoughtful assessment.[70] While seemingly toothless, it is still arguably strong in the tenets and reasoning it develops.[71] Its richness lies in its focus on the constitutional process and the need for that to align with the Canadian democratic framework as well as its assertion of the importance of the question presented by the Reference.[72]

What we see is the Canadian Supreme Court responding to a significant majority–minority conflict in a therapeutically informed representation-reinforcing way. It can be conceived as a curial response to a 'burden of inertia'[73] in terms of 'delay in addressing democratic demands for constitutional change'.[74] The Court's 'softly, softly' approach has the effect of identifying the legal position as rightly placing the conflict firming in the political arena while crafting a therapeutic judgment that 'hears out' both sides. With the long history of Quebec secessionist aspirations, the Court shows an appreciation of the complexity of the matter, which it cannot (and even should not) resolve, while also identifying the exigency of its resolution. Fittingly, it was said a decade after that the decision:

> overcame an unprecedented threat to its constitutional integrity, legal order and the rule of law, in a manner that permits the legitimate political forces at play within this country to continue to promote their options for change within the prevailing constitutional framework, while respecting basic rights and fundamental principles.[75]

In adopting this approach, the Supreme Court calls, in a therapeutic sense, for a wider inter-institutional and societal listening while de-positioning its role or capacity to resolve the democratic crisis. The Court appreciates the institutional and constitutional risks of it being seen to 'leap-frog' a political response to a longstanding and fraught issue for Canada and the Quebecois. The complexity of this was only amplified by the relevant minority not

[68]Radmilovic (n 51) 856.
[69]*Reference re Secession of Quebec* (n 53) [153].
[70]Dixon, *Responsive Judicial Review* (n 9) 242.
[71]See Dixon, *Responsive Judicial Review* (n 9) 207, 242.
[72]*Reference re Secession of Quebec* (n 53) [1].
[73]Dixon, *Responsive Judicial Review* (n 9) 82 ff.
[74]Dixon, *Responsive Judicial Review* (n 9) 2.
[75]See also, Newman, (n 66).

accepting the jurisdiction of the Court. The benefit of applying the therapeutic lens to the judgment is to see the representation-reinforcing moment as shaped by the court's institutional limitations but also as providing a contribution attuned to the significance of the conflict for Canadian society and to emboldening a political response.

R (Miller) v The Prime Minister (Miller No. 2)

The second example is the UK prorogation dispute in *Miller No. 2*. In *Miller No. 2*,[76] the UK Supreme Court was asked to determine whether the Prime Minister's 2019 advice to the Queen to prorogue Parliament for five weeks was lawful. Baroness Hale and Lord Reed, delivering the judgment for the Court, found that it was indeed unlawful. The judgment emphasized that the question was a legal and justiciable one while at the same time eliding Brexit debates.[77]

The Court held that prorogation would unjustifiably impair governmental accountability and was therefore rightly the province of curial decision. It was also explained as a legitimate case for judicial intervention when it ensured that the Government was not permitted to act illegally through proroguing Parliament.[78]

The Court held that:

> a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[79]

It found that the prorogation advice was unlawful and therefore was of no legal effect.[80]

The decision justifies the Court intervening, based on fundamental constitutional principles of accountability and in the CRRT vein of the 'extreme effect on the fundamentals of … democracy'.[81] In explicating the constitutional role of the court being based on the 'exceptional'[82] and 'not normal'[83] circumstances and the invalidation as not usurping the separation of powers, we see a clear claim for legal legitimacy being voiced by the Court. The Court is careful to acknowledge the margin of 'latitude'[84] that Parliament should be granted but emphasizes the significant 'constitutional responsibility' of the Prime Minister.[85] For the Court, there is an assertion of a clear democratic crisis or malfunction in the actions of the Prime Minister in acting counter to the government's 'democratic legitimacy' sourced from its accountability to, and the confidence invested in it by, the Parliament.[86]

