THE NORMATIVITY OF THE PRINCIPLE OF LEGALITY

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The constitutional justification for the principle of legality has been transformed. Its original basis in a positive claim about authentic legislative intention has been repudiated. Statutes today are so far-reaching that it would be wrong to suppose any actual improbability in legislative intentions to abrogate common law rights. Two rival justifications for the principle have emerged in response. One is a refined positive claim: legislatures do not intend to abrogate 'fundamental' rights. The other is a normative claim: courts should attribute an intention not to abrogate rights in order to improve the political process. Distinguishing these justifications answers the vexed question of which rights engage the principle of legality. 'Fundamental' rights, in the first claim, just are those rights that legislatures do not, in fact, intend to abrogate. The normativity of the second claim is engaged not by 'fundamental' rights, but by 'vulnerable' rights not adequately protected by the ordinary political process. 'Vulnerable' rights may originate not only in the common law but also in statutes.

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> 'A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction … [I]t is an expression of a legal value'.[1]

I Introduction

The principle of legality does not enjoy the continuous historical pedigree that is widely supposed. I use 'principle of legality' in its narrow and 'rather strange'[2] sense to mean the interpretive presumption against legislative abrogation of fundamental common law rights. That presumption is, of course, just one aspect of the principle of legality, which is a wider set of constitutional precepts requiring that any governmental action be undertaken only under positive authorisation. The principle of legality, in the narrow sense, manifests in a 'clear statement principle' according to which courts will not, in the absence of clear statutory words, impute to legislatures an intention to abrogate fundamental common law rights. Although the principle seems outwardly familiar, its legitimating underpinnings shifted over the course of the 20th century. Those underpinnings appear still to be unsettled. I do not mean simply that the content and scope of the principle has evolved over time. The courts have transformed the principle's very constitutional justification. When Gleeson CJ said that it is 'not a factual prediction',[3] his Honour might have said that it is not *any longer* a factual prediction, for it once was. One objective of this article is to chronicle the transformation from fact to value, an understanding of which is important in its own right. Another

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

[2] Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*' (2009) 125 *Law Quarterly Review* 598, 600.

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

objective is to explain the significance of the transformation for the proper approach to the content and scope of the principle.

The clear statement principle was first articulated as a set of *positive* claims about the improbability of legislative abrogation of rights. The claims were 'positive' in the sense that they sought to describe authentic legislative intentions — that is, what the legislature actually meant or intended. Throughout this article, I will refer to what the legislature 'actually meant or intended' as an inexact shorthand for the somewhat more subtle concept of 'what the legislature appears to have intended … to mean, given evidence of its intention that is readily available to its intended audience'.[4] This textualist subtlety does not detract from the essentially positive, or descriptive, character of claims about that intention. Founded upon a combination of political trust and forensic experience, the claims originally underpinning the clear statement principle were addressed to what legislatures were in fact likely to have intended in relation to the displacement of the general law, including common law rights. But as the reach of the activist regulatory state expanded during the 20th century, those claims became increasingly implausible. They must be regarded now as descriptively untenable. Yet the principle of legality remains. The courts have renovated the principle of legality to accommodate the sociological changes that accompanied the rise of the regulatory state.

There are now two rival justifications for the principle, each one having emerged from a distinct path of accommodation. On the one hand, there has emerged a refined positive basis for the presumption: it is said to be engaged not simply by 'rights', but by 'fundamental' rights. These rights, so the argument goes, are so 'fundamental' that their intentional abrogation, even by an activist legislature, is highly improbable. This claim is buttressed by a further claim that Parliament can be taken — once again *in fact* — to have drafted its legislation against the known operation of the presumption. I will call this justification for the principle of legality the 'positive refinement'. On the other hand, there is a new normative justification for the presumption, which I will call the 'normative refinement'. This justification advances a set of claims about the constitutional relationship between courts and legislatures: courts *should*, it is claimed, prevent legislatures from abrogating rights, otherwise than by clear words, in order to enhance electoral accountability and the political process. This 'normativity' of the principle of legality places less emphasis on authentic legislative intentions. It is concerned to attribute,

[4] See Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 248.

rather than to discern, intention. It is concerned not with 'a factual prediction', but with 'a legal value'.[5]

It is useful at this point to expand on the relationship between the principle of legality and the nature of legislative intention. Legislative intention is relevant to statutory construction in the sense that 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[6] When a court 'takes' a legislature to have intended words to have particular meaning, it engages in an objective exercise, and not a subjective exercise, of discerning and attributing intention. Although the exercise 'must begin with a consideration of the text itself',[7] the court also has regard to '[t]he context of the words, the consequences of a literal or grammatical construction, the purpose of the statute [and] the canons of construction'.[8] The principle of legality or clear statement principle is such a 'canon of construction'. My argument is about the competing justifications for this canon. Both the positive justification and the normative justification are consistent with the duty of the court to give statutory words their 'legal meaning' in accordance with an objective legislative intention.[9] Both are consistent with the view that 'judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.[10] But only the normative justification, and not the positive justification, is consistent also with the view that findings as to legislative intention are not expressions of any ontological truth, the very idea of which is said to be 'a fiction which serves no useful purpose'.[11] Importantly, however, the normative justification does not entail that view. It does not necessarily deny the existence of discernible, authentic legislative intentions. It could

[5] *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [20] (Gleeson CJ). See also Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press, 2013) 120–1.

[6] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

[7] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ). See also *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, 268–9 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

[8] *Project Blue Sky* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

[9] See ibid.

[10] *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

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

be formulated in terms only that in some circumstances courts may be justified in attributing an intention that might not coincide with the authentic intention.

The debate about the authenticity of legislative intentions is too important and too rich for me to engage directly here.[12] I simply emphasise that both camps in that debate can coherently embrace the normativity of the principle of legality, while those who reject authentic legislative intention as a 'fiction' cannot embrace positive justifications for the principle of legality. That is because the positive justifications depend centrally upon claims about the existence and content of an authentic intention. That at least a majority of the present High Court appears to adhere to the view that legislative intention is an unhelpful fiction underscores the importance of studying the distinctive features of the normative justification for the principle of legality.

The categorical distinction between interpretive canons that are justified by considerations of (positive) expected meaning and those that are justified by (normative) policy considerations is well-recognised by diverse theorists in the United States,[13] although those theorists can, of course, disagree about the proper classification of any given canon.[14] Also recognised is the possibility that the justification for a single canon may change over time, and change *categorically* from being positive in character to normative in character. For example, of the 'constitutional-doubt canon', according to which American courts construe a statute to 'avoid[] placing its constitutionality in doubt', Scalia and Garner identify its original basis in 'a genuine assessment of probable meaning'. But, they continue, because '[t]he modern Congress sails close to the wind [constitutionally speaking] all the time', expected meaning 'is today a dubious rationale' and '[a] more plausible basis for the rule is that it represents judicial policy'.[15]

My claim is that something similar has occurred in relation to the principle of legality. But in Australia, for whatever reason, that transformation has so far been insufficiently appreciated. The two rival justifications for the

[12] See generally Goldsworthy, above n 4, 232–47; Greenawalt, above n 5, 59–75; Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012); Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) 92–119.

[13] See William N Eskridge Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994), especially at 276; Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (West, 2012); Cass R Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103 *Harvard Law Review* 405, 454–60.

[14] See, eg, William N Eskridge Jr, 'The New Textualism and Normative Canons' (2013) 113 *Columbia Law Review* 531, reviewing Scalia and Garner, above n 13.

[15] Scalia and Garner, above n 13, 247–9.

principle of legality, if they are both recognised, are not often clearly distinguished.[16] It is not my purpose in this article especially to defend either one of the two justifications. It is important enough to explain the distinction between them and the consequences or possibilities that each entails. A proper understanding of the two different justifications, apart from having intrinsic value, also equips us with the resources to deal with the central doctrinal difficulties emerging in this area of the law. Foremost amongst those difficulties is the problem of identifying which rights are to be regarded as 'fundamental' in the sense required to attract the presumption.[17] As a Full Court of the Federal Court observed, the principle of legality 'is sometimes criticised on account of uncertainty about the rights to which it applies'.[18]

Indeed, it is controversial whether or not the gloss of 'fundamentality' is at all useful. Chief Justice Spigelman said that '[t]he word "fundamental" has work to do',[19] while French CJ suggested that '[i]t might be better to discard it altogether'.[20] My exposition of the transformation of the principle of legality will explain this divergence of view. The refined emphasis on 'fundamental' rights was just one response to the implausibility of the claim that legislatures do not (as a positive matter) intend to abrogate the common law. In parallel to this positive refinement, however, emerged the distinct normative refinement. If one accepts the new normativity of the principle of legality, then one need not invoke positive claims about authentic legislative intentions, and can therefore bypass any perceived need to confine the principle to some narrow category of 'fundamental' rights. The difference between French CJ and Spigelman reflects a more basic difference between the new, rival justifications for the principle of legality itself.

[16] Notable exceptions are the account given in Goldsworthy, above n 4, 304–12; and the short references in Rosalind Dixon, 'A New (Inter)national Human Rights Experiment for Australia' (2012) 23 *Public Law Review* 75, 78; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 177–8.

[17] See Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 456–9; David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 6, 18.

[18] *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 76 [86] (Black CJ, Sundberg and Weinberg JJ).

[19] J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 781. See also *Harrison v Melhem* (2008) 72 NSWLR 380, 382–4 [2]–[11] (Spigelman CJ).

[20] *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43]. Cf *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 211 [42] (French CJ), 239 [148] (Heydon J); *Monis v The Queen* (2013) 295 ALR 259, 342 [331] (Crennan, Kiefel and Bell JJ).

This is not to say that the normative justification would open the principle of legality to be engaged by just any right. The normative justification is controversial. Unlike the positive justification, as I will explain, it is open to objections from democratic principles. The necessity to accommodate those objections circumscribes the legitimate scope of the principle of legality. Rather than a search for '*fundamental*' rights, the normativity of the principle of legality would direct us to a search for '*vulnerable*' rights: rights claimed in circumstances where the capacity of the political process to discipline legislative action is inherently weak and curial insistence upon clear statutory language would strengthen that capacity. 'Vulnerability' as a criterion has, I will argue, both justificatory and explanatory force. Significantly, it is more sensitive than 'fundamentality' is to *context*, so that the same right can sensibly be seen to be vulnerable or invulnerable, and therefore engage or not engage the principle of legality, depending upon the context in which that right is claimed. Using vulnerability as the criterion may, furthermore, have some surprising results. One provocative implication is that 'common law' rights (never mind 'fundamental' ones) can be shown to enjoy no special claim to protection, so that certain rights originating in statutes would also come within the presumption against abrogation.[21] This result is sympathetic with the pivotal role that legislative activism has played in the recent revisions of the principle of legality's rationale.

