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The Principle of Legality and a Common Law Bill of Rights—Clear Statement Rules Head Down Under

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*Dan Meagher**

> In our steadfast faith in responsible government and in plenary legislative powers distributed, but not controlled, you as Americans may perceive nothing better than a willful refusal to see the light and an obstinate adherence to heresies; but we remain impenitent. Yet, in most other respects our constitution makers followed with remarkable fidelity the model of the American instrument of government. Indeed it may be said that, roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions.[1]

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1. Sir Owen Dixon, *Two Constitutions Compared*, *in* JESTING PILATE AND OTHER PAPERS AND ADDRESSES 100, 102 (2d ed. 1997).

INTRODUCTION

In fundamental and enduring respects, the Australian Constitution mirrors its U.S. counterpart.[2] It is a written and entrenched constitution that establishes a system of federalism, a supreme federal court, and a national government of separated powers.[3] That was no accident. Andrew Inglis Clark, the framer responsible for the original draft of the Australian document, was a man for whom the U.S. Constitution was held in almost mystical regard.[4] That draft also contained a series of formal rights guarantees that were inspired by the U.S. Bill of Rights and were seen by Clark to be the necessary consequence of a re-

2. Professor Frickey notes that "[i]n large part because of shared common law roots, Australia and the United States have a similar legal culture." Philip P. Frickey, *Structuring Purposive Statutory Interpretation: An American Perspective*, 80 AUSTL. L.J. 849, 849 (2006); *see also* James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 J. MARSHALL L. REV. 627, 649–71 (1997).

3. *See* GABRIEL MOENS & JOHN TRONE, LUMB & MOENS' THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 10–30 (7th ed. 2007); MICHAEL COPER, ENCOUNTERS WITH THE AUSTRALIAN CONSTITUTION 72–86 (1987).

4. *See* ANDREW INGLIS CLARK, STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW (1997); John Reynolds, *A.I. Clark's American Sympathies and his Influence on Australian Federation*, 32 AUSTL. L.J. 62 (1958).

publican form of government with natural rights at its constitutional and moral core.[5] Those formal rights, however, were deleted from the final text of the Australian Constitution, which was enacted into law by the Imperial Parliament in 1900, and came into operation on January 1, 1901.[6] The other framers, steeped in the orthodoxy of British constitutional theory and practice, rejected the U.S. notion of constitutional rights and advocated that a combination of the common law and parliamentary government (with the principle of responsible government at its heart) offered a superior and more democratic model of rights protection.[7] This was one of the foundational decisions of Australian constitutional design, and it has exerted a powerful attitudinal (and institutional) influence on how rights are legally protected in Australia. Specifically, the profound Australian reluctance about formal rights guarantees—which persists to this day—originated in that decision to excise the formal rights guarantees from Clark's original draft.

As this article will demonstrate, however, the absence of a constitutional bill of rights notwithstanding, the U.S influence on the legal protection of fundamental human rights in Australia would ultimately not be denied. A remarkable—and controversial—judicial response was sparked by a combination of legal developments. These were successive failed attempts to amend the Australian Constitution and enact a statutory bill of rights to provide more formal rights protection as well as the emergence of new species of (constitutionally valid) legislation, which were openly hostile to fundamental human rights. The Australian High Court ("the Court") transformed an old interpretive canon (with U.S. roots) into a strong Australian species of clear statement rules for fundamental human rights called "the principle of legality."[8] The methodology of clear statement rules—which

5. Andrew Inglis Clark, *Natural Rights*, 16 ANNALS AM. ACAD. POL. & SOC. SCI., no. 2, 1900, at 36.

6. The Commonwealth of Australia Constitution Act 1900 (UK) ("Australian Constitution Act") was passed on July 9, 1900, as an ordinary act of the Westminster Parliament. Indeed, what is now the Australian Constitution is contained in Section 9 of that act. By royal proclamation, the Australian Constitution Act took effect on January 1, 1901, and on this date, the new Commonwealth of Australia came into existence. *See* CHERYL SAUNDERS, THE CONSTITUTION OF AUSTRALIA: A CONTEXTUAL ANALYSIS 9–19 (2011).

7. Dixon, *supra* note 1, at 102.

8. *See infra* Part IV.

require unmistakably clear statutory language ("magic language")[9] to curtail or abrogate fundamental human rights—underpins this refashioned canon. The Court continues to do so to fill the lacuna in formal rights protection in Australia and to temper (if not outright resist) increasingly common legislative attempts to eradicate fundamental human rights—such as liberty, due process, and access to the courts—especially in the areas of criminal investigation and migration policy.

The robust application of the principle of legality began in the 1980s in a series of Australian High Court cases, which served to protect a range of fundamental human rights that, taken together, are now said to constitute a common law Australian Bill of Rights.[10] This doctrine has proven to be strongly resistant to legislative encroachment, maybe defiantly so, and also made clear the normative justification for the judicial application of the principle in contemporary Australian law. The original justification for the old canon (like interpretive canons more generally) was the discovery and vindication of authentic legislative intention. But, it is difficult to square the manner in which the Australian High Court has applied the principle of legality—to protect fundamental human rights in the heart of legislation that intends to curtail or abrogate them—with that justification. As a consequence, the Court, arguably and controversially, turned to the Australian Constitution to provide its contemporary justification and guide its future development.[11] This is one part of the Australian High Court's move toward providing the rules and principles of statutory interpretation with a constitutional foundation. It led to the fundamental reconceptualization of the interpretive duty of judges as one that determines legislative intention as the product—not goal—of statutory interpretation. In terms of the principle of legality, the Court effectively dispensed with its original normative justification and used the

9. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 354–55 (2d ed. 2006).

10. JAMES J. SPIGELMAN, *The Common Law Bill of Rights*, *in* STATUTORY INTERPRETATION AND HUMAN RIGHTS 1–50 (2008); *see* Dan Meagher, *The Common Law Principle of Legality in the Age of Rights*, 35 MELB. U. L. REV. 449 (2011).

11. *See* Justice John Basten, Constitutional Dimensions of Statutory Interpretation, Speech Delivered at the University of Melbourne School of Law: Constitutional Law Conference (July 24, 2015).

method of clear statement to construct a common law Australian Bill of Rights that is now quasiconstitutional in strength.

In order to detail and critique these remarkable, controversial, and often U.S.-inspired developments in the judicial protection of fundamental human rights in Australia, the article will proceed as follows. Part I will outline the profound and enduring impact U.S. political institutions, constitutional doctrine, and republican theory had on Andrew Inglis Clark and the structure and content of his original 1891 draft of the Australian Constitution. That draft established a federal system of government, a constitutional separation of powers, and—most relevant for the purposes of this article—a suite of formal rights guarantees that were inspired by the U.S. Bill of Rights. Clark's vision of constitutional rights for the new Commonwealth of Australia, however, did not survive the later Constitutional Conventions held in 1897 and 1898, where drafting took place. The framers consciously decided to remove those rights provisions. Instead, they opted for the British-inspired model that was deeply skeptical of formal rights guarantees, preferring to place faith in the common law and democratic politics to protect fundamental human rights. Part II will explain why the framers made that decision and will detail the subsequent constitutional and legislative attempts, all unsuccessful, to provide for more formal legal protection of rights. This provides the foundation for the analysis undertaken in Parts III and IV, which will trace the rise of the new judicial rights consciousness in Australia and how this manifested itself in the fashioning of the principle of legality used to construct a quasiconstitutional common law Australian Bill of Rights. Finally, Part V will consider and critique the Australian High Court's turn toward the inherently contested and question-begging principles of the Australian Constitution to anchor the principle of legality and the interpretive process more generally. The untethering of notions of authentic legislative intention from statutory interpretation is a foundational shift in judicial doctrine and practice. Unsurprisingly, from a normative, doctrinal, and constitutional perspective, it poses as many questions and problems as it does answers.

I. ANDREW INGLIS CLARK AND THE AUSTRALIAN CONSTITUTION

Written in 1891, the original draft of the Australian Constitution was largely the work of one man: Andrew Inglis Clark.[12] Clark was from the island state of Tasmania.[13] He was a poet, philosopher, engineer, judge, politician, university vice-chancellor, and fierce republican—at a time when that political persuasion in Australia was necessarily radical in light of the hegemony of British colonial interests.[14] In section A, Clark's fascination with U.S republicanism, and its significant impact on his political and constitutional ideas, will be explored. Then Clark's influential draft of the Australian Constitution and, in particular, his republican vision of constitutional rights will be outlined in section B.

A. Andrew Inglis Clark and U.S. Republicanism

Significantly in terms of Australian constitutional design, Clark was the *only* framer with a detailed knowledge of—indeed fascination with—U.S. political institutions, constitutional doctrine, and republican theory.[15] The primary architect of the Australian Constitution was a member of the American Club[16] no less!

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12. *See* JOHN A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 24 (1972); JOHN WILLIAMS, THE AUSTRALIAN CONSTITUTION: A DOCUMENTARY HISTORY 63–65 (2005).

13. *See* FRANCIS J. NEASEY & LAWRENCE J. NEASEY, ANDREW INGLIS CLARK (2001).

14. *See* A LIVING FORCE: ANDREW INGLIS CLARK AND THE IDEAL OF THE COMMONWEALTH (Richard Ely ed., 2001); William G. Buss, *Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States*, 33 MELB. U. L. REV. 718, 719–23 (2009).

15. *See* LA NAUZE, *supra* note 12, at 273; John Williams, *Andrew Inglis Clark: Our Constitution and His Influence*, *in* PAPERS ON PARLIAMENT NO. 61, 'THE TRUEST PATRIOTISM': ANDREW INGLIS CLARK AND THE BUILDING OF AN AUSTRALIAN NATION 86 (2014).

16. The American Club comprised a small group of Tasmanian republicans that met annually on the 4th of July at Beaurepaire's Hotel in Hobart, Tasmania to celebrate the founding of the U.S. Constitution. Reynolds, *supra* note 4, at 62–63.

At the American Club annual dinner, which celebrated the centenary of the Declaration of Independence in Hobart, Tasmania in 1876, Clark told the crowd of "young, ardent republicans"[17]:

> We have met here tonight in the name of the principles which were proclaimed by the founders of the Anglo-American Republic as those which justified resistance to a government which had violated them and a permanent repudiation of its authority; and we do so because we believe those principles to be permanently applicable to the politics of the world and the practical application of them in the creation and modification of the institutions which constitute the organs of our social life to be our only safeguard against political retrogression.[18]

In the local newspaper of record, the *Hobart Mercury* (which is owned by Rupert Murdoch, another Australian with strong ties to the United States), Clark was condemned for "holding such very extreme ultra-republican, if not revolutionary views, and was one who would find his proper place in a band of Communists."[19] Yet, his ties with the United States were deep, abiding, and of the foremost importance to contemporary (not just foundational) Australian constitutional law. Of particular significance was Clark's long-standing correspondence and friendship with Oliver Wendell Holmes Jr. That correspondence is now housed in the Harvard Law School library.[20] It reveals the great intellectual debt that Clark owed to Holmes and his strong view that U.S. theory and structure of government ought to provide the constitutional template to unite the disparate, conflicting, and geographically isolated colonies in the new Commonwealth of Australia.[21] Clark visited the United States and met with Holmes in Boston in 1890, 1897, and 1902.[22] Interestingly, as Professor John Williams relates, Clark's fondness of Holmes was

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17. Henry Reynolds, *Clark, Andrew Inglis (1848-1907)*, *in* 3 AUSTRALIAN DICTIONARY OF BIOGRAPHY (1969), http://adb.anu.edu.au/biography/clark-andrew-inglis-3211/text4835.

18. *See* Reynolds, *supra* note 4, at 62–63 (excerpting Clark's speech at the American Club Annual Dinner in Hobart on July 4, 1876).

19. Reynolds, *supra* note 17.

20. John M. Williams, *"With Eyes Open": Andrew Inglis Clark and our Republican Tradition*, 23 FED. L. REV. 149, 162 (1995).

21. J. M. Neasey, *Andrew Inglis Clark Senior and Australian Federation*, 15 AUSTL. J. POL. & HIST., no. 2, 1969, at 1, 4–6.

22. *See* Reynolds, *supra* note 4, at 63–64.

so apparent that he had "the study window from Holmes's house in Boston shipped and installed into the study of his own house, 'Rosebank', in Hobart."[23]

Unlike his famous U.S. friend and intellectual hero,[24] however, Clark was a firm believer in the centrality and importance of natural rights.[25] Indeed, in 1900, the Annals of the U.S. Academy of Political and Social Science (which Clark joined in 1891) published a paper of his titled *Natural Rights*.[26] The article explained why the Declaration of Independence was so foundational to Clark's political philosophy and provided the normative justification for his unqualified support of a U.S.-style bill of rights in the new Commonwealth of Australia. Clark stated:

> I am a believer in the reality of the fundamental rights of man . . . and I accept the affirmation of the declaration of independence by the people of the United States of America that for strictly political purposes all men must be regarded as equal in the possession of the inalienable rights of life, liberty and the pursuit of happiness.[27]

It was this republican vision of fundamental rights that informed those provisions in Clark's draft of the Australian Constitution that sought to provide formal rights guarantees.

B. Andrew Inglis Clark's Draft Constitution

The new Commonwealth of Australia was created on January 1, 1901, when the Australian Constitution came into operation.[28] United States government theory and structure had a profound influence on Clark's original draft of the Australian Constitution. Nonetheless, Australia continued to use the Westminster

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23. Williams, *supra* note 20.

24. *See* OLIVER WENDELL HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS 310 (2007). But, for a detailed critique of Holmes' account of natural law, see Robert P. George, *Holmes on Natural Law*, *in* NATURE IN AMERICAN PHILOSOPHY 127 (Jean De Groot ed., 2004).

25. Andrew Inglis Clark, *Why I am a Democrat*, *reprinted in* A LIVING FORCE: ANDREW INGLIS CLARK AND THE IDEAL OF THE COMMONWEALTH 27 (Richard Ely ed., 2001).

26. Clark, *supra* note 5.

27. John M. Williams, *Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment,"* 42 AUSTL. J. POL. & HIST. 10, 11 (1996); Clark, *supra* note 25.