[76] *R (Miller) v The Prime Minister* [2019] UKSC 41.
[77] *R (Miller) v The Prime Minister* (n 76) [1], [28]–[31]. See also Tew (n 42) 55.
[78] *R (Miller) v The Prime Minister* (n 76) [34].
[79] *R (Miller) v The Prime Minister* (n 76) [50].
[80] *R (Miller) v The Prime Minister* (n 76) [69].
[81] *R (Miller) v The Prime Minister* (n 76) [58].
[82] *R (Miller) v The Prime Minister* (n 76) [57].
[83] *R (Miller) v The Prime Minister* (n 76) [56].
[84] *R (Miller) v The Prime Minister* (n 76) [58].
[85] *R (Miller) v The Prime Minister* (n 76) [60].
[86] *R (Miller) v The Prime Minister* (n 76) [55].

There is also a clear claim for the legitimacy of invalidating the executive action in this case through the need for mechanisms of parliamentary accountability to operate and to ensure that elected members of Parliament are appropriately able to represent the people of the United Kingdom.[87] The judgment's language, understood through a therapeutic lens, was therefore about re-setting the democratic process to allow for parliamentary scrutiny and sovereignty to operate when 'the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model'.[88] Kavanagh has identified the difficult line the Court was walking here. She notes:

> Although there was widespread support for this decision in the unusual and time-pressured circumstances surrounding the Brexit negotiations, we might worry about its long-term effects on the political culture. The worry is that the precedent of *Miller* means that political actors will run to the courts in high-stakes political controversies, rather than attempting to solve the political issues themselves, thus leading to a corrosive legalization of the political process.[89]

While seeking to elide the Brexit-infused convolution of the dispute, the precedential element identified by Kavanagh highlights the risk in the Court's response as upsetting legal political–cultural institutional norms. However, amidst this responsive complexity we also see thoughtful therapeutic court craft at work. The Court shows a consciousness of the need for the decision to be cast as legally extraordinary and therefore weak in its precedential carriage. The Court noted in its opening paragraph that the scenario 'arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a "one off".[90] The legitimacy of the Court's response is therefore aided by a clear assertion of its institutional limits and the need to 'remembe[r] always that the actual task of governing is for the executive and not for Parliament or the courts'.[91] The claim for legitimacy therefore derives from it as an extraordinary judicial response which the UK Supreme Court seeks to draw a clear line under. The Court appreciates the inter-institutional threat posed by the determination but asserts its moral claim in needing to respond to what is characterized as a clear executive overreach, within that particular legal–historical setting. A therapeutic jurisprudential lens allows the judgment to be seen as a democratic re-set in CRRT terms after a moment of breach. It therefore allows for the judgment to operate restoratively, with democratic representative democracy being put in its rightly place.

The remedy imposed in finding the advice unlawful and therefore Parliament not validly prorogued has also been the subject of comment. Daly identified how the Court could have stopped at finding the advice unlawful and that the further order 'suggests a striking lack of trust in Mr Johnson and his advisors' in 'put[ting] control of the next steps in the hands of Parliament'. He observed that this 'implies scepticism about the likelihood of the Prime Minister responding in good faith to the Court's judgment', something that 'sheds significant light on Britain's extraordinary contemporary political climate' facing

[87] *R (Miller) v The Prime Minister* (n 76) [57].
[88] *R (Miller) v The Prime Minister* (n 76) [48].
[89] Kavanagh (n 2) 1487, fn 24.
[90] *R (Miller) v The Prime Minister* (n 76) [1].
[91] *R (Miller) v The Prime Minister* (n 76) [55].