In developing these themes, the argument unfolds in four parts. This introduction is Part I. Part II chronicles the transformation of the principle of legality and the emergence of the two rival justifications that are presented for it today. Part III takes up the question of which rights engage the principle, dealing in turn with 'fundamental' rights, 'vulnerable' rights, and finally 'statutory' rights. Part IV concludes.

II The Principle of Legality Transformed

A *Myth of Continuity*

The principle of legality in Australia is typically traced to the 1908 decision of the High Court in *Potter v Minahan*.[22] When James Minahan tried to enter

[21] See *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 159 [93] (Kirby J); *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110, 111 [4] (Debelle J); *Buck v Comcare* (1996) 66 FCR 359, 364–5 (Finn J); *R v Cain* [1985] 1 AC 46, 55–6 (Lord Scarman); D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) [5.37].

[22] (1908) 7 CLR 277.

Australia, a Customs official administered to him a dictation test on the basis that he was an 'immigrant' within the meaning of the *Immigration Restriction Act 1901* (Cth). Mr Minahan failed the test and was charged with being a prohibited immigrant found within the Commonwealth. This would have been unremarkable for the time, except that Mr Minahan had been born in Victoria. His father took him as a child to China, where he lived for 26 years until his attempted return.

A magistrate dismissed the charge, finding on the evidence that Mr Minahan had remained domiciled in Victoria. An appeal to the High Court was dismissed, the magistrate's factual finding not being disturbed and it being held that the Customs official had, in any event, administered the dictation test incorrectly. But the Court had to deal with an argument that '"immigrating" into Australia must be taken to mean "entering" Australia, and that every person entering Australia is prima facie an immigrant'.[23] Rejecting this argument, O'Connor J concluded that 'it must … be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia'.[24] His Honour articulated the applicable rule of construction in this well-known passage:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[25]

The principle was not that Parliament is incapable of achieving the asserted result, but that it must use clear words to do so. This clear statement principle, as Chief Justice French recently explained,[26] was not original to O'Connor J, who was quoting from *Maxwell on Statutes*,[27] which in turn borrowed from an

[23] Ibid 303 (O'Connor J).

[24] Ibid 305.

[25] Ibid 304 (citations omitted).

[26] Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820, 827.

[27] Sir Peter Benson Maxwell and J Anwyl Theobald, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122.

early opinion of the United States Supreme Court.[28] Meagher has tentatively speculated that the principle might have originated even earlier.[29] Certainly, some writers identify a cognate presumption against derogation from the common law originating in the 14th century,[30] although markedly different constitutional arrangements then obtained.[31]

Although there is obviously some relationship between the rule in *Potter v Minahan* and the principle of legality as we apply it today, any suggestion that the relationship is one of continuity should be resisted. In that claim I assume a heavy burden of persuasion. Chief Justice Spigelman, in his important article on the topic, described the interpretive principle as being 'of longstanding … go[ing] back at least as far as Blackstone and Bentham'[32] and as having 'a long history in Australian jurisprudence dating back to' *Potter v Minahan*.[33] Chief Justice Gleeson said similarly that '[t]here is nothing revolutionary about the principle of legality' and, after identifying *Potter v Minahan* as the seminal Australian decision, said that the principle had been 're-asserted' in modern times.[34] Kirby J thought the principle could 'be traced back for at least 300 years and probably further'.[35] More recently, French CJ said that the principle 'is of long standing and has been restated over many years', citing a line of cases from *Potter v Minahan* to the present.[36] Heydon J identified the 'many authorities, ancient and modern' for the principle.[37] Bell J similarly

[28] *United States v Fisher*, 6 US (2 Cranch) 358, 390 (Marshall CJ for Marshall CJ, Cushing, Paterson, Washington and Johnson JJ) (1805).

[29] Meagher, above n 17, 452–3, citing *Somerset v Stewart* (1772) Lofft 1; 98 ER 499.

[30] Sir Carleton Kemp Allen, *Law in the Making* (Oxford University Press, 7th ed, 1964) 456–7 n 6. *Contra* Roscoe Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383, 400–2.

[31] See Charles Howard McIlwain, *The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England* (Yale University Press, 1910) 257–328; John F Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1, 36–56.

[32] Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 19, 775.

[33] Ibid 780. See also James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 24–5.

[34] Chief Justice Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (Speech delivered at the Victoria Law Foundation Oration, Melbourne, 31 July 2008) 23 <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_31jul08.pdf>.

[35] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 415 [30].

[36] *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 211 [42].

[37] Ibid 239 [148].

called it a 'longstanding principle of interpretation',[38] while Kiefel J described it as 'not new'.[39] Gageler and Keane JJ, with greater specificity, maintained that the 'same rationale' for the rule in *Potter v Minahan* continues to justify the principle of legality in its modern expression.[40] Consistent with these observations, Meagher saw 'nothing particularly new about judges construing statutes … to protect rights and interests considered fundamental at common law'.[41] He identified in *Potter v Minahan* what he called the principle's 'significant common law lineage'[42] and described its current manifestations, as Chief Justice Gleeson did, as contemporary 'judicial *reassertion*'.[43] In the United Kingdom too, leading authorities see a 'considerable common law pedigree'[44] and claim that '[t]here is nothing new in [the presumption]: it is a well-established interpretative principle'.[45]

This weighty orthodoxy illustrates the common lawyer's tendency to construct a narrative of continuity, even as change occurs. Goldsworthy describes the skilful agents of such change as 'reluctant revolutionaries' who are 'loath to acknowledge — even to themselves — what they are doing'.[46] English constitutionalism more generally was long recognised to have continued in 'connected outward sameness, but hidden inner change'.[47] It is in the nature of the common law for its exponents to rationalise change within a framework of continuity: to build coherent bodies of principle from the synthesis of individual decisions, which may span many years. The principle of legality now bears that complexion of coherence. *Potter v Minahan* has been synthesised with more recent decisions. But attempts to synthesise principle, important as they be, should not overlook that the reasons or justifications for a rule matter: 'The principle [of legality] ought not … to be extended beyond

[38] *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 378 [528].

[39] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 416 [171].

[40] Ibid 450–2 [309]–[312].

[41] Meagher, above n 17, 452.

[42] Ibid 453.

[43] Ibid 452, 454, 464 (emphasis added). The phrase 'judicial reassertion' appears to have been used earlier in New Zealand: Claudia Geiringer, 'The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*' (2008) 6(1) *New Zealand Journal of Public and International Law* 59, 89.

[44] Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5, 18.

[45] F A R Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th ed, 2008) 823. See also Sales, above n 2, 600.

[46] Goldsworthy, above n 4, 2.

[47] Walter Bagehot, *The English Constitution* (C A Watts & Co, first published 1867, 1964 ed) 59.

its rationale'.[48] When the reasons or justifications for a rule change, so might the rule itself.[49] The asserted continuity of the principle of legality is actually 'an illusion, enabling radical changes to be effected without anything much appearing to have happened.'[50] In what follows, I demonstrate with close attention to the decided cases the changes over time in the underlying rationale for the principle of legality. Contrary to conventional wisdom, the contemporary principle of legality is much more than a 'reassertion' of an old rule.

B *Original Justification and Critique*

In *Potter v Minahan*, O'Connor J claimed that a certain result — that the legislature infringes rights etc. — was 'improbable'.[51] He did not call the result 'impermissible', or 'indefensible', or even 'inadvisable'. 'Improbability', central to the clear statement principle as O'Connor J expressed it, denotes a particular set of *positive* claims: claims that the approach to construction is justified because it will ensure that words are not given 'a meaning in which they were not *really* used'.[52] These claims are positive in the sense that they are about what the legislature in fact meant or intended or was likely to have meant or intended. As Griffith CJ contemporaneously explained, '[p]resumptions are founded upon the existence of a high degree of probability'.[53] In contrast, *normative* standards 'do not merely *describe* a way in which we in fact regulate our conduct. They make *claims* on us; they command, oblige, recommend, or guide.'[54] In 1908, the normative content of the clear statement principle was merely implicit. It consisted in a claim that courts ought to give statutory language a meaning in accordance with what the legislature actually meant or

[48] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 452 [313] (Gageler and Keane JJ).

[49] Cf *PGA v The Queen* (2012) 245 CLR 355, 373–4 [30]–[31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 614–15 (Gummow J); *Lamb v Cotogno* (1987) 164 CLR 1, 11 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[50] Sir John Baker, *The Oxford History of the Laws of England* (Oxford University Press, 2003) vol 6, 12, quoted in Justice W M C Gummow, 'The *Constitution*: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167, 167.

[51] (1908) 7 CLR 277, 304.

[52] Ibid 304, quoting Maxwell and Theobald, above n 27, 122 (emphasis added).

[53] (1908) 7 CLR 277, 286 (in the context of a different presumption).

[54] Christine M Korsgaard, 'The Normative Question' in Onora O'Neill (ed), *The Sources of Normativity* (Cambridge University Press, 1996) 7, 8 (emphasis in original).

intended. The real work of the principle was done by the positive claim that Parliament was, in fact, unlikely to have intended to infringe rights.

The positive or empirical character of the principle is consistent with the suggestion that 'it may have evolved through a distillation of forensic experience of the way Parliament proceeded'.[55] We know that several of the drafters of the *Australian Constitution* perceived no need for formal rights protection, in part because it was 'unthinkable'[56] that legislators steeped in 'the traditions of acting as honourable men'[57] would not, in fact, respect individual rights and freedoms. For Trenwith, for example, 'it seem[ed] … utterly impossible to conceive that … Parliament [would] proceed to infringe any of the liberties of the citizens'.[58] Interestingly, O'Connor-the-framer did not share this view. He favoured constitutional rights protections on the basis that legislatures might well be expected to 'cut down … rights'[59] or 'commit an injustice'.[60] Whatever insight this might give into his personal beliefs, there can be no mistaking the central importance of the more trusting view in the public grammar of the clear statement principle as O'Connor-the-judge later expressed it.