28. *See* PATRICK PARKINSON, TRADITION AND CHANGE IN AUSTRALIAN LAW 132–39 (2d ed. 2001).

parliamentary system of government that was established by the English during its colonial reign of the Australian colonies in the first half of the nineteenth century.[29] The Westminster system entails the principle of responsible government and the formation of government from the ranks of the elected legislature, specifically by the political party with a majority in the House of Representatives.[30] But, in all other significant respects, the United States influenced the original draft of the Australian Constitution in its structure, content, and outlook.[31] In this regard, its most obvious defining characteristic was that it was *written* and would, when enacted, be entrenched higher law. That was *the* most fundamental shift from the prevailing orthodoxy of British constitutional theory and practice in 1891, which eschewed the need or wisdom of a written and fixed constitution.[32] It also established a federal system of government and a constitutional separation of powers that insulated the judiciary from the political arms of government.[33] In order to do so, Clark directly copied the structure of the U.S. Constitution by devoting the first three chapters of his draft constitution to the establishment of the legislative, executive, and judicial arms of the Australian federal government.[34] And whilst the relationship between the Australian legislative and executive branches was

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29. Indeed, Clark was not a fan of responsible government, which he argued did not serve the Australian colonies well. *See* Andrew Inglis Clark, *Our Australian Constitutions*, 1 QUADRILATERAL 56 (1874); Neasey, *supra* note 21, at 9–11; Williams, *supra* note 20, at 170–71.

30. *See* Geoffrey Lindell, *Responsible Government*, *in* ESSAYS ON LAW AND GOVERNMENT: PRINCIPLES AND VALUES 76–79 (Paul Finn ed., 1995).

31. *See* Sir Owen Dixon, *The Law and the Constitution*, 51 L. Q. REV. 590, 597 (1935); Dixon, *supra* note 1, at 102; Thomson, *supra* note 2, at 638–49.

32. John Williams, *The Emergence of the Commonwealth Constitution*, *in* AUSTRALIAN CONSTITUTIONAL LANDMARKS 1, 13–17 (H. P. Lee & George Winterton eds., 2003).

33. *See* Buss, *supra* note 14, at 768–99; Thomson, *supra* note 2, at 666–71.

34. In Australia, the relevant constitutional structure is as follows: Chapter I: The Parliament (Section 1: "The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth."), *Australian Constitution* s 1; Chapter II: The Executive Government (Section 61: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."), *Id.* s 61; Chapter III: The Judicature (Section 71: "The judicial power of the

necessarily qualified in a constitutional document that incorporated the Westminster principle of responsible government, the structural and textual parallels between the draft (and eventual) Chapter III of the Australian Constitution and Article III of the U.S. Constitution, which both outline the rules and powers of the respective judiciaries, were striking.[35] Indeed, in 1903, the *Harvard Law Review* published an article that he wrote titled *The Supremacy of the Judiciary Under the Constitution of the United States, and Under the Constitution of the Commonwealth of Australia.*[36] Importantly, Clark noted in the article that a written constitution that established a federal system of government required the supremacy of the judiciary in particular.[37]

Clark, however, did make three important deviations from the U.S. model. First, the Australian Supreme Court (to be called the High Court of Australia) would have general appellate jurisdiction to hear and determine appeals from the decisions of *any*

Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as to invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."). *Id.* s 71.

35. Buss, *supra* note 14, at 768–69. Professor Buss notes the close similarity between the structure and content of the judiciary provisions in the Australian and U.S. Constitutions. This was expressly acknowledged by Clark in the accompanying memorandum to his draft Constitution: "The matters I have placed under the jurisdiction of the Federal Judicatory are the same as those placed by the *Constitution of the United States* under the jurisdiction of the Supreme Court of the American Union." John M. Williams, *Inglis Clark's Memorandum to Delegates*, *in* THE AUSTRALIAN CONSTITUTION: A DOCUMENTARY HISTORY 69 (2005).

36. Andrew Inglis Clark, *The Supremacy of the Judiciary Under the Constitution of the United States, and Under the Constitution of the Commonwealth of Australia*, 17 HARV. L. REV. 1 (1903).

37. Williams, *supra* note 20, at 64.

federal, state, or territory court.[38] Second, the Australian "autochthonous expedient"[39] would permit the Commonwealth Parliament to invest state courts with federal jurisdiction[40]—which

38. *Australian Constitution* s 73 ("The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences: (i) of any Justice or Justices exercising the original jurisdiction of the High Court; (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council; (iii) of the Inter-State Commission, but as to questions of law only; and the judgment of the High Court in all such cases shall be final and conclusive.").

39. *See R v Kirby: Ex parte Boilermaker's Society of Australia* [1956] 94 CLR 254, 267–68 (Austl.) ("The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature. The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary power of the States. The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be prescribed and the content of their jurisdiction ascertained. These very general considerations explain the provisions of Chap. III of the Constitution which is entitled 'The Judicature' and consists of ten sections. It begins with s 71 which says that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia and in such other courts as the Parliament creates or it invest with federal jurisdiction. There is not in s 51, as there is in the enumeration of legislative powers in Art. I, s.8, of the American Constitution, an express power to constitute tribunals inferiors to the Federal Supreme Court. No doubt it was thought unnecessary by the framers of the Australian Constitution who adopted so definitely the general pattern of Art. III but in their variations and departures from its detailed provisions evidenced a discriminating appreciation of American experience. On the other hand, the autochthonous expedient of conferring federal jurisdiction of State Courts required a specific legislative power and that is conferred by s 77(iii).").

40. *Australian Constitution* s 77(iii) provides state courts with federal jurisdiction. *See* LESLIE ZINES, COWEN AND ZINE'S FEDERAL JURISDICTION IN AUSTRALIA 194–95 (3d ed. 2002) ("The use of State courts as repositories of federal jurisdiction was described by the High Court as an 'autochthonous expedient', as indigenous or native to the soil. It has no counterpart in the American Constitution. In the United States, Congress has on many occasions

reflects the current structure.[41] This resulted in the fundamental principle that the Australian Constitution provides for one unified system of common law.[42] Third, and of considerable importance to this article, the Australian High Court would expressly have the power to issue writs of mandamus against an officer of the Commonwealth,[43] which, based on Clark's knowledge and (possibly confused)[44] understanding of the U.S.

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vested concurrently the enforcement of federal rights in State and federal courts. The Supreme Court of the United States has upheld the obligation of State courts to enforce those rights where they are courts of general jurisdiction or their jurisdiction is otherwise adequate under State law. That does not mean, however, that the State courts exercise federal jurisdiction in the sense that that expression is used in s 77(iii) of the Commonwealth Constitution nor does it enable Congress to legislate in the manner that the Commonwealth Parliament has done in, for example, s 39 of Judiciary Act." (citations omitted)).

41. *Judiciary Act 1901* (Cth) s 39(2) (Austl.).

42. *Lange v Austl Broad Corp* (1997) 189 CLR 520, 563 (Austl.); *Kable v DPP* (1996) 189 CLR 51, 112 (Austl.). It is important to note here that the High Court of Australia—unlike the U.S. Supreme Court—is a general common law court with inherent common law powers. Sir Owen Dixon outlined its significance in *The Common Law as an Ultimate Constitutional Foundation*, which noted that, in Australia, the common law was an antecedent system of law that formed the backdrop to the creation of the Australian Constitution and provides the context for its ongoing interpretation by the court. Dixon, *supra* note 1, at 205. In this regard, Professor Pojanowski notes that the general common law powers of U.S. state courts are more like the Australian High Court than the U.S. Supreme Court. *See* Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 534 (2013). Moreover, the article makes the argument that, as courts with general common law powers, state courts (compared with their federal counterparts) *may* be justified in applying a hybrid interpretive model that combines elements of federal-style textualism and a more dynamic purposivism: "This proposal suggests that while constitutional concerns may preclude state courts from *narrowing* the semantic meaning of a statute to fit its background purpose, these courts retain discretion to *extend* a statute beyond its linguistic scope in pursuit of the statute's purpose or broader coherence in the legal fabric." *Id.* at 522.

43. *Australian Constitution* s 75(v); *see* JAMES STELLIOS, THE FEDERAL JUDICATURE: CHAPTER III OF THE CONSTITUTION, COMMENTARY AND CASES 323–44 (2010).

44. *See* James Bradley Thayer, *Review of Books and Periodicals*, 15 HARV. L. REV. 419, 420 (1902) (observing that the part of Clark's treatise that discussed *Marbury v. Madison* was incorrect because it stated that President Thomas Jefferson once refused to obey a writ of mandamus issued by the U.S. Supreme Court to compel a judicial appointment made by the President's successor).

Supreme Court's landmark decision in *Marbury v. Madison*,[45] sufficiently addressed the U.S. Supreme Court's perceived deficiency in this regard.

The issue of whether the Australian Constitution ought to incorporate a bill of rights, however, was vexing (at least to most of the framers steeped in the orthodoxy of British constitutional theory and practice).[46] Unsurprisingly, Clark was emphatic in his support. In this regard, he considered the U.S. model a necessary and desirable consequence of republicanism and emphasized the importance of having a final appellate court, which would enable any person to petition to it and would ensure that their constitutional rights and privileges were upheld:

> [I]n response to the appeal of the humblest citizen [the U.S. Supreme Court] will restrain and annul whatever folly or the ignorance or the anger of a majority of Congress or of the people may at any time attempt to do in contravention of any personal or political rights or privilege the Constitution has guaranteed to him. So great and momentous a power has probably never been vested in any other judicial tribunal in the world, and the protective function and impregnable position assigned to the Supreme Court of the United States may always with pardonable pride be claimed by the advocates of a republican form of government as having been first exhibited to the world in association with republican institutions. Many of its most important and beneficent decisions have been founded upon those amendments of the Constitution which as I have previously stated are frequently described as the American Bill of Rights and those decisions may be cited as examples of a successful

45. *But see* LA NAUZE, *supra* note 12, at 233 ("The origin of [Section 75(v)] lay in Inglis Clark's familiarity with American constitutional history. In particular, as he knew, as judgment of Chief Justice Marshall in the case of *Marbury v. Madison* (1803) had held that the Supreme Court had no authority to issue writs of mandamus to public officers in the exercise of its original (as distinct from its appellate) jurisdiction, since such writs were not included among the matters specifically assigned to that jurisdiction by the Constitution. Clark wished to avoid this consequence in the Australian context, and so deliberately assigned such an authority to the original jurisdiction of the Supreme Court in his draft Bill of 1891."). *See* Buss, *supra* note 14, at 779–88.

46. *See* GEORGE WILLIAMS & DAVID HUME, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 57–60, 67–69 (2d ed. 2013).

> application to practical politics of the essentially republican doctrine of the natural rights of man.[47]

As a result, Clark's original draft of the Australian Constitution contained the following rights provisions:

> Clause 17: A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.
>
> Clause 46: The Federal Parliament shall not make any law for the establishment or support of any religion, or for the purpose of giving any preferential recognition to any religion, or for prohibiting the free exercise of any religion.
>
> Clause 65: The trial of all crimes cognizable by any Court established under the authority of this Act shall be by jury, and every such trail shall be held in the Province where the crime has been committed and when not committed within any Province the trial shall be held at such place or places as the Federal Parliament may by law direct.
>
> Clause 81: No Province shall make any law prohibiting the free exercise of any religion. [48]

As Professors Williams and Hume note: "Clark's choice of rights in his draft constitution was idiosyncratic. For example, he included a clause respecting freedom of religion, but nothing that

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47. Williams, *supra* note 20, at 164–65; Andrew Inglis Clark, The Constitution of the United States of America (1897) (unpublished manuscript) (on file with the University of Tasmania Library, C4/F1).

48. At the 1897 and 1898 Conventions, Clark sought (unsuccessfully) to delete Clause 17 and replace it with a new version of Clause 110, which read:

> The citizens of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all privileges and immunities of citizens of the Commonwealth in the several states; and a state shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.

See WILLIAMS & HUME, *supra* note 46, at 65–71; Williams, *supra* note 27, at 11–16.

would protect freedom of speech or association."[49] Nevertheless the constitutional vision for Australia that was embodied in his draft constitution was considered, criticized, and debated by the drafters during the Constitutional Conventions held in Sydney (1891), Adelaide and Sydney (1897), and finally in Melbourne (1898).[50] Remarkably, that vision remained largely intact, notwithstanding Clark's absence at all but the first of the Constitutional Conventions.[51] Of particular significance was his success in the establishment of an independent and entrenched federal judiciary, as the drafting committee removed the provisions in the original draft that entrenched the Australian High Court at the 1891 Convention, which Clark did not attend.[52] He fought successfully for the restoration of these provisions in 1897, and they formed part of the final version of the constitution ratified by the 1897 Constitutional Convention and enacted into law by the Imperial Parliament in 1900.[53]

But, Clark's republican vision of constitutional rights did not survive the subsequent Constitutional Conventions. The framers consciously decided to renounce those provisions based on the U.S. Bill of Rights and instead settled upon a final version of the Australian Constitution that, in terms of rights, owed more to Albert Venn Dicey and his deep skepticism of formal rights guarantees.[54] That foundational decision on constitutional design exerted an important and constraining influence on the

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49. WILLIAMS & HUME, *supra* note 46, at 62.

50. See JOHN QUICK & ROBERT GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 115–206 (reprinted in 1995).

51. George Williams and David Hume note that only eight of the ninety-six clauses in Clark's draft Constitution were not adopted in some form in the final document. WILLIAMS & HUME, *supra* note 46, at 54.

52. On Easter weekend of 1891, the Drafting Committee undertook a voyage on the *Lucinda*, which departed from Port Jackson in Sydney. On the voyage, the Drafting Committee removed the provisions in Clark's 1891 draft that established an independent federal judiciary. Clark did not attend the voyage due to illness but lobbied successfully to have those provisions restored at the 1897 Convention. *See* Williams, *supra* note 20, at 172–73.

53. *See* Neasey, *supra* note 21, at 7, 12–15.

54. ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 206–07 (10th ed. 1965) ("The security which an Englishman enjoys for personal freedom does not really depend upon or originate in any written document . . . since with us freedom of person is not a special privilege but the outcome of the ordinary law of the land enforced by the courts. Here, in short, we may observe the application to a particular case of the general principle that with us individual rights are the basis, not the result, of the law of

manner in which Australian law provides for the protection of rights, which Professor Hilary Charlesworth aptly calls "the Australian reluctance about rights."[55]

II. THE AUSTRALIAN RELUCTANCE ABOUT RIGHTS[56]

This Part will explain briefly *why* the framers made the decision not to include a bill of rights and will detail the subsequent constitutional and legislative attempts—all unsuccessful—to provide for more formal legal protection of fundamental human rights in Australia. This will set the scene for the analysis undertaken in Parts III–V, which detail how and why Australian judges filled this lacuna in formal rights protection by fashioning a strong Australian species of clear statement rules from an old common law canon to erect (and robustly protect from legislative encroachment) a common law bill of rights.