the UK at the time. The acuteness of the response therefore may be a reflection of this.[92] As Lady Hale noted afterwards, the result was 'quite a source of, not pride, but satisfaction' when it 'means a lot to the constitution', suggesting the doctrinal impetus for the action taken by the Court.[93] It therefore was seeking to restore democratic trust through clear line-drawing. The Court also demonstrated clear therapeutic awareness in its explanation for the unprecedented prorogation. Although finding, there was not a reasonable explanation here, the case was cast so as to require governments to furnish reasons and be heard on that basis.[94] This provided an acknowledgement that government action must sometimes depart from accepted norms and that respect for such actions must be accorded when the circumstances necessitate it. This approach to court craft by Baroness Hale and Lord Reed demonstrates an appreciation of the dangerous waters the Court was wading into and the difficult decisions that courts must make in representation-reinforcing contexts. The assertion by the Court of situational exceptionalism makes an important claim for inter-branch respect and legitimacy and for a clear assertion of the limits on judicial review by an apex court. This therapeutic method adopted by the Court therefore legitimates the unprecedent nature of the Court's intervention, thus buttressing the democracy-enervating response through the relational and institutional reverence shown.

Murphy v Electoral Commissioner

The High Court of Australia in *Murphy v Electoral Commissioner*[95] was faced with an electoral law challenge to the seven-day period in which a person needed to enrol (or change their enrolment) after the issuance of electoral writs for a federal election. Murphy contended that modern technology meant that this period was unduly limiting enrolments which should feasibly be possible closer to the election day, as occurred in some States across the Australian federation. The High Court across six separate judgments (something not uncommon in the Australian High Court constitutional decision-making) rejected the constitutional argument that sections 7 and 24 of the *Commonwealth Constitution* in requiring members of parliament to be 'directly chosen by the people' introduced an electoral imperative to augment electoral participation.

The Court exhibited edginess around the constitutional principle being asserted by the defendant and saw matters of electoral design, in a representation-reinforcing form, as very much the province of the Commonwealth legislature.[96] As Keane J recognized in his judgment, the constitutional imperative of parliamentary representatives being 'directly chosen by the people' in limiting the constitutionality of parliamentary action doesn't stretch to imposing the Court's own notions of what representative government requires.[97] Similarly, French CJ and Bell J explained that:

[92]P Daly, 'Some Qualms about R (Miller) v Prime Minister' [2019] UKSC 41, 24 September 2019, available at <https://www.administrativelawmatters.com/blog/2019/09/24/some-qualms-about-r-miller-v-prime-minister-2019-uksc-41/>.

[93]S Hattenstone, 'Lady Hale: "My Desert Island Judgments? Number one would probably be the prorogation case"', 11 January 2020, *The Guardian*, available at <https://www.theguardian.com/law/2020/jan/11/lady-hale-desert-island-judgments-prorogation-case-simon-hattenstone>.

[94]*R (Miller) v The Prime Minister* (n 76) [51].

[95]*Murphy v Electoral Commissioner* (2016) 90 ALJR 1027.

[96]See, e.g., *Murphy* (n 95) [204] (Keane J), [263] (Gordon J).

[97]*Murphy* (n 95) [177]; see also similar reticence of Nettle J at [243] and [254] and Gordon J at [262].

> The impugned provisions do not become invalid because it is possible to identify alternative measures that may extend opportunities for enrolment. That would allow a court to pull the constitutional rug from under a valid legislative scheme upon the court's judgment of the feasibility of alternative arrangements.[98]

In *Murphy*, what emerges is a unanimously deferential stance with the Court concluding that the Parliament is best placed to determine the appropriate electoral legislative mechanics. This was not a scenario where particular subsets of voters were excluded from the franchise as in *Roach*[99] (prisoners) or in *Rowe*[100] (potential voters out of time to enrol or re-enrol). In pulling back from these earlier, more participatory-enforcing approaches, the Court was conscious of clearly delineating the boundary when judicial intervention would be nothing more than overreach. It was not a case where authoritarian powers were being exercised in a majoritarian way or where there were 'democratic blind spots' or 'inertia' at play.[101] Instead the judgments expressly delineate the institutional role of the Court, seeking to frame the non-intervention as a legitimate response which could be distinguished from the earlier invalidations by the Court of provisions of the *Commonwealth Electoral Act 1918* (Cth).