The idea of a public grammar is important here: I am concerned to examine the justifications for the clear statement principle *as they have been expressed*. Judges express themselves in published reasons. Those reasons record what at the time of publication counted as a good judicial reason or justification. In 1908, whatever O'Connor J or others might privately have thought about the rule in *Potter v Minahan*, or about any instrumental reasons for its application, the rule derived such legitimacy as it had only from the acceptance of its public justification — justification in terms of Parliament's actual intention and in terms of the sense in which Parliament 'really used' its words.

The empirical claim that Parliament is unlikely to have intended to interfere with common law rights would have been much more persuasive in 1908

[55] *Maunsell v Olins* [1975] AC 373, 394 (Lord Simon of Glaisdale). See also at 390 (Lord Diplock).

[56] Aronson and Groves, above n 16, 177.

[57] Robert C L Moffat, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 59, 85–6.

[58] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1761 (William Trenwith). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 688 (John Cockburn).

[59] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1761 (Richard O'Connor).

[60] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 688 (Richard O'Connor).

than in more recent times. Having described the presumption as a 'distillation of forensic experience', Lord Simon of Glaisdale and Lord Diplock, speaking in dissent in 1975, explained that '[h]owever valid this particular aspect of the forensic experience may have been in the past, its force may be questioned in these days of statutory activism.'[61] The growth of 'statutory activism' as an incident of the modern regulatory state means that intrusions by the legislature into what was previously the domain of the common law are now routine. Of course, many of these 'intrusions' were actually ameliorative of the 19th century's 'callous disregard of those who had few inherited rights to be protected'.[62] By no later than the 1970s, 'it came to be accepted that there was no area of law that might not properly become the object of parliamentary attention'. [63] Statutes 'entrenched directly upon areas of governmental, commercial and social life which for the most part were regulated, if at all, by common law doctrines'.[64] The proposition that a legislative intention to abrogate the common law would be 'improbable' was rendered descriptively untenable. Abrogating the common law is precisely what modern legislatures do.

This critique of the rule in *Potter v Minahan* is most forcefully made in Australia by McHugh J. *Malika Holdings Pty Ltd v Stretton* ('*Malika Holdings*')[65] concerned the construction of s 167 of the *Customs Act 1901* (Cth), which provides that an owner of goods may pay a disputed rate or duty under protest and then bring an action for recovery. After the owner imported goods entered as duty-free, the Collector of Customs received advice that the goods were in fact dutiable and sued the owner for the outstanding sum. A preliminary question was whether the owner was entitled collaterally to dispute the liability to pay duty, it being argued that s 167 prescribed the exclusive objection procedure and precluded the owner from otherwise disputing liability. One of the owner's arguments in response (not the one on which it succeeded) was that to construe the provision in that way would contradict

[61] *Maunsell v Olins* [1975] AC 373, 394 (Lord Simon of Glaisdale), Lord Diplock collaborated in the preparation of the judgment: at 390. *Contra* at 383 (Lord Reid), 384 (Viscount Dilhorne).

[62] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, 1940) 141. Cf *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596, 607 [35] (French CJ and Gageler J); *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ); Justice Gummow, above n 50, 176; Geiringer, above n 43, 88.

[63] Chief Justice Gleeson, 'The Meaning of Legislation', above n 34, 3.

[64] Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 11.

[65] (2001) 204 CLR 290.

the rule in *Potter v Minahan*. It was said that such a construction would deprive it of its ordinary right in a civil action to dispute the elements of the claim against it.

McHugh J, in a considered obiter dictum, expressed the opinion that the rule in *Potter v Minahan* did not apply. His Honour said of that rule:

> Hallowed though the rule of construction … may be, its utility in the present age is open to doubt in respect of laws that 'infringe rights, or depart from the general system of law'. In those areas, the rule is fast becoming, if it is not already, an interpretative fiction. Such is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law.[66]

McHugh J repeated this critique in *Gifford v Strang Patrick Stevedoring Pty Ltd*, describing the presumption as 'inconsistent with modern experience and border[ing] on fiction'.[67]

The subsequent challenge for the principle of legality has been to accommodate this critique, the correctness of which has not been, nor could be, seriously doubted. Different accommodations of the critique have been proposed, but the differences between them have not always been recognised. It is to that topic I now turn.

C *Accommodations of the Critique*

The original justification for the rule in *Potter v Minahan* can helpfully be set out in a syllogism:

Syllogism A

1	Courts should give statutory language the meaning Parliament intended.
2A	Parliament means not to abrogate rights unless it uses clear words.
3	(1+2A) In the absence of clear words, courts should give statutory language a meaning that does not abrogate rights.

Premise 1 is the rule's implicit normative content, while Premise 2A is the positive claim doing most of the work. It is Premise 2A that has been shown now to be false. Seeing the justification for the rule in this syllogistic form, it will be apparent that one may accommodate the falsity of Premise 2A by

[66] Ibid 299 [29].

[67] (2003) 214 CLR 269, 284 [36].

either one of two routes. The first route is a positive refinement: restate Premise 2A in a form that *is* true (and adjust Conclusion 3 accordingly). The second route is a normative refinement: restate Premise 1. In fact, both routes have been attempted.

1 *Positive Refinement: 'Fundamental' Rights*

The first kind of accommodation involves refashioning the positive claim upon which the clear statement principle rests. In this accommodation, the normative content of the principle is undisturbed. We still begin from the proposition that the court should give statutory language the meaning parliament intended. Then, accepting that there can be no improbability in the statutory abrogation of the common law *at large*, the positive claim in the second premise is refined to say that there is, nevertheless, improbability in the statutory abrogation of common law principles or rights that are '*fundamental*':

Syllogism B

1 Courts should give statutory language the meaning Parliament intended.

2B Parliament means not to abrogate '*fundamental*' rights unless it uses clear words.

3B (1+2B) In the absence of clear words, courts should give statutory language a meaning that does not abrogate '*fundamental*' rights.

This refashioning demands very close attention to the criteria for identifying a right as 'fundamental' in the relevant sense.

This positive refinement is evident in the observations of the High Court in *Bropho v Western Australia* ('*Bropho*').[68] It was accepted there, consistent with the positive claim underpinning *Potter v Minahan*, that the rationale for the clear statement principle 'lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear.'[69] Their Honours then explained the need to identify a right that is truly fundamental:

> If such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental prin-

[68] (1990) 171 CLR 1.

[69] Ibid 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

> ciple or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.[70]

Further explaining this accommodation in *Malika Holdings*, McHugh J carefully distinguished between 'overthrow[ing] fundamental principles', 'infring[ing] rights', and 'depart[ing] from the general system of law', all of which results O'Connor J had in 1908 presumed to be 'improbable'. For McHugh J in 2001, it was only abrogating 'fundamental principles' that could accurately be said to be improbable. Even then, his Honour cautioned that '[w]hat is fundamental in one age or place may not be regarded as fundamental in another age or place'.[71] His Honour did not regard 'rights' as necessarily 'fundamental' in the required sense:

> Some rights may be the corollaries of fundamental principles. In that sense, they are fundamental rights … But nearly every session of Parliament produces laws which infringe the existing rights of individuals. Given the frequency with which legislatures now amend or abolish rights or depart from the general system of law, it is difficult to accept that it is 'in the last degree improbable' that a legislature would intend to alter rights or depart from the general system of law …[72]

The principle of legality was invoked in *X7 v Australian Crime Commission* to protect 'the accusatorial nature of the criminal justice system'.[73] In identifying this as an aspect of the 'general system of law',[74] Hayne and Bell JJ may appear to have rejected McHugh J's attempt to discard that third limb of the rule in *Potter v Minahan*. Their Honours nonetheless described this aspect of the general system of law as 'a defining characteristic' of the criminal justice system. Kiefel J, the other member of the majority, maintained the language of 'fundamental principle'.[75] It would seem, therefore, that this feature of the reasoning of the majority should not be read as relaxing any requirement of 'fundamentality'.

[70] Ibid.

[71] *Malika Holdings* (2001) 204 CLR 290, 298 [28].

[72] Ibid 298–9 [28].

[73] (2013) 248 CLR 92, 132 [87] (Hayne and Bell JJ).

[74] Ibid.

[75] Ibid 153 [159]. See also *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 417 [174], [176] (Kiefel J).

The clear statement principle, as expressed in *Bropho* and *Malika Holdings*, is concerned to describe in an empirically accurate way the likely intention of a legislature in the modern regulatory state. It accepts that there can be no presumption against modification of the general law, or even of common law rights. The presumption is accurate only in relation to 'fundamental' rights. It is in this way that, as Chief Justice Spigelman suggested, '[t]he word "fundamental" has work to do'.[76]

To this refinement of the principle of legality has recently been added an additional layer of empirical justification. It is now said, by a majority of the High Court, that application of the presumption against the abrogation of fundamental rights is justified because it is 'a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted.'[77] The argument is that Parliament (and parliamentary drafters to the extent, if any, that the imputed knowledge of those individuals is relevant)[78] can be taken to know that the presumption against abrogation of fundamental rights will be applied in the courts, so that an absence of clear words is therefore affirmative evidence of an intention *not* to rebut the known presumption. Goldsworthy explains the argument in terms of attributing 'standing commitments' to a legislature: 'If I know that others attribute standing commitments to me, and do nothing to disavow them, I confirm the attribution and dispel any previous doubts'.[79] This very argument was rejected in *Bropho*, in relation to the presumption that statutes do not bind the Crown.[80] What made the argument 'unconvincing' were the 'not infrequent occasions', empirically observable, where a legislature obviously meant to bind the Crown without saying so expressly.[81] Putting to one side whether in the context of abrogating rights the argument is any more persua-

[76] Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 19, 781.

[77] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), quoting *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ). See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134–5 [30] (French CJ, Crennan and Kiefel JJ); *Monis v The Queen* (2013) 295 ALR 259, 342 [331] (Crennan, Kiefel and Bell JJ); *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 211 [42] (French CJ).