A. The Rejection of U.S.-Style Constitutional Rights

At the 1897 and 1898 Constitutional Conventions, the framers deleted or gutted most of the rights provisions that formed part of Clark's draft constitution.[57] They expressly rejected the constitutional provisions based on the U.S. Bill of Rights and strongly affirmed, at least formally, the quintessentially British faith in the rights-protective capacity of the common law, representative democracy, and responsible government.[58] In his speech, *Two Constitutions Compared*, which was delivered at the annual dinner of the American Bar Association in Detroit in 1942, Sir Owen Dixon, generally regarded as Australia's preeminent jurist,[59] explained the Australian reluctance about formal rights guarantees in the following terms:

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the constitution."); *see* Eric Barendt, *Dicey and Civil Liberties,* 1985 PUB. L. 596 (1985); WILLIAMS & HUME, *supra* note 46, at 67–69.

55. Hilary Charlesworth, *The Australian Reluctance About Rights*, 31 OSGOODE HALL L.J. 195 (1993).

56. I acknowledge that this is the title of Professor Charlesworth's article. *Id.*

57. *See* WILLIAMS & HUME, *supra* note 46, at 62–71; Williams, *supra* note 27, at 11–18.

58. *See* DICEY, *supra* note 54, at 195–202.

59. On April 28, 1986, in a speech to commemorate the 100th Anniversary of the birth of Sir Owen Dixon, the Governor-General of Australia (and former justice of the Australian High Court), Sir Ninian Stephen, noted that Lord Diplock of the House of Lords said that Dixon was *the* outstanding exponent of the

> The men who drew up the Australian Constitution had the American document before them; they studied it with care. . . . They all lived, however, under a system of responsible government. That is to say, they knew and believed in the British system by which the Ministers are responsible to the Parliament and must go out of office whenever they lose the confidence of the legislature. They felt therefore impelled to make one great change in adapting the American Constitution. Deeply as they respected your [U.S.] institutions, they found themselves unable to accept the principle by which the executive government is made independent of the legislature. . . . In this country men have come to regard formal guarantees of life, liberty and property against invasion by government, as indispensable to a free constitution. Bred in this doctrine you may think it strange that in Australia, a democracy if ever there was one, the cherished American practice of placing in the fundamental law guarantees of personal liberty should prove unacceptable to our constitution makers. But so it was. The framers of the Australian Constitution were not prepared to place fetters upon legislative action. . . . The history of their country had not taught them the need of provisions directed to the control of the legislature itself. . . . With the probably unnecessary exception of the guarantee of religious freedom, our constitution makers refused to adopt any part of the Bill of Rights of 1791 and *a fortiori* they refused to adopt the Fourteenth Amendment. It may surprise you to learn that in Australia one view held was that these checks on legislative action were undemocratic, because to adopt them argued a want of confidence in the will of the people.[60]

Sir Owen Dixon identified that the framers considered that rights protection under the Australian Constitution would primarily occur through the processes of representative and responsible government—not judicial review by the courts. That formal historical account of the framers' position was shared by Harrison Moore, one of leading constitutional commentators of the day, who said that the "great underlying principle" of the Australian Constitution is that "the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share,

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common law of his time and that, upon his retirement, was described by a justice of the U.S. Supreme Court as "the greatest judge in the English-speaking world." *See* Dixon, *supra* note 1, app.

60. *Id.* at 101–02.

and an equal share in political power."[61] Constitutional historian, Professor La Nauze, later endorsed this concept in his seminal treatise, *The Making of the Australian Constitution*,[62] and was subsequently confirmed in the contemporary judgments of the Australian High Court.[63]

These matters of (British) constitutional principle and political theory, however, were not the only reasons why the framers renounced formal rights guarantees of the kind found in the U.S. Bill of Rights. Clark, for example, clearly modeled Clause 17 in its original form (amended Clause 110) after the Fourteenth Amendment of the U.S. Constitution. But, considerations of "race and discrimination,"[64] and not just a deep faith in the rights-protective capacity of the common law, representative democracy, and responsible government, motivated the rejection of the Fourteenth Amendment, which enshrined both due process of law and equal protection under the law. The framers were well aware that existing colonial legislation, which discriminated on the basis of race, would likely be imperiled by the implementation of an Australian version of the Fourteenth Amendment. Around the time of the 1898 Convention, the Goldfields Act in the state of Western Australia stated that "no Asiatic or African alien [could] get a miner's right or go mining on a goldfield."[65] Relevantly, the premier of Western Australia told delegates at the 1898 Constitutional Convention:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk

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61. W. H. MOORE, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 329 (1902). *But see* WILLIAMS & HUME, *supra* note 46, at 74 ("For its time, the Australian Constitution was one of the most democratic in the world. However, as seen through modern eyes, Moore was blind to the position of many Australians, particularly ethnic minorities, Aboriginal Australians and women. For some of these people, the 'great underlying principle' of the Australian Constitution was not equality, but the framers' desire to enable each State to 'preserve the cultural and racial homogeneity of their societies' and to ensure their exclusion from the political process." (citations omitted)).

62. LA NAUZE, *supra* note 12, at 231.

63. *See McCloy v New South Wales* [2015] HCA 34 (Austl.); *Austl Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136, 182, 228–29 (Austl.).

64. Williams, *supra* note 27, at 18; *see also* LA NAUZE, *supra* note 12, at 232.

65. *Goldfields Act 1895* (WA) ss 14 & 92 (Austl.); *Goldfields Act (Amendment) Act 1898* (WA) s 4 (Austl.).

> about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.[66]

Thus, the pervasiveness of racial discrimination in the community and legislation of the Australian colonies exerted a significant influence on the drafting of the Australian Constitution. For example, another delegate from Victoria, Isaac Isaacs (who would be appointed a justice of the Australian High Court), told the 1898 Convention that Clark's amendment, which sought to guarantee equal protection under the law, should be deleted because legislation in Victoria that regulated factories that discriminated against Chinese persons would be "void" if the Australian Constitution contained such a clause.[67] As Williams persuasively states:

> Clark's amendment, based on the 14th Amendment of the United States Constitution, was not rejected because it attempted to "establish personal liberty by constitutional restriction", or that it inhabited the "democratic process", or that it was unacceptable because of its republican tarnish. Rather it was expunged from the Draft Constitution on the basis of race. To have adopted the Clark amendment would have limited the capacity of the federal and state governments to discriminate against persons of "undesirable races or of undesirable antecedence."[68]

Like any other foundational document, the Australian Constitution was a product of its time. At least by contemporary standards, racism and discrimination were widespread at the time.[69]

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66. Commonwealth, *Convention Debates, Vol. 4*, 8 Feb. 1898, 666 (Austl.), http://parlinfo.aph.gov.au/parlInfo/download/constitution/conventions/1898-1104/upload_binary/1898_1104.pdf;fileType=application/pdf#search=%22third%20session%22.

67. *Id.* at 687.

68. Williams, *supra* note 27, at 19 (citations omitted).

69. *See* HELEN IRVING, TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA'S CONSTITUTION 100 (1999) ("Among the many models that were tried on for the new nation, one was rejected outright. Australia, it was almost universally agreed, must not be Chinese. It is hard now to appreciate fully what was meant by this in the 1890s, and how absolutely necessary most people then believed it to be for the new nation to be 'white'. Cartoons, caricatures and purple prose images of Asians were drawn so crudely and repulsively, that they represented now a barrier to understanding the imagination of the nineteenth century on this issue. The issue of 'colour' was unequivocally a racist

These societal attitudes not only accounted for the deletion of the formal guarantees of rights contained in the earlier drafts of the Australian Constitution but also resulted in Section 51(xxvi), which conferred power upon the Commonwealth Parliament to legislate for "the people of any race, other than the aboriginal race in any State, for whom it is deemed to make special laws."[70] These views also reflected the prevailing attitude toward indigenous Australians, which were expressed in Section 127: "In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."[71] In this social and political milieu, it is probably no surprise then that one of the first pieces of legislation enacted by the new Commonwealth Parliament was the Immigration Restriction Act 1901.[72] This law was the cornerstone of the "White Australia" policy that ensured, so far as possible, that migration to the new Commonwealth of Australia was limited to English-speaking Europeans and precluded Asians in particular.[73]

Ultimately, the newly created commonwealth formally incorporated into its political and legal architecture this profound Australian reluctance about formal rights guarantees.[74] It

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issue, but it was much more than this. As much as anything, it was a type of cultural strategy in the processes of nation building."); Raymond Evans, *White Citizenship: Nationhood and Race at Federation*, *in* 2(2) MEMOIRS OF THE QUEENSLAND MUSEUM: CULTURAL HERITAGE SERIES 179, 179 (2002).

70. *Australian Constitution* s 51; *see* QUICK & GARRAN, *supra* note 50, at 622 ("This sub-section does not refer to immigration; that is covered by sub-sec. xxvii. It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came."); Robert French, *The Race Power: A Constitutional Chimera*, *in* AUSTRALIAN CONSTITUTIONAL LANDMARKS 180–212 (H. P. Lee & George Winterton eds., 2003).

71. In 1967, there was a national referendum that succeeded in amending the Australian Constitution to remove the phrase "other than the aboriginal race in any State" from Section 51 (xxvi) and to delete Section 127. *See* BAIN ATTWOOD ET AL., THE 1967 REFERENDUM, OR WHEN ABORIGINES DIDN'T GET THE VOTE (1997).

72. *Immigration Restriction Act 1901* (Austl.).

73. *See* A. C. PALFREEMAN, THE ADMINISTRATION OF THE WHITE AUSTRALIA POLICY (1967).

74. *See* Charlesworth, *supra* note 55, at 196–201.

forged a habit of mind in the Australian constitutional and political psyche that was (and arguably still is) characterized by deep suspicion and skepticism of the notion of judicially enforced rights entrenched in higher law.[75]

B. The Failure of Constitutional and Statutory Rights Reforms

The Australian reluctance about formal rights protection came to the forefront in the two postfederation attempts to amend the Australian Constitution, which sought to enshrine the sorts of formal rights guarantees that were decisively rejected by the framers. The first attempt occurred in 1944 as part of a constitutional package—the Constitutional Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944—which aimed to facilitate Australia's reconstruction in the aftermath of World War II.[76] It sought to incorporate a constitutional right to freedom of speech and expression and to strengthen the existing establishment and free exercise of religion clauses.[77] In general, amending the Australian Constitution requires the agreement of a double majority through a referendum: in other words, the amendment must receive approval from a majority of voters nationally *and* a majority of voters in four of the six Australian

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75. *See* Jeffrey Goldsworthy, *Introduction*, *in* PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS: INSTITUTIONAL PERFORMANCE AND REFORM IN AUSTRALIA 2–3 (2006) (quoting the following passage written in 1955 by Gough Whitlam, a future leader of the left-leaning Australian Labor Party and Prime Minister of Australia from 1972–1975: "British history shows that Parliament has been our great liberating force. Parliament has conferred political freedom on those represented in it, first of all the barons and squires and then the merchants and now all adults. . . . [W]e must have effective parliamentary government and, accordingly, dispense with fetters on parliament rather than contrive them. For every person whose liberty has been prejudiced by government action, there are many whose liberty has been enhanced. . . . The forum which Parliament provides is the best guardian of our liberties. . . . The High Court . . . is less representative of the Australian people than are their elected representatives. Judges are irresponsible in that they hold office for life, which is sometimes a very long life. Some have used that asset for a political purpose. . . . We are constrained by our present Federal Constitution to leave the final disposition of many matters in the hands of lawyers. We are forbidden to do not so much what the Constitution forbids us to do but what the judges forbid us to do.").

76. *See* WILLIAMS & HUME, *supra* note 46, at 73.

77. *See* Brian Galligan, *Australia's Rejection of a Bill of Rights*, 28 J. COMMONWEALTH & COMP. POL. 344 (1990).

states.[78] The proposed 1944 amendment achieved neither of the majorities needed for the bill to be passed.[79]

The second effort to amend the Australian Constitution occurred in 1988, which was considerably more ambitious but even more spectacularly unsuccessful.[80] The Constitutional Alteration (Rights and Freedoms) Bill 1988 sought to strengthen the constitutional rights to jury trial, eminent domain, and (again) the free exercise and establishment of religion clauses.[81] The proposal was supported by 31 percent of voters nationally (the lowest level of support ever for a constitutional amendment proposal put to the Australian people) and did not secure a majority in any of the states.[82] As Charlesworth explains, these unsuccessful attempts to bolster the strength and status of constitutional rights in Australia underlines the significance of—and long shadow cast by—the framers' foundational decision to reject formal rights guarantees:

> The Australian suspicion of constitutionally entrenched rights has been enduring. It has been supported by arguments that constitutional rights could both politicize the judiciary and legalize public policy, thus undermining our legal culture. . . . At a more fundamental level, reservations about rights are linked to a utilitarian confidence in [the] existing governmental structure [of Australia].[83]

Over the years, this Australian reluctance about fundamental human rights sunk even modest proposals to enact a statutory bill of rights.[84] For example, in 1973, the Australian government

78. *Australian Constitution* s 128; *see* James A. Thomson, *Altering the Constitution: Some Aspects of Section 128*, 13 FED. L. REV. 323 (1983).

79. Only two of six states achieved majority votes (Western Australia and South Australia), and only 45.99 percent of the national population approved the measure. *See* GEORGE WILLIAMS & DAVID HUME, PEOPLE POWER: THE HISTORY AND FUTURE OF THE REFERENDUM IN AUSTRALIA 90–91 (2010).

80. *See* BRIAN GALLIGAN & JOHN R. NETHERCOTE, THE CONSTITUTIONAL COMMISSION AND THE 1988 REFERENDUMS (1989).

81. *See* Charlesworth, *supra* note 55, at 201.

82. *See* WILLIAMS & HUME, *supra* note 46, at 90–91.