Justice Gageler, as he then was, while indicating his awareness of the democratic threat of isolating from the democratic scene 'political process persons whose participation is unwanted'[102] was critical of the Plaintiffs' attempt in *Murphy*. For his Honour, the attempt was misconceived and was illegitimately seeking to place the Court in the role of an electoral 'reform[er' dictating how the electoral framework would operate by 'compel[ling] the Parliament to maximise the franchise'.[103] For Gageler J, this was the role of the legislature and not the judiciary.

Australia is unusual in having compulsory voting at elections. This is, however, arguably not a constitutional requirement but a matter of electoral design.[104] In earlier electoral cases, particularly *Roach* and *Rowe* noted above, a majority of the High Court had controversially, and in a much criticized decision,[105] appeared to suggest that maximizing participation was a constitutional requirement of sections 7 and 24.[106] In clearly demarcating the need for constitutional limits to be supervised but to stop when trespassing into the domain of legislative choice, the High Court walked a carefully marked path seeking to

[98] *Murphy* (n 95) [42].

[99] *Roach v Electoral Commissioner* (2007) 233 CLR 162.

[100] *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[101] Dixon, *Responsive Judicial Review* (n 9).

[102] *Murphy* (n 95) [95]. Note also the evidence of the writings of Ely in his pre-appointment writings: S Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 154 ff; S Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162. See also R Dixon and A Loughland, 'Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia' (2021) 19(2) *International Journal of Constitutional Law* 455.

[103] *Murphy* (n 95) [109]–[110].

[104] See, e.g., A Twomey, 'Compulsory Voting in a Representative Democracy: Choice, Compulsion and the Maximisation of Participation in Australian Elections' (2013) 13(2) *Oxford University Commonwealth Law Journal* 283.

[105] See, e.g., A Twomey, '*Rowe v Electoral Commissioner*: Evolution or Creationism' (2012) 31(2) *University of Queensland Law Journal* 181–202; G Orr, 'The Voting Rights Ratchet: Rowe v Electoral Commissioner' (2011) 22 *Public Law Review* 83–9.

[106] *Murphy* (n 95) [180] (Keane J).

delineate its institutional role within the Australian democratic system of government. The therapeutic lens places the High Court as appropriately refraining to act based on applicable constitutional limits and where a representation-reinforcing response would be a constitutional overstep lacking democratic legitimacy.

The court craft that emerges through the judgment is one of explicit line-drawing below the high water mark of previous more franchise-expansionist court decisions and a clear attempt to distinguish the earlier authority. The prime risk in earlier cases was from limitations in opportunities to enrol/vote which affected the constitutional requirement of direct choice; however, this was found not to be the case in *Murphy*. We also see a joining of the judgments of French CJ and Bell J, who were both in the majority in *Rowe*, potentially strengthening their position by uniting. The challenge with any line-drawing exercise is doing so in a way that suitably acknowledges and respects the democratic concerns of the losing litigant so that, as Des Rosiers recognizes,[107] the judgment leaves the 'loser' feeling heard and validated while at the same time laying out definitively the constitutional arguments that must defeat them.

Casting the decision in this wider therapeutic jurisprudential frame suggests that the Court is attempting to re-set the Australian electoral law judicial review landscape.[108] This was not a highly controversial decision or one that prompted considerable public debate but it provided the High Court with a valuable opportunity to dissuade challengers from electoral law 'fishing' expeditions hoping for a captive activist Court while recalibrating Australian electoral law jurisprudence. While deciding not to strike down the electoral law provisions, it spotlights what sort of actions will fall constitutionally foul and to re-assert the institutional responsibilities of the courts vis-a-vis the democratically elected legislature. The relatively low-stakes nature of the decision made this an easier positional shift than the High Court had faced in earlier decisions like *Roach* on prisoner disenfranchisement or in *Rowe* on early roll-closure. Putting the CRRT decision in a therapeutic jurisprudence spotlight makes the assertiveness of the judicial response easier to explain and legitimizes the Court's interest in demarcation within the often highly contentious space of electoral litigation.