[78] See *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 211 [42] (French CJ); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1, 28–9 [31] (French CJ).

[79] Goldsworthy, above n 4, 306.

[80] (1990) 171 CLR 1, 20–1 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[81] Ibid.

sive than it has been found to be in the context of binding the Crown, the argument and its rebuttal in *Bropho* are positive or empirical in character: they purport accurately to describe authentic legislative intentions.

2 *Normative Refinements*

There is an alternative way to respond to the critique of the positive proposition that Parliament is unlikely to have intended to abrogate rights. Rather than try to confine that proposition to a narrower category of 'fundamental' rights, it is possible to relocate the principle of legality by revising its *normative* content. This argumentative strategy obviates any need to rely on a positive claim about likely parliamentary intention (which is consonant with the view that there is no such thing). In terms of the syllogisms set out previously, this alternative response queries the truth of Premise 1. It posits circumstances in which the courts *should* do something *other than* give statutory language the meaning that the legislature may in fact have intended.

There have been two notable attempts in Australia so to revise the normativity of the principle of legality. The issue in *Coco v The Queen* ('*Coco*')[82] was whether a Queensland statute, which empowered a judge to authorise the use of listening devices, extended to empowering the judge to authorise entry upon private property for the purpose of installing and maintaining a listening device. The High Court held that it did not. It applied the clear statement principle in favour of the common law right to exclude others from private property. Mason CJ, Brennan, Gaudron and McHugh JJ reiterated the *Potter v Minahan* rationale for the principle, but then added:

> At the same time, curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.[83]

Gageler and Keane JJ subsequently described this additional observation as '[r]eflecting again the same rationale' as the rule in *Potter v Minahan*.[84] It is, with respect, difficult to see how this can be the case: *Coco*'s concern to 'enhance the parliamentary process' is a categorically different rationale for the presumption against rights-abrogation. It is a normative, rather than positive, rationale. The thought appears to be that, because of curial insistence

[82] (1994) 179 CLR 427.

[83] Ibid 437–8.

[84] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 451 [310].

upon 'clear expression', the legislature will be encouraged to give closer attention to the rights implications of its enactments. The notion of 'curial insistence' suggests a qualification upon the premise that the court should give effect to the intended meaning of the words. The 'insistence' is directed to *preventing* Parliament from abrogating rights otherwise than by clear words, even if in using general words it did in fact mean to abrogate rights. Thus, Sir Anthony Mason (who, as Chief Justice, participated in *Coco*) later said that 'some strong presumptive rules [are] of a fictional kind (because they do not reflect the actual legislative intent)'.[85] The justification for the clear statement principle in this form appears to be something like this:

Syllogism C

1C Courts should enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on (fundamental) rights.

2C Parliament will give a greater measure of attention to the impact of legislative proposals on (fundamental) rights if the courts 'insist' that statutes will not be effective to abrogate (fundamental) rights in the absence of clear words.

3 (1C+2C) In the absence of clear words, courts should give statutory language a meaning that does not abrogate (fundamental) rights.

An observation to which I will return in more detail later is that although *Coco* used the language of 'fundamental' rights, its internal logic works with or without that qualification.

A different kind of normativity for the principle of legality emerged in the United Kingdom. *R v Secretary of State for the Home Department; Ex parte Simms* ('*Simms*')[86] concerned whether a Prison Service Standing Order, made under a rule-making power, was properly construed to authorise a policy that imposed a 'blanket ban'[87] on interviews of prisoners by journalists. The applicants were serving life sentences of imprisonment for murder, and were seeking to persuade journalists to investigate the safety of their convictions. The House of Lords accepted that to do so would be an exercise of a fundamental freedom of expression and, moreover, an exercise 'qualitatively of a

[85] Sir Anthony Mason, 'Commentary' (2002) 27 *Australian Journal of Legal Philosophy* 172, 175. See also J J Doyle, 'Common Law Rights and Democratic Rights' in P D Finn (ed), *Essays on Law and Government: Principles and Values* (Lawbook, 1995) vol 1, 144, 158.

[86] [2000] 2 AC 115.

[87] Ibid 124 (Lord Steyn).

very different order' from that general participation in political debate which is properly excluded by the 'purpose of a sentence of imprisonment'.[88] Their Lordships held the blanket ban to be unauthorised by the Standing Order. The contrary construction of the Standing Order would have been ultra vires the enabling legislation, which had to be construed conformably with the principle of legality.[89]

Lord Hoffmann's concurring speech articulated the rationale for the approach to construction in terms of the democratic process and electoral accountability:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon [this power] are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.[90]

His Lordship's explanation was quoted approvingly in Australia, first by Kirby J,[91] then by Gleeson CJ.[92] French CJ more recently adopted the passage,[93] and Heydon J identified it as the 'good reason' for the principle's

[88] Ibid 127.

[89] Ibid 119 (Lord Browne-Wilkinson), 130 (Lord Steyn), 146 (Lord Millett). Cf *Wotton v Queensland* (2012) 246 CLR 1, 14 [22]–[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[90] *Simms* [2000] 2 AC 115, 131.

[91] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 415 [30] n 107; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 582 [106]. See also *A-G (WA) v Marquet* (2003) 217 CLR 545, 599–600 [164]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 26–7 [87]; *Putland v The Queen* (2004) 218 CLR 174, 214 [118]; *Chang v Laidley Shire Council* (2007) 234 CLR 1, 27 [85]; *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 262 [106]; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 69 [69]; *Wurridjal v Commonwealth* (2009) 237 CLR 309, 406–7 [255].

[92] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] n 61.

[93] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47].

existence.[94] Gageler and Keane JJ approved the same passage in *Lee v New South Wales Crime Commission*.[95]

Forcing Parliament 'squarely [to] confront what it is doing and accept the political cost' is presented as a justification for not construing general or ambiguous language to interfere with rights. Even if the legislature in fact intended to abrogate rights with its general words, the court's response is that it is not making any 'factual prediction, capable of being verified or falsified',[96] but expressing a legal value consistent with the rule of law. This justification for the principle of legality might be expressed in the following syllogism:

Syllogism D

1D Courts should ensure that Parliament is made to accept political responsibility for its decisions to abrogate (fundamental) rights.

2D Parliament will not bear responsibility if general or ambiguous statutory language is construed to abrogate (fundamental) rights.

3 (1D+2D) In the absence of clear words, courts should give statutory language a meaning that does not abrogate (fundamental) rights.

Two points may be noted. First, as with Syllogism C, the logic of the argument holds with or without the qualification of 'fundamental' rights. Second, there is a flavour of curial resistance to being conscripted to do the political branches' bidding. That is, the courts will not step in to give the desired hard edge to Parliament's fuzzy language, but will instead insist that Parliament take the responsibility for its own choices. This emerging theme is evident also in federal constitutional law.[97]

Each of *Coco* and *Simms* is a *normative* refinement in that each revises the normative premise of Syllogism A (that courts should give statutory language the meaning Parliament in fact intended). But the two accommodations differ in a crucial respect. The animating concern in *Coco* is the rights themselves. The Court regarded actual attention to rights as the salient enhancement of the parliamentary process. In contrast, *Simms* is process-oriented. It is animated by a concern to ensure not necessarily that the legislature give

[94] *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 239 [148].

[95] (2013) 302 ALR 363, 451 [311]. See also *R v Pora* [2001] 2 NZLR 37, 50–1 [53] (Elias CJ and Tipping J).

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

[97] See especially *South Australia v Totani* (2010) 242 CLR 1. Cf *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

anxious consideration to rights, but that it express itself clearly to the electorate, taking responsibility for its decision, and so that the electorate can effectively discipline that decision. Expressing a policy clearly might be thought necessarily to require prior consideration, if not anxious consideration, of the rights at stake, though the two concepts are analytically distinct.

Saeed v Minister for Immigration and Citizenship ('*Saeed*') illustrates the distinction.[98] One of the issues in the case was whether amendments made in 2002 to the *Migration Act 1958* (Cth)[99] manifested a clear intention to exclude or limit the requirements of procedural fairness. The amendments had been made in response to *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*,[100] which held that the statute was insufficiently clear to exclude procedural fairness. Extrinsic materials, including the Minister's second reading speech and the Explanatory Memorandum, appeared to make very explicit that the amendments were intended now to exclude the common law rules. The Court held, nevertheless, that the amendments did not achieve that result. It emphasised that the relevant clarity of intention to displace fundamental common law principles must be found, if at all, in the statutory words themselves and not the extrinsic materials:

> Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning. …
>
> It may be accepted that the context for the enactment … was provided by the decision in *Ex parte Miah* and that [the enactment] was an attempt to address the shortcomings identified in that decision. Resort to the extrinsic materials may be warranted to ascertain that context and that objective … But that objective cannot be equated with the statutory intention as revealed by the terms of the subdivision.[101]

If the motivation for the interpretive principle were, as stated in *Coco*, that Parliament give a 'greater measure of attention' to rights, then the extrinsic materials, perhaps even more so than the legislative words, should be sufficient indication of that attention. If, conversely, the underlying motivation is, as stated in *Simms*, the objective of ensuring the clear expression of rights-

98 (2010) 241 CLR 252.

99 *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

100 (2001) 206 CLR 57.

101 *Saeed* (2010) 241 CLR 252, 264–5 [31], 266 [34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

abrogative policy, to enable the electors effectively to discipline the Parliament, then the legislative words, and not the extrinsic materials, matter most (at least upon a theory that subjects of the law are entitled to know what the law is from what the law says).[102] Under *Coco*, we should be concerned about whether Parliament paid attention to rights. Under *Simms*, we should be concerned about whether Parliament took responsibility before the electorate for its rights-abrogative decision. The different approaches encourage and permit different uses of extrinsic materials.

D *Provisional Conclusion*

The transformation of the principle of legality over the course of the 20th century has not simply involved evolution in content and scope. Nor can its contemporary application be described as a mere 'reassertion' of an old rule. On the contrary, the very constitutional justification for its application has been transformed in response to the establishment of the activist, regulatory state, for which legislation is the preferred, and ubiquitous, mechanism of governance. A myth of continuity traces the principle of legality in Australia to *Potter v Minahan*, but the positive claims that underpinned that decision, however plausible they might have been in 1908, are obviously false in contemporary conditions. To accommodate that newfound descriptive falsity, the principle of legality is now justified on competing bases. There are two analytically distinct justifications: one is a refined *positive* justification, emphasising a narrow category of 'fundamental' rights and the genuine 'standing commitments' of parliaments. The other is a new *normative* justification, which acknowledges that modern legislatures might well intend to abrogate common law rights, but which urges the courts to insist upon a clear statement of intent, so as to facilitate political accountability and electoral discipline.