83. Charlesworth, *supra* note 55, at 201.

84. *Id.* at 205–10; PETER HAMILTON BAILEY, THE HUMAN RIGHTS ENTERPRISE IN AUSTRALIA AND INTERNATIONALLY 144–52 (2009).

sought, unsuccessfully, to enact in domestic legislation the International Covenant on Civil and Political Rights (ICCPR).[85] The ICCPR provides for the protection at international law of core civil and political rights, such as life, liberty, fair trial, nondiscrimination and freedom of association, assembly, religion and speech. The signature and ratification of the ICCPR imposes international law obligations regarding the protection of the enshrined rights and freedoms upon the acceding nation-state.[86] But, in Australia, domestic legislation is required to give effect to these international laws.[87] In 1983, the government drafted the Bill of Rights bill, which marked another attempt to enact the ICCPR into domestic Australian law.[88] The bill, however, faced immediate political hostility and was never introduced into the Commonwealth Parliament.[89] More recently, a 2009 report by the National Human Rights Consultation Committee (which was established and appointed by the Australian government) recommended[90] that the Commonwealth Parliament enact a statutory bill of rights similar to those operating in other comparable Commonwealth nations with parliamentary systems of government, such as New Zealand[91] and the United Kingdom.[92] The same Australian Government rejected that recommendation with the enigmatic statement that it "believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community."[93] Instead, the government decided that enhanced parlia-

85. *Human Rights Bill 1973* (Cth) (Austl.); *see* George Williams, *Lionel Murphy and Democracy and Rights*, *in* JUSTICE LIONEL MURPHY—INFLUENTIAL OR MERELY PRESCIENT? 50 (Michael Coper & George Williams eds., 1997).

86. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

87. *Victoria v Commonwealth* (1996) 187 CLR 416, 480–81 (Austl.).

88. *See* Charlesworth, *supra* note 55, at 207–09.

89. *See* BAILEY, *supra* note 84, at 146–48; Charlesworth, *supra* note 55, at 207–10.

90. NAT'L HUMAN RIGHTS CONSULTATION COMM., NATIONAL HUMAN RIGHTS CONSULTATION REPORT (2009), http://library.bsl.org.au/jspui/bitstream/1/1320/1/NHRC_Report.pdf.

91. New Zealand Bill of Rights Act 1990 (N.Z.).

92. Human Rights Act 1998 (U.K.).

93. *See* HUMAN RIGHTS BRANCH, ATTORNEY-GENERAL'S DEP'T, AUSTRALIA'S HUMAN RIGHTS FRAMEWORK 1 (2010), https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf.

mentary scrutiny of proposed federal legislation was the appropriate mechanism to better protect and promote fundamental human rights in Australian law. In response, the legislature enacted the Human Rights (Parliamentary Scrutiny) Act 2011. It established the Parliamentary Joint Committee on Human Rights, which examines and reports to Parliament whether Australian bills are compatible with the seven international human rights treaties to which Australia is a party.[94]

In any event, this void in the formal protection of fundamental human rights in Australia ensured that, for much of the twentieth century, the constitutional vision of the framers—to place no (fundamental human rights) fetters upon legislative action[95]—would be realized. That framework for lawmaking ensured that "within their respective constitutional boundaries [Commonwealth and State Parliaments] [we]re as sovereign as the UK Parliament."[96] Not surprisingly, the unfettered scope of legislative power enjoyed by Australian Parliaments led to the enactment of legislation that seriously infringed upon fundamental human rights. This was especially so and problematic during wartime, when the rights to liberty, association, religious freedom, and freedom of speech of unpopular minorities were legislatively targeted.[97]

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94. See Dan Meagher, *The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and the Courts*, 42 FED. L. REV. 1, 2–5 (2014).

95. *See* Dixon, *supra* note 1, at 102; ROBERT MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH: AN EXAMINATION OF THE GROWTH OF POWER IN THE AUSTRALIAN FEDERATION 54 (1967).

96. Jeffrey Goldsworthy, *Parliamentary Sovereignty and Statutory Interpretation*, *in* THE STATUTE: MAKING AND MEANING 187, 187–88 (Rick Bigwood ed., 2004).

97. *See Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 (Austl.) (addressing an unsuccessful constitutional challenge to Regulation 3 of the National Security (Subversive Associations) Regulations 1940, which gave the Commonwealth Government the extraordinary power to declare anybody corporate or unincorporate as prejudicial to the defence of the Commonwealth and unlawful as a consequence). As another example, during the Cold War, the Communist Party Dissolution Act 1950, sought to ban the Communist Party and affiliated organizations and seriously limit the civil liberties of persons whom the Commonwealth Government declared were (potentially) dangerous communists. *See* George Winterton, *The Communist Party Case*, *in* AUSTRALIAN CONSTITUTIONAL LANDMARKS 108 (H. P. Lee & George Winterton eds., 2003). The act was invalidated by the Australian High Court on federalism grounds, namely the absence of federal legislative power to support it. *Austl Communist Party v Commonwealth* (1951) 83 CLR 1

III. THE NEW JUDICIAL RIGHTS CONSCIOUSNESS IN AUSTRALIA

A combination of current and former legislative developments that began in the 1980s inspired the courts to fill the formal rights lacuna in Australia in an effort to resist laws that were increasingly and openly hostile to fundamental human rights. They have done so by, amongst other things, developing a strong clear statement rule for fundamental human rights—now termed the "principle of legality"—from the old common law canon that also had its roots in early nineteenth century U.S. law.

There can be little doubt, however, as to the significance of the rise of fundamental human rights as a core concern of the international legal order in the aftermath of World War II.[98] It swiftly led to the creation of the United Nations in 1945[99] and the promulgation of the Universal Declaration of Human Rights in 1948.[100] The ICCPR[101] and the International Covenant on Economic, Social and Cultural Rights,[102] which were adopted and opened for signature, ratification, and accession by the U.N. General Assembly in December 1966, further established the international law of human rights. Australia ratified both treaties in 1980, which provided the courts with a human rights touchstone and an "updated set of values"[103] from which to adjust common law rules and develop more rights-sensitive principles of statutory interpretation.[104]

(Austl.). The Australian High Court thus always had the power to review (and invalidate) legislation for offending the structural and federal provisions of the Australian Constitution. *See* Adrienne Stone, *Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 OXFORD J. LEG. STUD 1 (2008).

98. *See* CONOR GEARTY, CAN HUMAN RIGHTS SURVIVE? 25–28 (2006); Michael Ignatieff, *Human Rights as Politics and Idolatry*, *in* HUMAN RIGHTS AS POLITICS AND IDOLATRY 3–52 (Amy Gutman ed., 2001).

99. *See* HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 133–35 (3d ed. 2008).

100. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 2948).

101. ICCPR, *supra* note 86.

102. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

103. Claudia Geiringer, *The Principle of Legality and the Bill of Rights Act: A Critical Examination of* R v Hansen, 6 N.Z. J. PUB. & INT. L. 59, 89 (2008).

104. *See* David Dyzenhaus, Murray Hunt, & Michael Taggart, *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD U. COMMW. L.J. 5, 32–33 (2001).

Around the same time, in the aftermath of the 1983 election, newly elected Prime Minister Bob Hawke held a National Crimes Conference to consider and tackle the new challenges posed by organized and sophisticated forms of crime.[105] It led to the establishment of Australia's first standing crime commission in 1984—the National Crime Authority—which was responsible for investigating and gathering intelligence on tax evasion and organized crime for the benefit of prosecuting authorities.[106] During this time, states also established similar (sometimes *ad hoc*) bodies tailored to the investigation of organized criminal activity because they considered traditional law enforcement powers and techniques inadequate.[107] In order to undertake their functions, legislators granted these national and state crime commissions investigative powers, including the power to compel persons under the threat of penalties to answer questions under oath, even when those answers might incriminate them.[108] As Justice Mark Weinberg recently noted, these compulsory investigative powers are far more extensive than those usually available to the police.[109] Whilst this legislation, and the powers it conferred, was controversial, the absence of formally entrenched rights guarantees in the Australian Constitution—such as the Fifth Amendment of the U.S. Constitution, which protects against self-incrimination—prevented the legislation from being held unconstitutional.[110]

In a trio of cases decided between 1987 and 1992, the Australian High Court began to apply its common law interpretive powers to protect, where possible, fundamental human rights from

105. *See* STEPHEN DONAGHUE, ROYAL COMMISSIONS AND PERMANENT COMMISSIONS OF INQUIRY 5–8 (2001).

106. *National Crime Authority Act 1984* (Cth) (Austl.); *see also* C. T. Corns, *The National Crime Authority: An Evaluation*, 13 CRIM. L.J. 233 (1989).

107. *See* Justice Mark Weinberg, Supreme Court of New South Wales Annual Conference: The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials 2–6 (Aug. 1, 2014), http://assets.justice.vic.gov.au/supreme/resources/66d960d7-4dae-4b13-853c-71a94e97a424/the+impact+of+special+commissions+of+inquiry+weinberg+j+-+1+aug+2014.pdf.

108. *National Crime Authority Act 1984*; *Independent Commission Against Corruption Act 1988* (NSW) (Austl.); *see also* DONAGHUE, *supra* note 105, at 59–72.

109. Weinberg, *supra* note 107, at 2–3.

110. *Balog v Ind Comm Against Corruption* (1990) 169 CLR 625 (Austl.); *see* W. G. Roser, *The Independent Commission Against Corruption: The New Star Chamber?*, 16 CRIM. L.J. 225 (1992).

legislative destruction.[111] At a time when common law "judges approached legislation as some kind of foreign intrusion,"[112] the Australian High Court dusted off an old interpretive canon (with U.S. roots[113]) from one of its early decisions. In 1908, the Australian High Court applied this canon to the construction of the word "immigrant" in Section 3 of the Immigration Restriction Act 1901 to protect the right of an Australian-born member of the community to reenter the country after a period of absence:

> 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.[114]

The Australian High Court then refashioned the content (and normative justification) for this fundamental human rights canon in its now seminal decision *Coco v. The Queen*.[115] The contemporary justification emphasizes the salutary role the canon can play when legislators are given clear and prior notice of the common law rights backdrop against which their legislation will be construed. This may improve the clarity and rights sensitivity of legislation-promoting democracy and rule-of-law values in the process.[116] And it is the judicial insistence that Parliament must consider and then decide whether its legislation infringes upon fundamental human rights that is the lynchpin of the canon—now termed the principle of legality—and its rights-protective capacity. The Australian High Court's following statement makes this clear:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic

111. *Re Bolton* (1987) 162 CLR 514 (Austl.); *Bropho v Western Australia* (1990) 171 CLR 1 (Austl.); *Coco v The Queen* (1994) 179 CLR 427 (Austl.).

112. *R v Janceski* (2005) 64 NSWLR 10, 23 (Austl.).

113. United States v. Fisher, 6 U.S. 358, 390 (1805); *see infra* Part V.

114. *Potter v Minihan* (1908) 7 CLR 277, 304 (Austl.) (citations omitted).

115. *Coco* 179 CLR at 427, 437, 446.

116. *See* Brendan Lim, *The Normativity of the Principle of Legality*, 37 MELB. U. L. REV. 372, 389–94 (2013).

> rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[117]

Rather than discovering authentic legislative intention, which was clearly the original justification for the canon, these notions suggest that using clear statement to protect fundamental human rights now underpins the contemporary canon.[118] The trio of cases that followed then vigorously applied the contemporary manifestation of the canon to protect the fundamental common law rights to liberty[119] and property[120] from legislative encroachment.

Even more significant from a contemporary perspective, the Australian High Court then used international human rights law to expand the catalogue of rights and freedoms it sought to protect through the application of the principle of legality. This

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117. *Coco* 179 CLR at 427, 437, 446.

118. *See* JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 308–09 (2010); Lim, *supra* note 116, at 413 ("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.").

119. *Re Bolton* (1987) 162 CLR 514 (Austl.).

120. *Coco* 179 CLR at 427.

expansion went beyond the common law's holy trinity of life, liberty, and property to include, for example, religious equality[121] and freedom of speech.[122] In doing so, senior appellate judges in Australia aligned themselves with important common law developments in the protection of rights occurring in the United Kingdom (another common law country that lacked a bill of rights or even (most famously) a written constitution).[123] In his influential article, *The Infiltration of a Bill of Rights*, Lord Browne-Wilkinson observed:

> If it were to be held that general statutory powers were presumed not to interfere with human rights unless Parliament expressly or by necessary implication has so authorized, for most practical purposes the common law would provide protection to the individual at least equal to that provided by the [European Convention on Human Rights (E.C.H.R.)]. . . . Even though the E.C.H.R forms no part of our law, it contains a statement of fundamental human rights (accepted by this country) much wider than the freedoms of the person and of property which have, of late, become the only rights afforded special treatment by our courts. We must come to treat these wider freedoms on the same basis and afford to freedom of speech, for example, the same importance as we have afforded to freedom of the person.[124]

Finally, in the early 1990s, the Australian High Court began to treat the few express rights in the Australian Constitution seriously[125] and derived implied constitutional rights to democratic participation and due process.[126] Relevant here, the Australian High Court implied from the text and structure of the

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121. *Canterbury Mun Council v Moslem Alawy Soc'y Ltd* (1985) 1 NSWLR 525, 544 (Austl.); *see* Kevin Boreham, *International Law as an Influence on the Development of the Common Law:* Evans v New South Wales, 19 PUB. L. REV. 271 (2008).

122. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31 (Austl.); *Evans v New South Wales* (2008) 168 FCR 576 (Austl.).

123. *See* Sir Anthony Mason, *Courts, Constitutions and Fundamental Rights*, *in* LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 273–88 (Richard Rawlings ed., 1997).

124. Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights*, PUB. L. 397, 408–09 (1992).

125. *See* Michael Detmold, *The New Constitutional Law*, 16 SYD. L. REV. 228 (1994); WILLIAMS & HUME, *supra* note 46, at 107–10.