Conclusion: Tying the Threads

As Dixon notes it is not always the case that courts operating in CRRT contexts act in the service of democracy whether this is evident at the time or only in retrospect.[109] A therapeutic jurisprudential lens allows for a greater ability to appraise this within a wider institutional context.

The case studies, though admittedly directed at the perspective of courts, also bring into focus the interplay with other governmental actors. The democratic legitimacy of the Canadian Government pursuing formal constitutional amendment is raised in *Quebec Secession*. While in *Miller No. 2*, the question was whether the decision to prorogue Parliament was in line with the Prime Minister's 'constitutional responsibilit[ies]'[110]and

[107]Des Rosiers, 'From Telling to Listening' (n 60).

[108]See, also *Murphy* (n 95) [195] (Keane J) who also commented that 'It would also blur the separation of powers under the Constitution by opening the way for the judiciary to instruct the Parliament in the exercise of the power of the purse'.

[109]Dixon, *Responsive Judicial Review* (n 9) 269.

[110]*R (Miller) v The Prime Minister* (n 76) [60].

what motivated this course of action. In *Murphy*, we see an emphasis, and even an affirmation of, Commonwealth Parliament's legislative prerogative over electoral design, brought about by constitutional parameters.

What we see in *Quebec Secession*, *Miller No. 2* and *Murphy* is how higher court representation-reinforcing responses, whether in a time of crisis or not, can be perceived in a democratic therapeutic sense. We can see the acute awareness of the courts' constitutional position vis-à-vis the other governmental branches and a realization of the potential impact of a curial response on institutional relations and constitutional legitimacy. We also see in all of the case studies the CRRT judgment as operating as a form of re-setting or restoration of the democratic landscape. The filter of therapeutic jurisprudence brings these dynamics to the fore and, over time, can provide a mechanism for better understanding the legitimacy of how institutions respond and participate as players within the democratic landscape.

V. Concluding observations

Courts within CRRT have a distinct role to play as democratic gatekeepers. In compensating for slippages in the political process, they can ensure that minority interests are, educatively, brought out of the shadows and can take appropriate action in cases where the legislative or executive agenda results in marked constitutional failures.[111] However, as institutions, courts have inherent weaknesses.[112] This means that sometimes courts need to step aside to allow for other democratic solutions to play out.

The clear risk is that a response framed as representation-reinforcing is seen as a clear over-reach, biased or tainted in some way. Ultimately, by applying a therapeutic lens, courts can be responsive to potential anti-therapeutic impacts of their actions and can reflect on the court's role and the community interests which are at stake. In such settings, action or inaction by courts can be conceived as a potential lever for democratic restoration or degradation. Representation-reinforcing judgments cast within this therapeutic frame do not seek to magnanimously heal all democratic wounds but instead can enhance the legitimacy of the response by adopting a democratically empathic response, tailored to the particular political–legal setting and delicate interests and institutional relationships at stake.

Applying a therapeutic jurisprudential lens to CRRT provides a normatively critical frame through which to unpack the legitimacy of the intervention by a court. By appraising the action or inaction by a court as in the long-term interests of democratic restoration or as strengthening democratic institutions, both whether and how intervention occurs can be brought into sharper focus. Claims for institutional legitimacy are still likely to be contested but can be understood as serving potentially therapeutic or anti-therapeutic democratic interests. As Des Rosiers suggests '[m]aybe … all that one can ask from the court on these questions' is to 'do as little damage as possible'.[113]

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[111]Dixon, *Responsive Judicial Review* (n 9); Jhaveri (n 21) 813–14.
[112]Dixon, *Responsive Judicial Review* (n 9) 24. See also Kavanagh, *The Collaborative Constitution* (n 41) 103.
[113]Des Rosiers, 'From Quebec Veto to Quebec Secession' (n 63) 183.

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