Understanding this transformation of the principle of legality, and the principle's new justifications, is important in its own right. It also informs the vexed question of which rights properly attract the protection of the principle. That is the subject of the next section.

[102] See *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340 (Gaudron J).

III Rights Engaging the Principle of Legality

Not every right engages the principle of legality. It is an important and difficult task to articulate a principled approach to identifying the rights that do. First, I will consider the leading approach, which says that 'fundamental' rights engage the principle of legality. But this approach is necessary only for those who adopt the *positive* justification for the principle. For those who adopt the *normative* justification, I consider an alternative approach. According to this approach, the relevant rights are 'vulnerable' rights — those which the ordinary political process may be inapt to protect. We should, I argue, bring notions of 'vulnerability' to bear upon the content of 'fundamental', or, more directly, discard 'fundamentality' altogether in favour of 'vulnerability'. Finally, I will explain that 'vulnerable' rights need not be common law rights but might also be statutory rights.

A *Fundamental Rights*

The purpose of 'fundamentality', the 'work' that it has to do,[103] is to improve the descriptive accuracy of the claim that Parliament did not, in fact, intend to abrogate a right by general or ambiguous language. That purpose sheds light on its proper meaning. The rights that are 'fundamental' in the relevant sense must be those rights which, it can be said as a descriptive matter, Parliament would not intend to abrogate absent clear words. So understood, 'fundamental' engages not abstract or idiosyncratic notions of what might be thought to be 'important', but rather the genuine 'standing commitments'[104] of legislatures. That is, a 'fundamental' right is one with such 'entrenched and consistent recognition in the decided cases *as* a fundamental right'[105] that it can be said, with descriptive plausibility if not truth, that Parliament intends to respect it.

This argument was put to the High Court in *Australian Crime Commission v Stoddart* ('*Stoddart*').[106] The Australian Crime Commission sought to 'equate "fundamental" with "well-established"'[107] and said that the right in

[103] Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 19, 781.

[104] Goldsworthy, above n 4, 306.

[105] Australian Crime Commission, 'Appellant's Submissions', Submission in *Australian Crime Commission v Stoddart*, No B71 of 2010, 31 January 2011, 12 [34] (emphasis in original).

[106] (2011) 244 CLR 554.

[107] Transcript of Proceedings, *Australian Crime Commission v Stoddart* [2011] HCATrans 44 (1 March 2011) 1159–69 (S J Gageler SC and French CJ).

question — a privilege against spousal incrimination — was so doubtful or uncertain in its very existence that there could not be said to be any standing commitment against its abrogation.[108] The issue was not decided because the appeal was allowed on the anterior ground that spousal privilege did not exist. Nevertheless, Crennan, Kiefel and Bell JJ tentatively accepted the argument, noting in an obiter dictum that '[i]t would appear … that the fundamental right, freedom, immunity or other legal rule which is said to be the subject of the principle [of legality]'s protection, is one which is recognised by the courts and clearly so.'[109] Heydon J, in dissent, rejected the argument: 'a right does not become fundamental merely because cases call it that. And a right does not cease to be fundamental merely because cases do not call it that.'[110] More recently, Gageler and Keane JJ appeared also to reject the argument, holding that the principle of legality is not confined to the protection of rights that are 'of long standing or recognised and enforceable or otherwise protected at common law'.[111]

Aronson and Groves, in a passing treatment, describe the Australian Crime Commission's argument as 'dubious'.[112] Though they do not elaborate upon their reasons for that view, one plausible reason is that the argument embraces a static conception of 'fundamentality'. It is static in the sense that, on this theory of fundamentality, it becomes difficult for courts to enforce a view that Parliament has adopted new standing commitments or discarded old ones, even as attitudes to rights and their scope might evolve.[113] Of course, the incapacity of courts to assert new parliamentary standing commitments is not obviously objectionable, or even all that static, because new standing commitments can always be declared in statutes. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), for example, declares the Commonwealth Parliament's standing commitment to the 'human rights' defined in that Act by reference to various international conventions and treaties. Furthermore, non-static conceptions of fundamentality potentially suffer from idiosyncratic application. Heydon J made notable attempts to articulate a substantive

[108] Australian Crime Commission, 'Appellant's Submissions', Submission in *Australian Crime Commission v Stoddart*, No B71 of 2010, 31 January 2011, 12 [35]; ibid 1225–34 (S J Gageler SC).

[109] *Stoddart* (2011) 244 CLR 554, 622 [182].

[110] Ibid 619 [166].

[111] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 452 [313].

[112] Aronson and Groves, above n 16, 178.

[113] Cf Spigelman, *Statutory Interpretation and Human Rights*, above n 33, 29; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 64 (Brennan J).

account of fundamentality. In *Stoddart*, his Honour said that 'spousal privilege … favours liberty. It preserves a small area of privacy and immunity from the great intrusive powers of the state, and those who invoke them. It fosters human dignity. It helps maintain self-respect.'[114] More recently, he explained why the common law right of free speech was 'sufficiently important to attract the principle of legality'.[115] His account drew on intrinsic values in human personality and instrumental values in fostering other freedoms and 'a liberal-democratic constitutional order'.[116] It is difficult to disagree with Heydon J about the importance of free speech. But if 'fundamental rights' are those rights which are 'sufficiently important' to a judge's own conception of a desirable 'constitutional order', then the scope for idiosyncrasy is readily apparent.

The difficulty charting a course between stasis and idiosyncrasy is, perhaps, why French CJ suggested that the notion of 'fundamentality' might be discarded altogether.[117] As I explained previously, 'fundamentality' is a necessary gloss only if one adopts the *positive* refinement of the rule in *Potter v Minahan* (Syllogism B). Within that accommodation, 'fundamentality' serves the purpose of narrowing the scope of the positive claim that Parliament is unlikely to have intended a certain result. In contrast, the *normative* refinements (Syllogisms C and D) work perfectly well without reliance on the notion. Each of them rejects the unqualified premise that courts must give effect to some discernible, authentic legislative intention, and replaces it with a premise to the effect that courts should sometimes prevent legislatures from abrogating rights otherwise than by clear words. Fundamentality has no obvious role to play: what is important is the enhancement of the parliamentary or electoral process in respect of rights. This is not to say that the principle *could not* be expressed in terms of 'fundamental rights'. It could be (and indeed in *Coco* it was), but the additional qualification would demand extrinsic justification. Nothing about the internal logic of the principle would require it, as it does in the case of the positive refinement (Syllogism B). The apparent difficulties in articulating what 'fundamental' means speak against

[114] (2011) 244 CLR 554, 618 [163].

[115] *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 240 [152].

[116] Ibid 240 [151], quoting Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) 364.

[117] *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43]. Compare his Honour's suggestion that a problem with the concept of fundamentality is the tendency for it to 'shift in … content with the times': Transcript of Proceedings, *Australian Crime Commission v Stoddart* [2011] HCATrans 44 (1 March 2011) 1209–10.

any persuasive extrinsic justification. The better view is that the significance placed upon identifying rights as 'fundamental' was just one way to respond to the *empirical* implausibility of *Potter v Minahan*. It is a response that is challenged by the alternative response founded upon the *normativity* of the principle of legality.

B *Vulnerable Rights*

The normativity of the principle of legality directs our search away from an elusive category of 'fundamental' rights and towards a different kind of right. I call them 'vulnerable' rights. To understand how the principle of legality identifies 'vulnerable' rights, it is necessary first to understand how the principle of legality is reconciled with democratic imperatives.

1 *Objection from Democracy*

The rule in *Potter v Minahan* was not obviously susceptible to objections from democracy. Of course, given what we know about O'Connor-the-framer's sceptical attitude to the supposed rights-respecting credentials of legislatures, the rule might have been privately imagined by O'Connor-the-judge as a veil for judicial oversight. At the very least, the application of the rule in particular cases might have frustrated legislative expectations or the majority will (even inadvertently). And it is possible, as Chief Justice French has suggested, that the rule had 'its origins in a rather anti-democratic, judicial antagonism to change wrought by statute'.[118] As early as 1938, there appears to have been criticism of the presumption as it was applied in Canada and the purported consistency of its application with authentic legislative intention.[119] The outward grammar of the principle nonetheless involved the courts in nothing more than giving statutory words the 'meaning in which they were … really used'.[120] While individual decisions might be open to allegations of error, the principle derived its systemic force from an acceptance of its positive claim

[118] Chief Justice Robert French, 'The Judicial Function in an Age of Statutes' (Speech delivered at the 2011 Goldring Memorial Lecture, Wollongong, 18 November 2011) 23 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18nov11.pdf>. See also Duxbury, above n 12, 36–9.

[119] John Willis, 'Statute Interpretation in a Nutshell: Preliminary Observations' (1938) 16 *Canadian Bar Review* 1, 17. For a more recent critique of a similar principle in the United States, see John F Manning, 'Clear Statement Rules and the *Constitution*' (2010) 110 *Columbia Law Review* 399.

[120] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting Maxwell and Theobald, above n 27, 122.

that the legislature was unlikely to have intended to abrogate common law rights by general words. As Goldsworthy says, citing Dicey, '[t]he traditional justification for [the principle] was entirely consistent with parliamentary sovereignty'.[121]

The new normative basis for the principle of legality, conversely, directly invites objections from democracy, because it claims that the courts are sometimes justified in giving statutory language a meaning other than that intended by the legislature (and not only for semantic or textualist reasons). The objection takes the form of the familiar 'counter-majoritarian difficulty':[122] how is it legitimate that the will of a court should prevail over the majority will expressed through its representative legislature? So the objection goes, judges interpreting statutes ought only to 'carry out decisions they do not make', acting as the 'honest agents of the political branches'.[123] Any deviation from giving effect to the meaning Parliament intended is, on this view, objectionable.