126. *See* George Winterton, *The Separation of Judicial Power as an Implied Bill of Rights*, *in* FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR LESLIE ZINES 185–208 (Geoffrey Lindell ed.,

Australian Constitution the following rights and freedoms: a right to freedom of political expression,[127] a right to due process in both federal and state court proceedings,[128] a right to vote in federal elections,[129] an entrenched minimal level of judicial review in federal administrative law,[130] and an entrenched minimum level of judicial review in state administrative law.[131] The rights to freedom of political expression and to vote in federal elections were implied from the text of Sections 7 and 24 of the Australian Constitution, which provide that members of the Senate and the House of Representatives shall be "directly chosen" by the people of the "State" and the "Commonwealth" respectively.[132] In this way, the Australian High Court held that the Australian system of representative government established by these provisions is a constitutional concept that, for its effective operation, requires freedom of political expression[133] and a franchise for all adult citizens, unless there is a substantial reason for excluding them.[134] The rights to due process and entrenched minimum levels of judicial review in federal and state administrative law, on the other hand, were implied from the strong separation of judicial power from the political arms of government that was established by Chapter III of the Australian Constitution. For example, Section 71 vests "judicial power" in federal courts and such other courts as the Commonwealth Parliament chooses to vest with federal jurisdiction.[135] As a consequence, the Australian High Court has held that "[j]udicial

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1994); Fiona Wheeler, *The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia*, 23 MONASH U. L. REV. 248 (1997); Graeme Orr & George Williams, *The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia*, 8 ELECTION L.J. 123 (2009).

127. *Austl Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Austl.).

128. *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 (Austl.); *South Australia v Totani* (2010) 242 CLR 1 (Austl.).

129. *Roach v Electoral Comm'r* (2007) 233 CLR 162 (Austl.).

130. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (Austl.).

131. *Kirk v Indus Relations Comm'n of NSW* (2010) 239 CLR 531 (Austl.).

132. *Austl Capital Television Pty Ltd v Commonwealth* 177 CLR at 106.

133. *Lange v Austl Broad Corp* (1997) 189 CLR 520, 559–60 (Austl.).

134. *Rowe v Electoral Comm'r* (2010) 243 CLR 1, 18–19 (Austl.).

135. Section 71 states: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a

power involves the application of the relevant law to facts as found in proceedings in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence against them."[136] Further, Section 75(v) of the Australian Constitution entrenches a minimum level of judicial review in federal administrative law by conferring on the Australian High Court original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.[137] That entrenched judicial review jurisdiction has been extended by the Australian High Court to state administrative law due to Chapter III (and Section 73 specifically) of the Australian Constitution, which expressly contemplates that state courts will exercise federal jurisdiction.[138] As a result, these constitutional rights developments were not only significant in their own right but also buttressed and inspired the protection of extant common law rights to fair trial, due process, and access to courts from legislative encroachment.[139]

IV. THE PRINCIPLE OF LEGALITY AS A CLEAR STATEMENT RULE AND A COMMON LAW BILL OF RIGHTS

In the absence of an entrenched Australian Bill of Rights—and faced with new kinds of rights-infringing legislation—the Australian High Court turned to alternative legal sources—international law, common law, and indigenous constitutional law—to develop a set of rules and interpretive principles that could provide more robust protection of fundamental human rights. The courts recognized their capacity (if not constitutional responsibility) to protect fundamental human rights whenever interpretively possible. This laid the normative and doctrinal foundation upon which the courts would construct a quasiconstitutional

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Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes." *Australian Constitution* s 71.

136. *Bass v Permanent Tr Co Ltd* (1999) 198 CLR 334, 359 (Austl.).

137. Section 75(v) is the constitutional provision included at the urging of Clark to address the mandamus/original jurisdiction issue in *Marbury v. Madison*.

138. *Kirk* 239 CLR at 531.

139. *See* Chief Justice Robert French, Speech at the Anglo Australian Lawyers Society: The Common Law and the Protection of Human Rights (Sept. 4, 2009), http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf; Mason, *supra* note 123, at 283–86.

common law bill of rights.[140] It would do so to resist another tranche of federal legislation that seriously infringed fundamental human rights. The methodological tool used was the old common law canon—now rebadged as the principle of legality[141]—which would develop into a strong Australian clear statement rule.

A. Migration Policy and Fundamental Human Rights

Since the early 2000s, Australia's migration policy has been characterized by the successive and ongoing legislative attempts of Australian governments to seriously limit and sometimes exclude the rights to liberty, natural justice, and court access of persons seeking asylum—especially those arriving by boat.[142] The policy now involves intercepting the boats at sea and taking those on board to offshore centers in small Pacific nations, such as Nauru and Papua New Guinea for processing.[143] The Australian government stated that no one seeking to migrate in this manner would be resettled in Australia and further sought to remove the ability of asylum seekers to challenge the legality of

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140. *See* JAMES J. SPIGELMAN, *The Application of Quasi-Constitutional Laws*, *in* STATUTORY INTERPRETATION AND HUMAN RIGHTS 86–97 (2008). It is fascinating to note here that in 1939, Professor Willis outlined strikingly similar interpretive (and constitutional) developments occurring in Canada where, in the absence of a bill of rights or even a constitutional separation of powers, the courts used their interpretive powers to establish a common law bill of rights. John Willis, *Administrative Law and the British North America Act*, 53 HARV. L. REV. 251, 274 (1939).

141. Sir Philip Sales explains that "the principle of legality" is the odd name used by Halsbury's Laws—and subsequently adopted by Lord Steyn in *R. v Secretary of State for the Home Department Ex Parte Simms*—for the doctrine that fundamental human rights and principles at common law are not overridden by statute unless done so expressly or by necessary implication. Sir Philip Sales, *A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998*, 125 L. QUART. REV. 598, 600 (2009). The terminology was first used in Australian law in *Electrolux Home Prod Pty Ltd v Austl Workers' Union* (2004) 221 CLR 309, 329 (Austl.).

142. *See* JANE MCADAM & FIONA CHONG, REFUGEES: WHY SEEKING ASYLUM IS LEGAL AND AUSTRALIA'S POLICIES ARE NOT (2014).

143. *See* Mary Crock & Daniel Ghezelbash, *Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers*, 18 AUSTL. J. ADMIN. L. 101, 101–14 (2011); *Australia: 'Pacific Solution' Redux—New Refugee Law Discriminatory, Arbitrary, Unfair, Inhumane*, HUM. RTS. WATCH (Aug. 17, 2012), https://www.hrw.org/news/2012/08/17/australia-pacific-solution-redux.

relevant migration decisions made upon processing.[144] This triggered a steady flow of migration cases (which now resembles a flood) that were heard by the Australian High Court. In these cases, Section 75(v) of the Australian Constitution loomed large. To recall, Section 75(v) provides that "[i]n all matters . . . in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth . . . the High Court shall have original jurisdiction."[145] It provides both the legal avenue *to* the Australian High Court (which trumped a federal statute that sought to exclude this access to asylum seekers who wished to challenge the migration decisions of the Australian government[146]) and the constitutional vehicle used *by* the court to develop the entrenched grounds upon which that review and relief is sought.[147]

In *Plaintiff S157 v. Commonwealth*—a 2003 case in which the Australian High Court strictly construed Section 474 of the Migration Act 1958, which sought to oust its review powers of migration decisions—Chief Justice Gleeson stated that Section 75(v) of the Australian Constitution "secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Australian Parliament."[148] Subject to the Australian Constitution, the Parliament may, of course, change the content of the statute, but the rule of law requires that the executive government obey the law.[149]

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144. *See* Jane McAdam, *Australia and Asylum Seekers,* 25 INT. J. REFUGEE L. 435, 440 (2013).

145. *Australian Constitution* s 75(v); *see* MARK ARONSON & MATTHEW GROVES, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 949–56 (5th ed. 2013); Leighton McDonald, *The Entrenched Minimum Provision of Judicial Review and the Rule of Law*, 21 PUB. L. REV. 14 (2010); Simon Young & Sarah Murray, *An Elegant Convergence? The Constitutional Entrenchment of "Jurisdictional Error" Review in Australia*, 11 OXFORD U. COMMW. L.J. 117 (2011).

146. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (Austl.); *see* Cheryl Saunders, *Plaintiff S157/2002: A Case Study in Common Law Constitutionalism*, 12 AUSTL. J. ADMIN. L. 115 (2005).

147. *See* Will Bateman, *The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review*, 39 FED. L. REV. 463 (2011); David F. Jackson, *Development of Judicial Review over the Last 10 Years: The Growth of Constitutional Writs*, 12 AUSTL. J. ADMIN. L. 22 (2004).

148. *Plaintiff S157/2002* 211 CLR at 476, 482.

149. MURRAY GLEESON, THE RULE OF LAW AND THE CONSTITUTION 68 (2000).

Yet, as to whether Section 474 authorized the executive government to make migration decisions without according natural justice (or due process of law) to those persons affected, Chief Justice Gleeson emphatically stated:

> [C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual."
>
> The principles of statutory construction stated above lead to the conclusion that Parliament has not evinced an intention that a decision by the Tribunal to confirm a refusal of a protection visa, made unfairly, and in contravention of the requirements of natural justice, shall stand so long as it was a bona fide attempt to decide whether or not such a visa should be granted. Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If Parliament intends to provide that decisions of the Tribunal, although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the Tribunal in order for its decisions to be effective under the Act, then [Section] 474 does not suffice to manifest such an intention.[150]

In the teeth of federal migration legislation—the ordinary meaning of which clearly and *intentionally* infringed upon rights—the Australian High Court deployed the Australian Constitution and the revitalized (old) common law canon, now called the prin-

150. *Plaintiff S157/2002* 211 CLR at 476, 492–94.

ciple of legality, to protect the fundamental human rights of asylum seekers who sought natural justice and access to the courts.[151]

In 2004, these developments gathered apace. In another migration case, this time involving an ultimately unsuccessful challenge to compulsory and open-ended executive detention of asylum seekers, Chief Justice Gleeson, once again, emphasized the link between the principle of legality and the rule of law:

> A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.[152]

This contemporary migration law jurisprudence demonstrates the willingness of the Australian High Court to apply the principle of legality to read down statutes that facially operate to seriously infringe fundamental rights close to the judicial heart such as liberty, due process, and access to the courts.

B. The Recognition and Development of U.S. Notions of Clear Statement

In 2005, Chief Justice Spigelman of the New South Wales Supreme Court published an important paper—*Principle of Legality and the Clear Statement Principle*[153]—that, for the first time, expressly drew the link between Australian common law and U.S. notions of clear statement rules. Significantly, Chief Justice Spigelman argued that the interpretive approach involved in the application of the principle of legality in Australia should more appropriately be called "the clear statement principle."[154] This

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151. *Id.* at 476, 482, 505–20; *see also* Willis, *supra* note 140, at 272–81 (articulating the pre-Charter interpretive developments in Canada, where the courts used (and developed) principles of statutory interpretation to secure the right to access the courts in the heart of legislation whose aim was clearly to the contrary).

152. *Al-Kateb v Godwin* (2004) 219 CLR 577 (Austl.). But see WILLIAMS & HUME, *supra* note 46, at 38, for an excellent critique of the "rule of law" justification for the principle of legality.

153. J. Spigelman, *Principle of Legality and the Clear Statement Principle*, 79 AUSTL. L.J. 769 (2005).

154. SPIGELMAN, *supra* note 140, at 88.

was so because it "more accurately reflect[ed] the true judicial role"[155] when determining whether or not the principle of legality can be applied to the construction of a statute. As Chief Justice Spigelman pointed out: "If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality."[156]

As Chief Justice Spigelman noted, in the United States, there has long been "a clear interaction between constitutional and quasi-constitutional principles,"[157] and a collection of substantive interpretive canons known as "clear statement rules" facilitated this interaction.[158] It is said that clear statement rules can secure robust protection of individual rights in a manner that enhances both legislative clarity[159] and democratic government[160] and can also promote constitutional and other important legal values.[161] The Australian High Court believes that the principle of legality can perform a similar rights-protective, democracy-enhancing role and, further, can be used as the primary means for the judicial protection of rights in a jurisdiction that lacks a bill of rights.[162] In terms of the methodology of clear statement rules, Professors Eskridge, Frickey, and Garrett explain their rule-like operation as follows:

> If a presumption of statutory meaning is sufficiently powerful, it can rise to the level of a clear statement rule. . . . In such instances, the Court is announcing a rule of law: in the absence of clear statutory text speaking to the precise issue, judges

155. *Id.*
156. *Id.*
157. *Id.* at 89–90.
158. *See* William N. Eskridge, Jr. & Philip P Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).
159. Finley v. United States, 490 U.S. 545, 556 (1989).
160. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 289–97 (1994).
161. *See* Eskridge, Jr. & Frickey, *supra* note 158, at 595–98; Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CAL. L. REV. 1371 (2010).
162. *See* Chief Justice Robert French, Speech at John Marshall Law School: Protecting Human Rights Without a Bill of Rights (Jan. 26, 2010), http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf.

> must interpret the statute a certain way. Sometimes the courts impose such a stringent requirement of statutory textual clarity as to require the legislature to draft statutes with highly targeted text containing what amounts to "magic language" if the legislature wishes to overcome the canon. For example, Congress is well advised, after *Nordic Village*, to include such language as "the sovereign immunity of the United States is hereby waived" in its statutes in addition to more general language indicating that the government is amenable to suit. Such steroidal canons dictating special language might be labeled *super-strong clear statement rules.*[163]

These clear statement rules are strictly applied to the construction of statutes to protect principles and values, such as federalism, due process, and the separation of powers, that have a common law, statutory, or constitutional source.[164] The U.S. Supreme Court's decision in *INS v. St. Cyr* demonstrates the interpretive bite that these rules can have when a statute engages core concerns and values of the courts and the judicial process (i.e., liberty, access to the courts, and the rule of law). In *St. Cyr*, the court addressed congressional legislation that, in its ordinary or natural meaning, deprived criminal aliens habeas corpus review of a deportation order.[165] Both the title of the relevant provisions at issue—the Elimination of Custody Review by Habeas Corpus—and its detailed legislative history confirm that U.S. Congress intended to repeal habeas corpus review in the courts.[166] The U.S. Supreme Court, however, held otherwise:

> For the [Immigration and Naturalization Service] to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. . . . Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, [U.S.] Congress must articulate specific and unambiguous directives to effect a repeal.[167]

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163. ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 9, at 354–55 (emphasis added).

164. *See id.* at 352–55.

165. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401(e), 110 Stat. 1214 (1996).

166. *See* INS v. St. Cyr, 533 U.S. 289, 329 (2001) (Scalia, J., dissenting).

167. *Id.* at 298–99 (citations omitted).