The counter-majoritarian difficulty was classically articulated as an objection not against interpretation, but against judicial review of legislation. Bickel recognised that many forces in a sophisticated democracy operate in a counter-majoritarian fashion. Judicial review was said to be more problematic than others because the 'legislative majority … is, in turn, powerless to affect the judicial decision.'[124] Mere interpretations, therefore, may seem less objectionable than invalidations. Could not the legislature, if it disagreed with the court's interpretation, override that interpretation where it could not override a declaration of invalidity? After all, 'if Parliament does not like the way a statute has been construed by the courts, it has it within its power to amend the statute.'[125] Thus, French CJ has sought to emphasise that the principle of legality 'does not constrain legislative power'[126] and Justice

[121] Goldsworthy, above n 4, 305.

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

[123] Frank H Easterbrook, 'The Court and the Economic System' (1984) 98 *Harvard Law Review* 4, 60. See also Goldsworthy, above n 4, 254; Manning, 'Textualism and the Equity of the Statute', above n 31. For a recent discussion of the faithful agent theory and competing theories, see Greenawalt, above n 5, 19–42.

[124] Bickel, above n 122, 20.

[125] Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 130.

[126] *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43]; *South Australia v Totani* (2010) 242 CLR 1, 29 [31].

Gummow, similarly, said that '[i]t is one thing to deny legislative power and another to encourage clear statements of legislative intent'.[127]

Despite its initial attraction, such reasoning does not, with respect, always fit comfortably within the Australian constitutional context. The idea that legislative amendment can always overcome judicial interpretation is inherited from British constitutional traditions and is not translatable to a system of strong bicameralism. In the United Kingdom, at least since the passage of the *Parliament Act 1911*[128] the legislature can override judicial decisions subject only to the political priorities of the government-controlled[129] House of Commons. The power of the House of Lords is one only of deferral.[130] In Australia, the need to secure the assent of both the House of Representatives and the Senate, whose respective powers are virtually equal and which may be controlled by different and equally disciplined political parties, means that a judicial interpretation can persist, even if one of the Houses would never have agreed to that interpretation and even if both Houses, acting on a clean slate, would together have agreed to some different interpretation. The counter-majoritarian difficulty is, therefore, no less acute (and in some circumstances more acute) in the case of 'mere' interpretation.

Interpretation 'introduces the judge as a decision-maker who can create a new default position'.[131] I will call a judicial interpretation that differs from the actual legislative intention or meaning an 'incongruent' interpretation, using that adjective without any pejorative connotation. In addition to the 'inertia' by which 'the legislature's freedom of action and its readiness to make its response in colloquies with the judiciary are qualified',[132] there are substantive obstacles to the possibility of bicameral override of an incongruent interpretation — 'it is not just that the writers of laws may not have sufficient time or interest to correct interpretive mistakes, the structure of the legislative process will, in many instances, make it *impossible* for them to do so.'[133]

[127] Justice Gummow, above n 50, 177.

[128] 1 & 2 Geo 5, c 13.

[129] See Duxbury, above n 12, 41. On occasion a minority government, or a majority coalition, has commanded the confidence of the House of Commons: see Vernon Bogdanor, *The Coalition and the Constitution* (Hart Publishing, 2011).

[130] See Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009) 146–9.

[131] Eskridge Jr, *Dynamic Statutory Interpretation*, above n 13, 167.

[132] Bickel, above n 122, 206. But see William N Eskridge Jr, 'Overriding Supreme Court Statutory Interpretation Decisions' (1991) 101 *Yale Law Journal* 331, 336–43.

[133] Jerry L Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press, 1997) 101–2 (emphasis in original).

Assume that each house of Parliament has an ideal policy position. An enactment approved by both houses will embody a compromise position somewhere between the two ideal positions. If a judicial interpretation shifts the meaning from the understood compromise position, but the incongruent position that it settles is no further from the ideal position of any one house than the compromise position in fact reached, then the one house will have no incentive to agree to override the incongruent interpretation. In other words, if just one house prefers the court's new position to the thwarted compromise position (or even if it is indifferent as between the two), that house will veto any remedial amendments proposed by the other house.[134]

The immediate aftermath of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Malaysian Declaration Case*')[135] illustrates the phenomenon. The Labor government's ideal position was to have the *Migration Act 1958* (Cth) authorise its policy of transferring asylum seekers to Malaysia.[136] I will stipulate for present purposes that this be taken to be the ideal position of the House of Representatives, which is ordinarily controlled by the government (thus putting to one side the unusual complications of a hung parliament).[137] The Senate's ideal position is a little more complex to discern, since a minor party held the balance of power. The Liberal-National Coalition favoured its own 'Pacific Solution', and the Australian Greens favoured onshore processing. The *Migration Act 1958* (Cth), prior to the *Malaysian Declaration Case*, was thought to be 'well accepted and understood on both sides of the House'[138] to enable *both* the Malaysian and Pacific Solutions, depending on the preference of the government of the day — effectively a compromise between Labor and the Coalition. In the *Malaysian Declaration Case*, the High Court ruled out the Malaysian Solution (the House of Representatives' stipulated ideal

[134] See generally William N Eskridge Jr and John Ferejohn, 'The Article I, Section 7 Game' (1992) 80 *Georgetown Law Journal* 523; ibid 105.

[135] (2011) 244 CLR 144.

[136] See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (signed and entered into force 25 July 2011); Prime Minister of Australia and Minister for Immigration and Citizenship, 'Australia and Malaysia Sign Transfer Deal' (Media Release, 25 July 2011).

[137] See Jeremy Thompson and Stephen Dziedzic, 'Crook to Vote against Asylum Bill', *ABC News* (online), 13 October 2011 <http://www.abc.net.au/news/2011-10-13/crook-to-vote-against-asylum-bill/3559640>.

[138] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2011, 9894 (Chris Bowen).

position) as a matter of statutory construction.[139] It did not clearly rule out the Pacific Solution,[140] and certainly did not rule out onshore processing. Therefore, neither the Coalition nor the Greens had any strong incentive to agree to the government's proposed amendments after the decision.[141] Together, they would have ensured the Senate's veto had the amending Bill progressed that far. That is so even though, if acting on a blank slate, the Coalition would have agreed to a compromise position to authorise the Pacific Solution.[142]

'Parliamentary supremacy', as though Parliament were univocal, is no answer to incongruent interpretations in Australia, because the court is not a second and subordinate actor. It is a third actor in a potentially complex 'game'.[143] In this way, the normativity of the principle of legality, by embracing incongruent interpretation and deviation from the 'faithful agent' theory of statutory interpretation, is susceptible to the same objections levelled against judicial review of legislation.

2 *Answering the Objection*

Overcoming the counter-majoritarian difficulty has been a central project of American constitutional theory. One very influential response came from Bickel's own student, John Hart Ely.[144] Ely defended a conception of judicial review which he said was *not* counter-majoritarian because it was 'representation-reinforcing'.[145] He meant that judicial review legitimately protected

[139] *Malaysian Declaration Case* (2011) 244 CLR 144, 183 [68] (French CJ), 204 [148] (Gummow, Hayne, Crennan and Bell JJ), 236 [255] (Kiefel J).

[140] Ibid 199–200 [128] (Gummow, Hayne, Crennan and Bell JJ). But see Stephen Gageler, Stephen Lloyd and Geoffrey Kennett, 'In the Matter of the Implications of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* for Offshore Processing of Asylum Seekers under the *Migration Act 1958* (Cth): Opinion' (SG No 21 of 2011, 2 September 2011) [3]; Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2011, 9894 (Chris Bowen).

[141] Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 2011, 10945–8 (Chris Bowen). But see now *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (assented to on 17 August 2012).

[142] Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2011, 9877–8 (Julia Gillard).

[143] See Eskridge Jr and Ferejohn, above n 134.

[144] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). In the Australian constitutional context, see Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138; Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162.

[145] Ely, above n 144, 87, 181.

systemic features of representative institutions and therefore majoritarian government. He meant that courts should 'keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open'[146] and to 'facilitat[e] the representation of minorities'.[147] Although the political process may be the primary 'mechanism of constitutional constraint',[148] it is at those points where it is 'inherently weak or endangered'[149] that judicial supervision has a legitimate role to play.

We might adapt Ely's theory of judicial review to the context of statutory interpretation, and in doing so defend the apparently counter-majoritarian complexion of the principle of legality.[150] The adaptation is at least prima facie defensible because of the normative affinity between Ely's theory and the principle of legality as it was articulated in *Simms* (and *Coco*): both are about facilitating and improving the political process. According to this adaptation, courts may legitimately insist upon a clearer statement of legislative intention in service of protecting 'vulnerable' rights. Some rights may not be adequately protected by ordinary political processes, in the sense that there is a real risk they might be abrogated by Parliament without effective opportunity for electoral discipline. Where the rights-holders are a politically weak minority (perhaps because they are 'discrete and insular');[151] where the rights themselves concern the substance of representative government and the political process; or where the circumstances are otherwise such that only an especially clear statement of legislative intent will ensure sufficient political scrutiny; then the rights at stake may be described as 'vulnerable' in the relevant sense — that is, vulnerable to casual abrogation. A clear statement principle has the purpose and effect of reinforcing the political process: ensuring that legislators take responsibility for any decision to abrogate vulnerable rights, and that their decision is subjected to electoral scrutiny. It may be that something like 'vulnerability' inheres in Gageler and Keane JJ's articulation of the principle of legality in terms of 'rights, freedoms, immunities, principles and values that

146 Ibid 76.

147 Ibid 135.

148 Gageler, 'Foundations of Australian Federalism', above n 144, 164.

149 Gageler, 'Beyond the Text', above n 129, 152.

150 See Eskridge Jr, *Dynamic Statutory Interpretation*, above n 13, 148–61, 289, 294–7.

151 *United States v Carolene Products Co*, 304 US 144, 152–3 n 4 (1938) (Stone J).

are important within our system of representative and responsible government under the rule of law'.[152]

Political minorities are not, of course, always vulnerable. In a pluralist political system, it can be the diffuse majorities that are vulnerable to a market for legislation dominated by powerful interest groups.[153] The inherent weaknesses of the political process can manifest not only in legislation that abrogates rights, but also in legislation that, for example, creates or misallocates economic rents, thereby serving private over public interests.[154] How the principle of legality might evolve 'symmetrically' to accommodate this circumstance is beyond the scope of this article. I simply foreshadow that there may be contexts other than the abrogation of rights in which normative clear statement principles would be equally justified.