The clear statement rule required that U.S. Congress use unambiguous language—"magic language"—to trump the relevant rights and freedoms at issue in the ordinary and natural meaning of the statute; thus, "in the absence of clear statutory text speaking to the precise issue,"[168] the language of the statute required the U.S. Supreme Court to construe the statute in *St. Cyr* in a rights-protective way. This amounts to a mandatory rule of interpretation that makes fundamental human rights (as discovered and defined by the judiciary) strongly resistant to legislative abrogation.[169]

The contemporary jurisprudence of the Australian High Court demonstrates the parallel between (and inspiration behind) the methodology of clear statement rules and the principle of legality.[170] Australian judges proceed from the interpretive premise that a statute does not disturb or infringe the relevant set of rights and freedoms considered fundamental at common law. This first interpretive step is the critical one: the judicial identification of the right or freedom that is engaged upon an ordinary construction of the relevant statute. Once this is done—and absent unmistakably clear statutory language ("magic language") to the contrary—the principle of legality is applied and the legislation is given a rights-protective construction. The Australian High Court made it clear in *Coco* that judges must construe legislation compatibly with fundamental human rights, unless the terms of the statute unambiguously state that "the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of

168. ESKRIDGE, JR., FRICKEY, & GARRETT, *supra* note 9, at 354.

169. It was, however, a conception of the interpretive requirement that the clear statement rule mandated, which was strongly disputed in dissent by Justice Scalia. He argued that U.S. Congress does *not* have to use express or "magic words" to rebut the strong (rights) presumption, so long as that intent is clear on the face of the statute. *St. Cyr*, 533 U.S. at 327, 333–34 (Scalia, J., dissenting, joined by Rehnquist, C.J., Thomas, J., & O'Connor, J.) (original emphasis).

170. *Lacey v A-G (Qld)* (2011) 242 CLR 573 (Austl.); *see* Dan Meagher, *The Principle of Legality as Clear Statement Rule: Significance and Problems*, 36 SYD. L. REV. 413, 424–29 (2014).

them."[171] The common law rights to liberty,[172] property,[173] free speech,[174] natural justice,[175] access to the courts,[176] and even the defining characteristics of our "general system of law," are thus protected from legislative encroachment by this application of rule-like conception of the principle of legality.[177]

Another migration case, *Saeed v. Minister for Immigration and Citizenship*, demonstrates how the principle of legality hardened into a strong Australian species of clear statement rules and the significance of this development for the protection of fundamental human rights. The applicant was refused a visa on the grounds that his application contained false or misleading information regarding his work history in Pakistan.[178] The Minister for Immigration obtained that information through inquiries made by her delegate but did not draw this information to the appellant's attention before her decision to refuse the visa.[179] On the facts, the right engaged on the ordinary meaning of the statute was the natural justice hearing rule. The court held that "in the ordinary case, an opportunity should be given to a person affected by a decision to deal with any adverse information that is 'credible, relevant and significant'"[180] before that decision is made. The relevant provisions in the Migration Act 1958 contained "an exhaustive statement of the requirements of the natural justice hearing in relation to the matters they deal with"[181] (which the court held related to onshore visa applicants). The common law right was abrogated for these onshore visa applicants, as the statute did not expressly require the Minister for

171. *Coco v The Queen* (1994) 179 CLR 427, 437 (Austl.).
172. *Re Bolton* (1987) 162 CLR 514, 523 (Austl.).
173. *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 (Austl.).
174. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31 (Austl.); *Evans v New South Wales* (2008) 168 FCR 576, 595–96 (Austl.).
175. *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252, 271 (Austl.).
176. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (Austl.).
177. *X7 v Austl Crime Comm'n* (2013) 248 CLR 92, 595–96, 612–13 (Austl.); *Lee v New South Wales Crime Comm'n* (2013) 251 CLR 196, 233–37, 265–71 (Austl.).
178. *Saeed* 241 CLR at 257.
179. *Id.* at 256.
180. *Id.* at 261.
181. *Migration Act 1958* (Cth) s 51A(1) (Austl.).

Immigration to give them an opportunity to address relevant adverse information (though, in her discretion, the minister did invite them to do so).[182] This had the effect of abrogating the right to a natural justice hearing for onshore visa applicants. And although there was ample legislative history that suggested that the provisions were intended to cover *all* visa applicants (onshore and offshore), as was the case in *St. Cyr*, the Australian High Court held that these materials were not interpretively decisive.[183] In doing so, the court rejected the notion that legislative history, even if clear and emphatic, can trump its primary interpretive duty—which is to ascertain the meaning of the statute through close consideration of its text.[184] Consequently, the relevant provisions were interpreted in the following terms:

> Assuming, for present purposes, that [Section] 51A as it applies to [Section] 57, is valid and effective to exclude the natural justice hearing rule, it is excluded only so far as concerns onshore visa applicants. . . . The position of offshore visas is not addressed. . . . It follows that [upon the application of the principle of legality] the implication of the natural justice hearing rule with respect to offshore visa applicants was maintained. The Minister was obliged to provide the appellant with an opportunity to answer adverse material.[185]

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182. *Id*. s 56.

183. *Saeed* 241 CLR at 264–65, 271.

184. *Id.* at 264–65; *see* Matthew Groves, *Exclusion of the Rules of Natural Justice*, 39 MONASH U. L. REV. 285, 290–91 (2013) ("*Saeed* also appeared to identify a deeper common law foundation for the presumptions surrounding natural justice when it explained that natural justice was one of the 'fundamental principles' protected by the principle of legality. . . . The principle of legality may be supported by longstanding authority, but any notion that observance of the rules of natural justice is an implied condition or requirement that is necessary for the valid exercise of statutory powers has a much more recent origin. Justice Basten has conceded that the implication of a condition to observe the requirements of fairness as a valid precondition to the exercise of statutory powers 'has a degree of artificiality.' . . . This . . . highlights a difficult point for the courts. The implication process used by the courts involves two competing issues. On the one hand, in this exercise the courts purport to ascertain and enforce the 'true intention' of Parliament. On the other hand, they do so through a process of common law assumptions and statutory interpretation so obscure as to raise the question of whether the intention finally discovered is as much, if not more, a judicial rather than a parliamentary one.").

185. *Saeed* 241 CLR at 271.

This curial insistence that Parliament first consider and then decide whether its legislation infringes upon a fundamental right is the lynchpin of the principle of legality. Justices Gummow and Bell emphatically endorsed this proposition in the recent Australian High Court case, *Plaintiff M47 v. Director General of Security*, where it held that the Migration Act 1958 "does not provide *in terms* that an unlawful non-citizen is to be kept in immigration detention permanently or indefinitely."[186] The court held that the relevant provisions of the Migration Act 1958 only authorized the detention of unlawful noncitizens until they were either deported, granted a visa, or removed (at their request) to another country.[187] The act did not expressly contemplate the possibility of indefinite detention of an unlawful noncitizen. In other words, Parliament did not "squarely confront" and then decide—using clear statutory language—to express the decision to abrogate the fundamental common law right to liberty for unlawful noncitizens seeking asylum.[188]

In this series of migration cases, the principle of legality operated as a "kind of manner and form requirement imposed on Parliament"[189] that necessitated "clear and unequivocal [statutory] language"[190] in order to interfere with fundamental human rights. This suggests that, in Australia (as in the United States), the Australian High Court "announc[ed] a rule of law: in the absence of clear statutory text speaking to the precise issue, judges must interpret the statute a certain way."[191] In this sense, the principle of legality has developed into a strong Australian species of clear statement rule for fundamental human rights.[192]

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186. *Plaintiff M47-2012 v Director General of Security* (2012) 251 CLR 1, 59, 188–93 (Austl.) (emphasis added); *see* Claire McKay, Plaintiff M47/2012 v Director-General of Security*: Where to Now for Al-Kateb?*, 24 PUB. L. REV. 3 (2013).

187. *Plaintiff M47-2012* 251 CLR at 59, 193.

188. *Id.*

189. GOLDSWORTHY, *supra* note 118, at 311.

190. *Momcilovic v The Queen* (2011) 245 CLR 1, 46 (Austl.).

191. ESKRIDGE, JR., FRICKEY, & GARRETT, *supra* note 9, at 354.

192. Interestingly, this evolution from a principle of legality into a clear statement rule for common law rights and freedoms reflects the process of convergence suggested by Professor Frederick Schauer: that, as an empirical matter, the behavior of rule-interpreters and rule-enforcers suggests that standards will be developed into rules, and that rules will be pushed toward standards. Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 305 (2003).

The significance is that the robust application of the principle now transcends what in Australia were a historically loose collection of rebuttable presumptions[193]—with their origins as specific rules and immunities,[194] residual freedoms,[195] and aspirational judicial values[196]—and has formed a common law bill of rights that is resistant to legislative encroachment, maybe even defiantly so.[197]

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193. For example, these presumptions include that legislation is not to have extraterritorial effect; legislation does not alter the common law; legislation is constitutional; legislation does not operate with retrospective effect; legislation does not limit the prerogative powers of the Crown; and legislation does not interfere with equality of religion or violate the rules of international law. *See* D. C. PEARCE & R. S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 255–59 (8th ed. 2014); J. J. Doyle, *Common Law Rights and Democratic Rights*, *in* 1 ESSAYS ON LAW AND GOVERNMENT: PRINCIPLES AND VALUES 144–67 (Paul D. Finn ed., 1995).

194. Relevantly, Justice Gummow observes:

> [T]o speak of "fundamental" common law "principles" assumes a level at which these are abstracted but offers little guidance as to the location of that level. Many rights and immunities are reduced by the general law to specific and justiciable principles and remedies; the rule respecting legal professional privilege and the protection of the "Englishman's castle" against intrusion by the Executive through the action for trespass and the setting aside of "general warrants" are examples; but a general principle or "value" respecting, say, equality before the law, may be another matter.

W. M. C. Gummow, *The Constitution: Ultimate Foundation of Australian Law?*, 79 AUSTL. L.J. 167, 176–77 (2005) (citations omitted).

195. *See* BAILEY, *supra* note 84, at 19 (noting that a common law "freedom" is not like a human rights-type claim or action, but rather it emerges as a general principle from a line of sufficiently similar individual cases).

196. In 2004, Professor Paul Rishworth noted that the traditional use of "common law rights" in legal argument was aspirational where the "rights" asserted were in fact desirable goals, not a clearly defined baseline against which to assess the legality of legislation and government action. Paul Rishworth, *Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights*, 15 PUB. L. REV. 103, 106 (2004).

197. Professor Goldsworthy observes that, arguably,

> the courts have waged a stealthy, and ultimately successful, campaign to acquire – or usurp – authority to protect "constitutional" values of their choice, by imposing a kind of manner and form requirement on Parliament. . . . For example, in a jurisdiction lacking a statutory Bill of Rights, the courts

C. A Common Law Bill of Rights

It was no surprise then that in a series of lectures delivered in 2008 by Chief Justice Spigelman on the topic of statutory interpretation and fundamental human rights,[198] the first was titled, *The Common Law Bill of Rights*.[199] In the lectures, he detailed how the progressive transformation from the old common law canon to the principle of legality, through the methodology of clear statement, gave the Australian Bill of Rights quasiconstitutional strength.[200] The suite of rights, freedoms, and immunities that comprise this bill of rights was said to include the following:[201] nonretrospectivity,[202] personal liberty,[203] freedom of movement,[204] freedom of speech,[205] fair trial,[206] access to the

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> might introduce one "through the back door", by developing a common law bill of rights that protects the same rights as a statutory bill and provides the same level of protection.

GOLDSWORTHY, *supra* note 118, at 311 (citations omitted).

198. These were the 2008 McPherson Lectures presented at the University of Queensland TC Bierne School of Law. S*ee* SPIGELMAN, *supra* note 10.

199. *Id*. at 1–50. The other lectures were *The Application of Quasi-Constitutional Laws, id.* at 51–98, and *Legitimate and Spurious Interpretation*, *id.* at 99–145.

200. *Id*. at 86–97; *see* WILLIAMS & HUME, *supra* note 46, at 43–44 (noting that, after detailing the catalogue of rights, freedoms, and principles that constitute the "common law bill of rights," the authors stated that this demonstrated the breadth of the principle of legality. But, its depth is also apparent, as its application does not require statutory ambiguity, and it trumps other textual and structural presumptions that may otherwise be interpretively relevant in particular legislative contexts).

201. SPIGELMAN, *supra* note 10, at 27–29; *see* PEARCE & GEDDES, *supra* note 193, at 255–59; *Momcilovic v The Queen* (2011) 245 CLR 1, 177–78 (Austl.); *see also* French, *supra* note 139, at 3–4.

202. *See Esber v Commonwealth* (1992) 174 CLR 430 (Austl.); *Rodway v The Queen* (1990) 169 CLR 515 (Austl.).

203. *See Re Bolton* (1987) 162 CLR 514 (Austl.).

204. *See Melbourne Corp v Barry* (1922) 31 CLR 174 (Austl.); *Potter v Minihan* (1908) 7 CLR 277, 304 (Austl.).

205. *See Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31 (Austl.); *Evans v New South Wales* (2008) 168 FCR 576, 594–96 (Austl.); *see also* Dan Meagher, *The Principle of Legality and the Judicial Protection of Rights*—Evans v New South Wales, 37 FED. L. REV. 295 (2009).

206. *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 (Austl.).

courts,[207] open justice,[208] lenity,[209] natural justice and due process of law,[210] property,[211] and freedom and equality of religion.[212]

The content of this bill of rights is now routinely endorsed by senior appellate courts in Australia,[213]and its expansion, though slow and incremental,[214] is being hastened by the influence of Australian constitutional law principle[215] and the interaction between international law on fundamental human rights and domestic law.[216]

In a speech delivered in 2010 at John Marshall Law School in Chicago titled, *Protecting Human Rights Without a Bill of Rights*, Chief Justice French of the Australian High Court said that "the [principle of legality] can be regarded as 'constitutional' in character, even if the rights and freedoms which it protects are not." To explain that "constitutional" character, he quoted an arguably question-begging[217] passage from Professor Trevor R. S. Allan:

> The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common

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207. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (Austl.).

208. *Assistant Comm'r Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (Austl.); *see* J. Spigelman, *The Principle of Open Justice: A Comparative Perspective,* 29 U. N.S.W. L.J., no. 2, 2006, at 147.

209. *Krakouer v The Queen* (1998) 194 CLR 202 (Austl.).

210. *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (Austl.).

211. *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 (Austl.); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 (Austl.).

212. *Evans v New South Wales* (2008) 168 FCR 576, 594–96 (Austl.); *Canterbury Mun Council v Moslem Alawy Soc'y Ltd* (1985) 1 NSWLR 525 (Austl.).

213. *See Momcilovic v The Queen* (2011) 245 CLR 1, 177–78 (Austl.); French, *supra* note 139, at 3–4.

214. *See* M. H. McHugh, *Judicial Method*, 73 AUSTL. L.J. 37 (1999); Lord Robert Walker, *Developing the Common Law: How Far is Too Far?*, 37 MELB. U. L. REV. 232 (2013).

215. *See* French, *supra* note 162; Meagher, *supra* note 170, at 430–31.

216. *See* Dyzenhaus, Hunt, & Taggart, *supra* note 104.

217. The passage is "question-begging" because it does not explain how (and why) common law rights may be considered "constitutional," even though they are "not formally entrenched against legislative repeal." See *infra* Part V., for an account and possible explanation for what this now entails in contemporary (Australian) common law.

> law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.[218]

This passage suggests, arguably, that whilst Parliament can always statutorily modify or abrogate rights recognized as fundamental at common law, the language used must be clear and unequivocal, which gives these fundamental human rights an enhanced durability and strength against legislative encroachment. In any event, a new wave of legislation that is openly hostile to fundamental human rights, which began in 1980s and continues to this day,[219] provoked and inspired the rights consciousness of Australian judges. In the absence of a constitutional bill of rights and a deeply entrenched political reluctance toward acknowledging formal rights, the Australian High Court sought to fill this void to temper, if not resist (what they consider to be), these deleterious legislative developments. To do so, the Australian High Court turned to alternative legal sources—international law, common law, and indigenous constitutional law—to develop a set of rules and principles to provide more ro-

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218. T. R. S. Allan, *The Common Law as Constitution: Fundamental Rights and First Principles*, *in* COURTS OF FINAL JURISDICTION: THE MASON COURT IN AUSTRALIA 146, 148 (Cheryl Saunders ed., 1996); French, *supra* note 162, at 32.

219. A recent, egregious example is the Law Enforcement Legislation Amendment (Powers) Act 2015 (Austl.). It authorizes that a person accused of a criminal offence may be examined compulsorily by the Australian Crime Commission on subject matter relating to the criminal charge and removes the (previous) obligation of the Commissioner to ensure the transcripts of the examination are suppressed. *Id.* s 14. On the contrary, it outlines circumstances where the disclosure of information to prosecuting authorities, which was obtained directly or indirectly from those examinations, is permitted. *Id.* s 16. Another is Section 35P, which recently was inserted into the Australian Security Intelligence Organisation Act 1979 (Austl.) and gives power to the Australian domestic spy agency to detain citizens who are not suspected of any crime for a week, and whilst detained, they must answer any question or face the possibility of a five year maximum jail term. In the event that a journalist reports on these matters, they too can be jailed for the same maximum period. *National Security Legislation Amendment Act (No 1) 2014* (Austl.) (inserting s 35P into the *Australian Security Intelligence Organisation Act 1979* (Austl.)); *see also* George Williams, *An Australian Perspective on the UK Human Rights Act Debate*, U.K. CONST. L. BLOG (Oct. 27, 2015), http://ukconstitutionallaw.org/2015/10/27/george-williams-an-australian-perspective-on-the-uk-human-rights-act-debate/; Kieran Hardy, *National Security Reforms and Freedom of the Press*, 3 GRIFFITH J. L. & HUMAN DIGNITY 1 (2015).

bust protection of fundamental human rights. Central to this judicial rights enterprise is the development of a strong Australian species of clear statement rule for fundamental human rights that erects a quasiconstitutional common law bill of rights that is strongly resistant to legislative encroachment.

V. CONTROVERSIES AND QUESTIONS

The contemporary rights developments in Australia detailed in Part IV are remarkable but controversial and problematic as well. This Part will outline some of the normative—indeed constitutional—concerns with this jurisprudence of the Australian High Court. As it turns out, old U.S. Supreme Court cases and more recent public law scholarship is, once again, central to these issues and analyses.

A. The Method and Justification for the Principle of Legality

The interpretive canon that was revived in contemporary Australian law as the principle of legality had its roots in old U.S. law. The Australian High Court stated in 1908:

> 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.[220]

This passage was in fact a direct quotation from the 1905 edition of the U.K. treatise, *Maxwell on the Interpretation of Statutes*.[221] As the Australian High Court recently noted, however, the origins of *that* quotation can be traced to a statement made by Justice Marshall of the U.S. Supreme Court in 1805: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect

220. *Potter v Minihan* (1908) 7 CLR 277, 304 (Austl.) (citations omitted).

221. PETER BENSON MAXWELL, MAXWELL ON THE INTERPRETATION OF STATUTES 122 (4th ed. 1905).

such objects."[222] Clearly enough, the canon's original justification—as with interpretive canons more generally[223]—was to determine authentic notions of legislative intention. This was so, despite the fact that the judicial attitude toward statutes at that time—in both Australia and the United States—was to view

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222. United States v. Fisher, 6 U.S. 358, 390 (1805).

223. Professor Eskridge notes:

> Anglo-American treatises on statutory interpretation from the nineteenth century to the present have relied heavily on the "canons of statutory construction," a homely collection of rules, principles, and presumptions. The canons have served as a collective security blanket for lawyers and judges because they combine predictability and legitimacy in statutory interpretation: by applying the relevant canon(s), the lawyer can figure out what the legislature intended a statute to mean, which in turn is a sure prediction of how a judge will interpret it.

ESKRIDGE, JR., *supra* note 160, at 275; *see also* CALEB NELSON, STATUTORY INTERPRETATION 82 (2011). Professor Nelson articulates the following:

> Most of the canons that state policy-neutral rules about vocabulary and syntax can be thought of as helping interpreters grasp the intended meaning of the statutory language, and at least some of the canons that put thumbs on the scale in favor of certain substantive policies can be thought of as telling courts how to proceed when their information about the enacting legislature's likely intent has run out. But these correlations are not perfect. A few canons that are entirely policy-neutral . . . are designed less to capture the likely intent behind particular formulations than to regularize the courts' approach to some recurring sources of ambiguity in English syntax. If these canons help courts ascertain the intended meaning of statutory language, it is only because legislators have come to know about the canons and to read bills against the backdrop that they provide. Conversely, many of the canons that favor particular substantive policies can be seen at least in part as tools for helping interpreters discern likely legislative intent, because the policies that they favor reflect norms that American legislatures have long tended to follow.

NELSON, *supra* note 223, at 82.

them as barely tolerable intrusions into the accumulated wisdom[224] and perfected reason[225] of the common law.[226]

In any event, the manner in which clear statement rules in the United States were developed and applied is not without serious constitutional and normative controversy.[227] In terms of their development, Professors Alexander and Prakash consider these interpretive rules to be "constitutionally problematic," as they "doubt that the judicial power—the power to decide cases—gives the federal judiciary the power to dictate interpretive rules to Congress. The courts cannot dictate (or constrain) how Congress must express itself."[228]

As noted earlier, the judicial provisions of the Australian Constitution largely mirror those of Article III of the U.S. Constitution. This makes the principle of legality—and the erection of the common law bill of rights that it facilitated—open to the same important constitutional objection.[229] Notwithstanding the "weighty precedential pedigrees"[230] of most clear statement rules, they are controversial because they "reflect judicially articulated policies that are sometimes enforced very vigorously . . .

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224. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); *R v Janceski* (2005) 64 NSWLR 10, 23 (Austl.) (articulating that, with respect to the presumption that Parliament did not intend to change the common law, it was now of minimal weight, as it reflected an era where judges treated legislation with hostility and resisted where possible its impact upon the common law). *But see* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357 (2015) (stating that judicial antipathy toward legislation was by no means universal amongst classical common lawyers).

225. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND sec. 138 [97.b.] (1985); FREDERICK POLLOCK, THE GENIUS OF THE COMMON LAW (1912).

226. *See* BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, *in* CARDOZO ON THE LAW 4–180 (1982); Dixon, *supra* note 1, at 152–65.

227. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning,* 58 VAND. L. REV. 1 (2005); Eskridge, Jr. & Frickey, *supra* note 158, at 629–44; Abbe Gluck & Lisa Shultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 940–48, 956–64 (2013); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

228. Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 102 (2003).

229. *See* GOLDSWORTHY, *supra* note 118, at 304–12.

230. Eskridge, Jr. & Frickey, *supra* note 158, at 598.

and thus do affect the allocation of power, rights, and property in [U.S.] society."[231] To this end, Alexander and Prakash persuasively argue that they "should be recognized for what they are: attempts to drag statutes away from their actual meaning and towards the substantive preferences of those who create the rules of interpretation,"[232] which, in the case of clear statement rules, are the senior members of the judiciary.[233]

This constitutional objection unearths a serious normative issue with clear statement rules and, in particular, the manner in which its strong Australian manifestation has been applied. The judicial application of normative canons of statutory construction is not undertaken in faithful service of congressional intent.[234] In their seminal article, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, Professors Eskridge and Frickey note that "the substantive canons are not policy neutral. They represent value choices by the Court."[235] In Australia, Professor Jeffrey Goldsworthy rightly argues that "the presumptions are not really motivated by genuine uncertainty about Parliament's intentions; instead, they amount to quasi-constitutional 'manner and form' requirements, imposed by the judiciary, to enhance Parliament's accountability to the electorate."[236] Arguably, that proposition is supported by Chief Justice Gleeson's observation that a

> statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.[237]

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231. ESKRIDGE, JR., FRICKEY, & GARRETT, *supra* note 9, at 356.

232. Alexander & Prakash, *supra* note 228, at 109.

233. *See* Richard Pildes, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 907–10 (1982).

234. *See* William N. Eskridge, Jr., *Book Review: The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 537 (2013); ESKRIDGE, JR., FRICKEY, & GARRETT, *supra* note 9, at 341–42; Young, *supra* note 161, at 1380.

235. Eskridge, Jr. & Frickey, *supra* note 158, at 595–96.

236. GOLDSWORTHY, *supra* note 118, at 308–09.

237. *Al-Kateb v Godwin* (2004) 219 CLR 577 (Austl.).

But the principle of legality is not only "an expression of a legal value, respected by the courts," it is an expression of a legal value that is *made and enforced by* the courts. That is why Professors Dyzenhaus, Hunt, and Taggart have said that the principle "is controversial, at least in so far as it requires judges to construct common law values, and in respect of the material they can legitimately use in this building exercise."[238] Those choices are especially controversial, as the judicial assumption—that certain fundamental human rights are so deep lying in the legal order that "[i]t is in the last degree improbable that the legislature would overthrow [them] . . . without expressing its intention with irresistible clearness"[239]—is so interpretively significant. This is so because the application of the principle to protect the common law bill of rights would limit the otherwise clear meaning of legislation.[240] The potential for strained (rights-compatible) interpretations is increased further as the principle of legality can be applied in Australia without the existence of statutory ambiguity beforehand.[241]

If the principle of legality is applied to protect fundamental human rights in the teeth of legislation that aims to curtail or abrogate them, it is difficult to square this concept with its original normative justification—the discovery of authentic legislative intention.[242] The principle is still one of *interpretation*. When appropriate, its role is to assist in working out the *meaning* of a statute. That is indeed mandated if federal judicial power is to be exercised in conformance with Chapter III of the Australian Constitution.[243] What then becomes decisive is the constitutional

238. Dyzenhaus, Hunt, & Taggart, *supra* note 104, at 6.

239. *Potter v Minihan* (1908) 7 CLR 277, 304 (Austl.).

240. Sir Philip Sales (justice of the U.K. High Court of Justice, Chancery Division) argues that the principle of legality ought to be narrowly applied for powerful constitutional reasons, as it operates to modify what is otherwise the natural and ordinary meaning of legislation. *See* Sales, *supra* note 141, at 605.

241. This is a significant doctrinal aspect of the principle of legality. Arguably, it confirms that the true normative justification for the application of the principle to the construction of statutes is not to honor authentic or likely legislative intention. *See Daniels Corp Int'l Pty Ltd v Austl Competition & Consumer Comm'n* (2002) 213 CLR 543, 552–53 (Austl.); Dennis Rose, *The High Court Decisions in Al-Kateb and Al Khafji—A Different Perspective*, 8 CONST. L. & POL'Y REV. 58, 59–60 (2005).

242. *See* Lim, *supra* note 116, at 378–94.

243. Relevantly, Chief Justice French states that

role or interpretive duty of the courts in the construction of statutes more generally. Once that fundamental rule is determined, the principle of legality must be applied necessarily in a manner that is compatible with the interpretive duty of the courts. In this regard, Professors Ekins and Goldsworthy recently noted the following:

> For at least six centuries, common law courts have maintained that the primary object of statutory interpretation "is to determine what intention is conveyed either expressly or by implication by the language used", or in other words, "to give effect to the intention of the [lawmaker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed."[244]

They did so to compare (and condemn) recent pronouncements of the Australian High Court with respect to how judges should interpret statutes that are at odds with this orthodox approach. In the past, the Australian High Court has stated that "legislative intention . . . is a fiction which serves no useful purpose."[245]

> [t]he common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as "the ultimate constitutional foundation in Australia". It also underpins the attribution of legislative intention on the basis that legislative power in Australia . . . is exercised in the setting of a "liberal democracy founded on the principles and traditions of the common law". It is in that context that this court recognizes the application to statutory interpretation of the common law principle of legality.

Momcilovic v The Queen (2011) 245 CLR 1, 46 (Austl.); *see also* Mark Aronson, *Statutory Interpretation or Judicial Disobedience?*, U.K. CONST. L. BLOG (June 1, 2013), https://ukconstitutionallaw.org/2013/06/03/mark-aronson-statutory-interpretation-or-judicial-disobedience/; Basten, *supra* note 11, at 3–8.

244. Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYD. L. REV. 39 (2014).