The concept of vulnerable rights, as well as having justificatory force, also has explanatory force. Pearce and Geddes list more than 40 rights that have been held to engage the principle of legality.[155] I do not propose to traverse them all. But consider some of the central types. Criminal process rights and cognate rights — which for present purposes I understand broadly to include aspects of investigation, prosecution and penalty in the regulatory environment — are classically 'vulnerable'. The relevant rights-holders tend to be politically weak, while the public interest in the detection and punishment of wrongdoing is strong and apt to confer substantial political credit upon elected officials who align themselves with that interest. It has recently been observed that 'tough law and order policies' in the states have become 'a key driver of the constitutional agenda'.[156] In those circumstances, the risk is high that rights will come to be abrogated without especially anxious consideration. Curial insistence upon a clear statement of legislative intention nudges the calculus not in favour of the right per se, but in favour of political scrutiny and electoral discipline of the decision to abrogate the right. It guards against

[152] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 452 [313].

[153] See Bruce A Ackerman, 'Beyond *Carolene Products*' (1985) 98 *Harvard Law Review* 713, 723–4; Michael T Hayes, *Lobbyists and Legislators: A Theory of Political Markets* (Rutgers University Press, 1981); James Q Wilson, *Political Organizations* (Princeton University Press, 2nd ed, 1995).

[154] See especially William N Eskridge Jr, 'Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation' (1988) 74 *Virginia Law Review* 275. See also Mashaw, above n 133, 81–105, discussing works by Easterbrook, Macey, Posner, Eskridge, and others.

[155] Pearce and Geddes, above n 21, 195–8 [5.36].

[156] Gabrielle J Appleby and John M Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 2.

casual intrusion upon, or 'inadvertent and collateral alteration' of,[157] a vulnerable class of rights. Thus, a clear statement is necessary to abrogate the privilege against self-incrimination,[158] legal professional privilege,[159] and procedural fairness.[160] A clear statement is necessary to authorise arrest and detention,[161] entry upon and search of property,[162] use of information obtained by telephone interception,[163] and compulsory production of documents.[164] The principle extends to the construction of substantive criminal provisions, requiring a clear statement to impose, for example, criminal liability for failure to observe a positive duty retroactively created,[165] or for conduct based on an honest and reasonable mistake of fact.[166] Refugee law is another prominent context in which rights of procedural fairness,[167] personal liberty,[168] and access to the courts[169] are vulnerable in the sense being discussed.

Freedom of expression,[170] freedom of assembly,[171] open courts,[172] and similar rights associated with participation,[173] are vulnerable in a somewhat

[157] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 452 [313] (Gageler and Keane JJ).

[158] *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

[159] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

[160] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (Hayne, Crennan and Kiefel JJ, dissenting).

[161] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514.

[162] *Coco* (1994) 179 CLR 427.

[163] *Taciak v Commissioner of Australian Federal Police* (1995) 59 FCR 285, 297–9 (Sackville J).

[164] *AB Pty Ltd v Australian Crime Commission* (2009) 175 FCR 296, 302–3 [18]–[19] (Flick J).

[165] *DPP (Cth) v Keating* (2013) 297 ALR 394, 403–4 [47] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[166] *CTM v The Queen* (2008) 236 CLR 440.

[167] *Saeed* (2010) 241 CLR 252.

[168] *Al-Kateb v Godwin* (2004) 219 CLR 562; *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 275–8 [110]–[121], 282 [145] (Gummow J), 378–80 [528]–[532] (Bell J).

[169] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

[170] *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197; *Monis v The Queen* (2013) 295 ALR 259; *Hogan v Hinch* (2011) 243 CLR 506, 526 [5] (French CJ); *Evans v New South Wales* (2008) 168 FCR 576.

[171] *South Australia v Totani* (2010) 242 CLR 1, 28–30 [31] (French CJ); *Melbourne Corporation v Barry* (1922) 31 CLR 174.

different sense. French CJ described freedom of speech as 'linked to the proper functioning of representative democracies' and as 'never more powerful than when it involves the discussion and criticism of public authorities and institutions'.[174] Rights of this kind underpin the capacity of the governed to effect change in their representative institutions. They are, therefore, more than 'important' in some abstract sense. They are also inherently vulnerable to attack from those who happen to control the representative institutions at any given point in time and who would seek to entrench their control. Curial insistence upon a clear statement of intent, again, ensures that legislatures do not evade electoral scrutiny of controversial decisions to intrude upon these rights.

The notion of 'vulnerable' rights also explains the central cases in which the courts have held the principle of legality *not* to be engaged. For example, in *Electrolux Home Products Pty Ltd v Australian Workers' Union* ('*Electrolux*'), the Court construed provisions conferring immunity from liability for damage occasioned by protected industrial action.[175] Although the immunity curtailed common law rights to sue, a majority of the Court did not apply the principle of legality.[176] Gleeson CJ most clearly explained why:

> The assistance to be gained from a presumption will vary with the context in which it is applied …
>
> The rights of action taken away are common law rights of a kind frequently modified by statute in the industrial context with which the legislation is concerned.[177]

Industrial law and politics in Australia is generally characterised by very well-organised representation on behalf of both employer and employee interests. There is little reason to suspect that the ordinary political process will not adequately manage the competing interests at stake. In other words, rights in

[172] *Hogan v Hinch* (2011) 243 CLR 506, 526 [5] (French CJ).

[173] See Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 232–54 ('Participation: The Right of Rights').

[174] *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 212 [43]. See also at 240 [151]–[152] (Heydon J). See also Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948), reproduced in Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965) 27; Charles L Black Jr, *Structure and Relationship in Constitutional Law* (Louisiana State University Press, 1969) 39–45, 51.

[175] (2004) 221 CLR 309.

[176] Ibid. But see at 398 [252] (Callinan J).

[177] Ibid 328 [19], 329 [22].

the industrial law context are not ordinarily 'vulnerable', so the principle of legality is not ordinarily engaged.

Malika Holdings,[178] which concerned a company's right to challenge its customs duty liability, is similar. In matters concerning revenue law there is little reason to suspect that striking a balance between the interests of the revenue and the taxpayer through the ordinary political process will inadequately protect the taxpayer's rights. This observation is consistent with the abandonment of the outdated approach to interpreting revenue statutes, which treated them as analogous to penal statutes that should be narrowly construed.[179]

I should not be thought to suggest that the criterion of vulnerability readily denotes an obvious category of rights, or even one that is fixed or determinate. The criterion denotes a mode of analysis or reasoning — a framework for argument about whether a given right should or should not attract the protection of the principle of legality. Indeed, the same right in different contexts may or may not be vulnerable. Or, at least, it might be vulnerable to a different degree. The spectral quality of 'vulnerability', compared to the binary quality of 'fundamentality', makes the concept more sensitive to the different contexts in which it might be applied. The same right might or might not be sufficiently 'vulnerable', and therefore might or might not engage the principle of legality, depending upon the particular context. Context will also inform the closely related question of what degree of clarity is sufficient to displace the presumption against abrogation: 'the degree of clarity required may vary from right to right and … from time to time.'[180]

For example, I claimed above that a refugee's right to procedural fairness is 'vulnerable'. But it really depends on the context. Consider *Plaintiff S10/2011 v Minister for Immigration and Citizenship* ('*Plaintiff S10*').[181] The Minister's obligation to afford procedural fairness in considering whether to exercise

[178] (2001) 204 CLR 290.

[179] Chief Justice Murray Gleeson, 'Statutory Interpretation' (Speech delivered at Taxation Institute of Australia 24th National Convention, 'Justice Hill Memorial Lecture', Sydney, 11 March 2009) 7 <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/gleeson11mar09.pdf>; Sir Anthony Mason, 'Taxation Policy and the Courts' (1990) 2(4) *CCH Journal of Australian Taxation* 40, 41–2; Scalia and Garner, above n 13, 299–300.

[180] Spigelman, *Statutory Interpretation and Human Rights*, above n 33, 88. See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134–6 [30]–[32] (French CJ, Crennan and Kiefel JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 78 [92] (Black CJ, Sundberg and Weinberg JJ).

[181] (2012) 246 CLR 636.

certain dispensing provisions was held to be abrogated by the legislation in question. The necessary clarity was identified in '[t]he cumulative significance'[182] of a range of structural features of the statutory scheme. Significantly, those features included: that the affected individual would necessarily have gone through an administrative process of original decision and merits review;[183] and that by parliamentary tabling requirements, 'the Minister is rendered accountable in an immediate sense to each House of the Parliament'.[184] In other words, the scheme was seen already to provide certain mechanisms of political accountability, so that any further 'curial insistence' upon a clearer statement was unnecessary or unjustified.

It might be objected that if vulnerability has this context-dependent quality, then 'vulnerable rights' are no more stable or no less idiosyncratic than 'fundamental rights'. It is important, however, not to mistake uncertainty for idiosyncrasy. Legal standards can be — indeed, almost always are — uncertain, or vague, at least in their penumbral application. They can be uncertain without being so devoid of content as to depend upon, say, 'idiosyncratic notions of fairness and justice'.[185] 'Vulnerability', in the sense I have described, has, I think, somewhat more content than the present understanding of 'fundamentality', which seems to be more a conclusory label than an explicative standard from which '[r]ules and principles [can] emerge'.[186] Of course, we might disagree about whether particular rights in particular contexts are 'vulnerable' or not, but that is not necessarily to say that we disagree about the essential content of the standard by which those rights fall to be classified as such.

[182] Ibid 668 [100] (Gummow, Hayne, Crennan and Bell JJ).

[183] Ibid 667–8 [99] (viii).

[184] Ibid 667 [99] (ii).

[185] *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J). See especially *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91] (Gummow and Crennan JJ), quoting Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 195. Cf *Hogan v Hinch* (2011) 243 CLR 506, 536 [31] (French CJ); *Thomas v Mowbray* (2007) 233 CLR 307, 419 [322] (Kirby J), 479 [516] (Hayne J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 231 [59] (Gaudron J), 238 [80] (Gummow and Hayne JJ).

[186] *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91] (Gummow and Crennan JJ), quoting Zines, above n 185, 195. Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 374 [38] (Brennan CJ), 390 [93] (McHugh, Gummow, Kirby and Hayne JJ); *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, 369–70 [10] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46] (Gaudron and Gummow JJ), 643 [144]–[145] (Hayne J); *Miller v Miller* (2011) 242 CLR 446, 469 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Perhaps a stronger objection is that to the extent the vulnerability of a right depends upon the context in which it is claimed, Parliament cannot reasonably know in advance whether in a particular context the courts will regard a right as attracting the clear statement principle. There can be no absolute answer to this objection. Whether Parliament can be taken to be aware that a particular right attracts the clear statement principle is very important within the positive accounts of the principle of legality.[187] That is so because the positive accounts purport to give effect to Parliament's authentic intentions and genuine standing commitments. And that is why, in the previous section, I argued that 'fundamental' must mean 'well-established', within positive accounts of the principle of legality. But notice to Parliament is less important in the normative accounts. It is true that the normative version of the principle of legality turns on requiring Parliament 'squarely [to] confront what it is doing'. And it may be accepted that if Parliament is unaware that a particular right in a particular context will be regarded by the courts as 'vulnerable', then it may not be moved 'squarely [to] confront what it is doing'. Be that as it may, the normativity of the principle of legality would demand in any event that the courts give protection to the vulnerable right: it is the vulnerability, and not Parliament's actual or imputed knowledge, which animates the court. It should be added that the cases in which the context compels a court to surprise the Parliament by recognising a new vulnerable right are likely to be rare. More frequently, I would expect contextual considerations to result, as in *Plaintiff S10*, in a well-known right being characterised as *not* relevantly vulnerable in the circumstances.

The examples canvassed in this section could be multiplied. Debate might be had at the margins and in particular cases. But I hope to have sketched the case for understanding the principle of legality to be engaged only by rights that are 'vulnerable'.

C *Statutory Rights*

If it be correct that the principle of legality is engaged by 'vulnerable' rights, then there is no particular reason why those rights need to be 'common law' rights. In particular, vulnerable rights might well have their source in *legislation*. To accommodate the principle of legality to the realities of the modern regulatory state, statutory rights should also be understood to be capable of engaging the principle of legality.

[187] See especially Sales, above n 2, 605.

Finn J articulated this very approach in *Buck v Comcare*.[188] Mrs Buck had been in receipt of compensation payments under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). Comcare suspended her payments under a provision of that Act:

> Where an employee refuses or fails, without reasonable excuse, to undergo [a medical examination], or in any way obstructs an examination, the employee's rights to compensation … are suspended until the examination takes place.

Finn J construed the provision as depending upon a jurisdictional fact (that the employee was without reasonable excuse) determinable by a court, rather than upon a decision or opinion of Comcare. In arriving at that construction, Finn J had regard to the rights-abrogative character of the provision. His Honour acknowledged that Mrs Buck's right to compensation did 'not fall into the category of "common law" rights which traditionally have been safeguarded from legislative interference',[189] but continued:

> To confine our interpretative safeguards to the protection of 'fundamental common law rights' is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.[190]

The recipients of various government benefits are often (not always) marginalised groups lacking in political power. The entitlements to those benefits can therefore be seen to be 'vulnerable' statutory rights in the sense previously discussed. Indeed, forms of 'government largess' have long been recognised as sharing common features with traditional property rights, which the principle of legality has historically protected:[191]

> in the case of government largess, nothing turns on the fact that it originated in government. The real issue is how it functions and how it should function. …
>
> The grant, denial, revocation, and administration of all types of government largess should be subject to scrupulous observance of fair procedures.[192]

188 (1996) 66 FCR 359.

189 Ibid 364.

190 Ibid 364–5.

191 See, eg, *Clissold v Perry* (1904) 1 CLR 363; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [42]–[43] (French CJ); *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409, 421–2 [32] (French CJ, Gummow, Crennan and Bell JJ).

192 Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733, 779, 783.

Various statutory non-discrimination regimes may also be seen to confer rights upon certain vulnerable groups. Chief Justice Spigelman contemplated whether these statutory norms of non-discrimination on grounds such as race, sex or disability could be recognised as fundamental common law rights.[193] On my account of vulnerable statutory rights, those norms may be brought within the protection of the principle of legality without first needing to develop the common law in the way that Spigelman foreshadowed.

Statutory rights that would be vulnerable in the 'participatory' sense might include access to merits or judicial review, or rights of appeal.[194] They would include rights under electoral laws.[195] The principle of legality could also extend to protect those 'quasi-constitutional statutes' which establish 'integrity branch' structures for the systemic protection of vulnerable rights.[196]

It is well-established that 'the law presumes that statutes do not contradict one another'.[197] Gaudron J explained the strength of that presumption:

> in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate …[198]

This presumption applies generally. So it would apply particularly to a statutory provision said to abrogate a right conferred by another statutory provision. It may, therefore, be open to doubt whether there is any conceptual need to extend the principle of legality to protect statutory rights. The principle of harmonious construction already offers protection against implied repeal of statutory rights. Whether or not there is a *need*, the two interpretive approaches are consistent and mutually reinforcing. If the

[193] Spigelman, *Statutory Interpretation and Human Rights*, above n 33, 29. See also Meagher, above n 17, 475–7.

[194] Cf *R v Cain* [1985] 1 AC 46, 55–6 (Lord Scarman).

[195] See *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 418–19 (Lord Rodger). Cf *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[196] See Spigelman, *Statutory Interpretation and Human Rights*, above n 33, 56; J J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724, applying the ideas and adopting the language of Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 694–6.

[197] *Commissioner of Police v Eaton* (2013) 294 ALR 608, 621 [48] (Crennan, Kiefel and Bell JJ). See also at 631 [98] (Gageler J).

[198] *Saraswati v The Queen* (1991) 172 CLR 1, 17.

principle of legality were to be synthesised with the presumption against inconsistency, then the rights-protective orientation of the principle of legality might emerge as an additional consideration, perhaps even a dominant consideration, when courts make the evaluative judgment as to whether or not two provisions (in the one statute or in different statutes) can stand together. This is worth emphasising: the principle of legality would operate not as a conflict-resolution rule, but as an anterior interpretive principle directed to dissolving apparent conflict.[199] If one of the statutes in issue confers a vulnerable right, the court should be very slow to find contrariety between that right and general, vague or ambiguous language said to abrogate it. As with common law rights, the court could insist upon a clear statement of intent.

Such an approach might have led to different outcomes in some of the decided cases. Consider, for example, *Ferdinands v Commissioner for Public Employment* ('*Ferdinands*').[200] Majorities in the Supreme Court of South Australia[201] and the High Court held that the *Industrial and Employee Relations Act 1994* (SA) and the *Police Act 1998* (SA) could not both apply to the termination of Mr Ferdinands' employment as a police officer. The *Police Act 1998* (SA) 'appear[ed] intended to deal comprehensively with questions of termination'.[202] Only Kirby J, in dissent, had overt regard to the effect upon Mr Ferdinands' statutory rights:

> important and beneficial privileges, expressed in unqualified language … being protective of valuable legal rights … would not ordinarily be read down … At least, this would not be done without clear provisions indicating that such was the purpose of the legislature.[203]

If the principle of legality had been engaged in this or similar cases, it is not inconceivable that different results might have followed.[204]

[199] See generally Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) ch 3.

[200] (2006) 225 CLR 130.

[201] *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110.

[202] *Ferdinands* (2006) 225 CLR 130, 147 [51] (Gummow and Hayne JJ). See also at 134 [4], 136 [10] (Gleeson CJ), 175 [148] (Callinan J).

[203] Ibid 159 [93] (citations omitted). See also *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110, 111 [4] (Debelle J).

[204] See also *Commissioner of Police v Eaton* (2013) 294 ALR 608.

IV Conclusion

Despite an outward appearance of continuity, the contemporary principle of legality is not the same as the rule in *Potter v Minahan*. They differ not simply in content and scope, but in their basic constitutional justification. The rule originally rested upon a claim, positive in character, that Parliament would not intend to abrogate common law rights. That central claim is descriptively false in the conditions of the modern activist state. To preserve the principle of legality, the courts have transformed its justification. There have been two distinct and parallel strategies to accommodate the change. The first is a positive refinement: though it cannot be said that an activist legislature would not intend to abrogate common law rights generally, it *can* be said that it would not intend to abrogate '*fundamental*' common law rights. The second is a normative refinement: irrespective of parliament's authentic legislative intention (and irrespective of whether there can be such a thing), courts *should* attribute a legislative intention not to abrogate rights, because to do so would enable or enhance mechanisms of political accountability and electoral discipline that are seen to be proper incidents of our system of representative and responsible government.

Understanding this transformation of the principle of legality is significant in its own right. But it also gives us the resources to answer one of the most important, but difficult, questions in the field: what rights engage the principle of legality? The difference of opinion between Spigelman and French CJ about the utility of 'fundamentality' can be explained as reflecting the difference between the two rival conceptions of the contemporary principle of legality. The purpose that 'fundamentality' serves — that is, to refine the *positive* claim about authentic legislative intention — gives content to the concept: rights are 'fundamental' only if it is *empirically true* that the legislature would not intend to abrogate them using general words. On the other hand, the new normativity of the principle of legality directs our attention away from 'fundamental' rights and towards 'vulnerable' rights. 'Vulnerable' rights are those rights which the political process is inherently inapt to protect, because they are claimed by a politically weak minority, or because they go to the substance of the political process and democratic representation itself. 'Vulnerability' is not a criterion that identifies a determinate set of rights, but rather a mode of analysis or framework for argument to apply to the particular circumstances in the particular context. Furthermore, nothing about the idea of a 'vulnerable' right implies that it need be a 'common law' right. Many vulnerable rights have a statutory source. They too should attract the protection of the principle of legality.

The justifications for legal rules matter. They matter because they inform the proper content and scope of the rules. Although the principle of legality is now firmly established in the law, its proper justification and rationale remain contested. That contestation, until it is settled, will undermine the coherence of the principle's content and scope. It has been my objective in this article, by explaining the distinctiveness of the *positive* and *normative* justifications and their respective doctrinal implications, to lay the analytical groundwork for a settlement.