245. *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 (Austl.); *see* Robert French, *The Courts and Parliament*, 87 AUSTL. L.J. 820, 824–25 (2013); Kenneth Hayne, *Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?*, 13 OXFORD U. COMMW. L.J. 271 (2013). But see Stephen Gageler, Lucinda Lecture at Monash University: Legislative Intention (Sept. 18, 2014), https://www.monash.edu/__data/assets/pdf_file/0007/141496/legislative-inten-

Controversially, the Australian High Court then described the nature of its interpretive function in the following terms:

> [J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and applications of laws. . . . [T]he preferred construction by the Court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[246]

As Ekins and Goldsworthy rightly observe, "[t]his suggests that legislative intention is not something that exists before judicial interpretation, but instead, is a product or construct of interpretation."[247] They argue that to untether statutory interpretation from legislative intention in this way is contrary to constitutional principles and has the capacity to render "unintelligible"[248] the settled interpretive practices of common law courts. The problem identified here is that, "[i]f legislative intention is a product of applying the principles of statutory interpretation, but those principles direct the courts to infer the legislature's intention, then the dog is chasing its own tail."[249] In this approach to statutory construction, there are distinct echoes of Bishop Hoadly's famous statement made in a sermon to King George I in 1717: "Whoever hath an ultimate authority to interpret any written or spoken laws, it is he who is truly the Lawgiver to all intents and purposes, and not the person who first wrote or spoke them."[250]

Again, Ekins and Goldsworthy rightly note that a possible example of this interpretive instability is "the way the so-called

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tion-justice-gageler.pdf, for a recent defense of the relevance of legislative intention to statutory construction by a current justice of the Australian High Court.

246. *Zheng v Cai* (2009) 239 CLR 446, 455–56 (Austl.). While it is beyond the scope of this article, the case raises the fascinating issue as to whether it is the general common law powers that justify, or at least partly explain, the foundational shift undertaken by the Australian High Court, which the interpretive proposition outlined in *Zheng* represents. It is this kind of (potential) impact on the interpretive method of U.S. state courts that might be sourced to their general common law powers, which Professor Pojanowski fruitfully explored. *See* Pojanowski, *supra* note 42.

247. Ekins & Goldsworthy, *supra* note 244, at 41.

248. *Id.* at 42.

249. *Id.* at 44.

250. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 100 (1909).

'principle of legality' seems to be evolving, from a genuine presumption of legislative intent, into a 'constitutional principle' operating like a manner and form requirement that express[es] [that] words are needed to qualify 'fundamental rights', regardless of how obvious the legislature's intention actually is."[251] The Australian High Court's reconceptualization of the interpretive duty of judges as one where determining legislative intention is the product—not the goal—of statutory construction is central to that evolution. Of course, the use of the language of "legislative intention" here does not connote that the construction process is in fact being undertaken, and the principle of legality specifically is being applied to discover what the legislature actually meant or likely intended.[252] In this context, "legislative intention" is fiction that amounts to the meaning ascribed to the statute by the courts upon the principles of statutory interpretation having been applied.[253] Yet, the Australian High Court has sought to underline the historical continuity of the principle of legality in terms of its content and justification by endorsing the centrality of "legislative intention" to its contemporary application. If this is to suggest that its application is to discover what the legislature actually meant or likely intended, then, as Brendan Lim argues, this is to perpetuate a common law myth of continuity.[254] As noted, however, the court has already dispensed with its original normative justification of furthering authentic legislative intention, both in terms of the principle of legality and for the principles of statutory interpretation more generally.[255]

B. The Constitutionalizing of the Principle of Legality and Statutory Interpretation Principles

In the U.S. context, Professor Ernest Young observed that if judges do not apply clear statement rules in order to discover authentic notions of congressional intent, they must then offer

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251. Ekins & Goldsworthy, *supra* note 244, at 44.

252. *See Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 388–90 (Austl.); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–92 (Austl.); *Zheng v Cai* (2009) 239 CLR 446, 455–56 (Austl.).

253. *See* Hayne, *supra* note 245.

254. *Lee v New South Wales Crime Comm'n* (2013) 251 CLR 196, 397–10 (Austl.); *see* Lim, *supra* note 116, at 378–82.

255. *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252, 258–59, 271 (Austl.).

an alternative normative justification for doing so. He suggests that this justification is the U.S. Constitution itself.[256] To recall, in Australia, the contemporary justification for the principle of legality offered by the Australian High Court is to promote democracy and rule-of-law values by improving the clarity and rights sensitivity of legislation. This has led the Australian High Court, necessarily and controversially, away from legislative intention and toward the Australian Constitution. In doing so, the Australian High Court emphasized that the principle exists to protect "rights, freedoms, immunities, principles, and values that are important within our [constitutional] system of representative and responsible government under the rule of law."[257] This concept echoes Professors Hart and Sacks, who offer a distinct explanation of the account and role that policies of clear statement rules may have on legislative power:

> [T]hese policies of clear statement may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally. . . . [I]n other words, they constitute conditions on the effectual exercise of legislative power. But the requirement should be thought of as constitutionally imposed. The policies have been judicially developed to promote objectives of the legal system

256. Young, *supra* note 161, at 1380. *But see* Manning, *supra* note 227, at 404 (making the powerful argument that "if the legitimacy of constitutionally inspired clear statement rules depends on the plausibility of tracing them meaningfully to the Constitution, that burden cannot be met. Such rules seek to enforce constitutional values in the abstract, standing apart from the constitutional provisions from which they are derived. . . . But constitutional values do not . . . exist in the abstract. Values such as federalism, nonretroactivity, and the rule of law, do not exist in freestanding form. Rather, like all constitutional values, they find concrete expression in many discrete constitutional provisions, which prescribe the *means* of implementing the value in question.").

257. *Lee* 251 CLR at 196, 310. In this passage, the Australian High Court identifies key constitutional norms in Australia that are protected when the principle of legality is applied to the construction of statutes. Moreover, there are other constitutional norms (federalism, religious liberty, political communication, representative government, responsible government) that are presently either dormant or underenforced but have the capacity to expand the content of the common law bill of rights and be vindicated through the principle's application. Thus, the Australian High Court has the opportunity and legal tools to deepen and systematize the (still nascent) interaction between the Australian Constitution and its interpretive canons in a manner that is comprehensively outlined by (for example) Cass Sunstein. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 468–502 (1989).

> which transcend the wishes of any particular session of the legislature.[258]

Arguably, this basal shift by the Australian High Court is one important aspect of its wider project to provide a constitutional foundation to Australian rules and principles of statutory interpretation. This lies at the heart of the proposition 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."[259] With respect to these developments, Justice Basten of the Supreme Court of New South Wales observed that "[i]f statutory interpretation is at the core of the judicial function, the Commonwealth Parliament must be constrained in its ability either to expand or diminish that function."[260] That statement was prefaced by Chief Justice Marshall's famous passage from *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expand and interpret that rule."[261] In Australian law, this judiciary rule is considered "axiomatic."[262] Justice Basten's passage serves to highlight the centrality of the separation of powers to the interpretive role of Australian courts and firmly locates that task within this *constitutional* framework. The proposition requires not only that the content of all statutory rules and common law principles of statutory interpretation—of which the principle of legality forms an important part—conform to the constitutional separation of powers but also that their application be central to the exercise of federal judicial power established and conferred by Chapter III of the Australian Constitution. Of course, these constitutional concepts that inform the content and limit the application

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258. HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAWS 1376 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

259. *Zheng v Cai* (2009) 239 CLR 446, 455 (Austl.).

260. Basten, *supra* note 11, at 1.

261. Marbury v. Madison, 5 U.S. 137, 177 (1834); *see also* Basten, *supra* note 11.

262. See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263 (Austl.), where the High Court observed that, in Australia, the principle of *Marbury v Madison*—that the courts not the legislature finally determine the validity of legislation—was considered "axiomatic."

of the law of statutory interpretation cut both ways.[263] It makes, for example, the judicial rewriting of statutes constitutionally impermissible.[264] Moreover, the constitutional concepts are stated at a level of abstraction that suggests rather than determines the sorts of rules and principles that might be properly derived from them.[265] It is important to remember that, in the

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263. SPIGELMAN, *supra* note 10, at 110–111 ("[Roscoe Pound] characterised spurious interpretation as an anachronism in an age of statutes and also as inconsistent with the separation of powers."). Famously, Pound stated:

> The object of genuine interpretation is to discover the intention with which the lawmaker intended to establish; to discover the intention with which the lawmaker made the rule, or the sense which he attached to the words wherein the rule is expressed. . . . Employed for these purposes, interpretation is purely judicial in character; and so long as the ordinary means of interpretation, namely the literal meaning of the language used in the context, are resorted to, there can be no question. . . . [O]n the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into a text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process.

Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381–82 (1907).

264. *See Pidoto v Victoria* (1943) 68 CLR 87, 110–11 (Austl.) (reasoning that it was judicial legislation not interpretation—and so beyond the judicial function of the court—to rewrite a facially invalid law to bring it within constitutional limits).

265. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation,* 124 HARV. L. REV. 1939, 1944–45 (2011) ("[T]he Constitution adopts *no free-standing principle of separation of powers*. The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted wholesale. The Constitution contains no Separation of Powers Clause. . . . Rather, in the Constitution, the idea of separation of powers, properly understood, reflects many particular decisions about how to allocate and condition the exercise of federal power. . . . Viewed in isolation from the constitutionmakers' many discrete choices, the concept of separation of powers as such can tell us little, if anything, about where, how, or to what degree the various powers were, in fact, separated (and blended) in the Philadelphia Convention's countless compromises." (citations omitted) (emphasis added)). In Australia, the largely abstract (and maybe unthinking) conception of the separation of powers articulated by the framers appears to be confirmed by Fiona Wheeler. *See* Fiona Wheeler, *Original Intent and the Doctrine of the Separation of Powers in Australia*, 7 PUB. L. REV. 96, 99 (1996) (noting that the record of the convention debates reveals that the framers gave little consideration to and were mostly unaware

U.S. context, the same constitutional conception of federal judicial power—like the power to finally determine cases[266]—underpins the argument made by Alexander and Prakash: that clear statement rules are "constitutionally problematic."[267] Alexander

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of the significance of introducing the doctrine of separation of powers into the Australian Constitution).

266. Alexander & Prakash, *supra* note 228, at 102. In Australia, the classic definition of judicial power is:

> [T]he power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has the power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330, 357 (Austl.).

267. Professor Frickey raised this very point to an Australian audience at the New South Wales Bar Association "Working With States" Conference in 2005, which discussed Section 15AA of the Acts Interpretation Act 1901. At the time, this federal statutory provision in Australia stated: "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object." *Acts Interpretation Act 1901* s15AA (Austl.). Frickey wrote:

> In the United States, there is no federal statute providing interpretive directions of this sort. Many States do have such statutes. At the federal level, at least, there would be at least some concern that legislative interpretive directives of this sort intrude upon the constitutional separation of powers. The venerable understanding in the United States is that "[i]t is emphatically the province and duty of the judicial department to say what the law is": Marbury v. Madison, 5 US 137 at 177 (1803). This cliché could be understood as including within the judicial role not simply the attribution of meaning to statutes, but the methodological questions concerning how that meaning is to be gleaned.

Frickey, *supra* note 2, at 856 n.31; *see also* Linda Jellum, *"Which is to be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009) (making a detailed argument concerning when statutory interpretive directives to judges violate constitutional separation of powers).

and Prakash's argument, however, conflicts with the recent jurisprudence of the Australian High Court with respect to the common law principle of legality.

What is so extraordinary (as it is controversial) is that the Australian High Court's untethering of legislative intention from statutory interpretation (consciously or not) occasioned precisely the kind of interpretive instability warned about by Ekins and Goldsworthy: "To break the [vicious] cycle, something would have to be changed. Thus, the new skeptical view [of legislative intention] is inherently unstable."[268] In order to do so, the Australian High Court turned toward the inherently contested and question-begging principles of the Australian Constitution to anchor the principle of legality and the interpretive process more generally.[269] Yet, in the future, such a foundational shift in judi-

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268. Ekins & Goldsworthy, *supra* note 244, at 44.

269. Regarding the compatibility of the rules and principles of statutory interpretation with the Australian Constitution, Justice Basten rightly notes:

> It is difficult to find any clear constitutional justification for particular rules of statutory interpretation. It is not difficult to accept that principles of statutory interpretation (not rules) identify or reflect key aspects of the relationship between the legislature and the judiciary. However, that is a statement operating at a high level of generality and says little about the detail of that relationship, or about the respective functions of each arm of government. Indeed it begs an important question as to whether principles of statutory interpretation perform the constitutional role of helping to define the functions of each arm, or whether they reflect functions defined elsewhere, or indeed play a dual role.

Basten, *supra* note 11, at 2. In the United States, Professor Manning makes the point that "[t]he Constitution does not itself address interpretive norms." Specifically, Manning notes that

> the Philadelphia Convention and the ratifying debates neither establish nor refute the idea that the Founders intended "the judicial power of the United States" to assimilate the practices known to the English common law tradition. Those who framed and ratified the Constitution may have had an array of views on equitable interpretation. Indeed, given the paucity of discussion, many may have regarded the rules of interpretation as a mere set of background norms, rather

cial doctrine and practice will pose as many questions and problems as it will answer.[270] One could argue that the principle of legality points toward the fuller integration of statutes into the Australian constitutional framework by requiring their interpretation and application to be compatible with constitutional principles.[271] To which a perfectly sound response might be that it represents nothing more than a constitutionally dubious colonization of the legislative realm through an expanded conception of federal judicial power and the concomitant expansion in the discretionary power of judges which that entails.[272] As Chief Jus-

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> than an inherent attribute of Article III power. The hard reality is that neither the framers nor the ratifiers systematically addressed, much less decisively resolved, the question of appropriate interpretive norms.

John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1670–71 (2001) (citations omitted).

270. Justice Basten says that

> the clear statement rule [the principle of legality] might be described as a principle *of* statutory interpretation: the proposition that it applies *to* statutory interpretation invites the question as to whether it is self-referential. In other words, is the clear statement rule not only a "quasi-constitutional manner and form requirement" but an entrenched requirement? If so, how does it work? Can the Parliament override the clear statement rule; or must it in effect comply with it in order to overrule it? It is possible we will develop what, in the USA, is called a "super-strong clear statement rule" effectively to entrench fundamental values. Such a course is facilitated by: (a) moving the language of statutory interpretation from "intention" to objective meaning; (b) invoking what may be a self-fulfilling reliance on principles "accepted by" legislators and the courts; and (c) identifying protected values in a common law constitutional compact.

Basten, *supra* note 11, at 11; *see also* Ekins & Goldsworthy, *supra* note 244, at 42–46; Meagher, *supra* note 170, at 429–42.

271. *See* Young, *supra* note 161, at 1384.

272. *See* Ronald Sackville, *Bills of Rights: Chapter III of the Constitution and State Charters*, 18 AUSTL. J. ADMIN. L. 67, 79 (2011). The author (an acting judge and Judge of Appeal on the Supreme Court of New South Wales) mentions that

tice French recently observed, these ongoing developments further illustrate why and how "the [principle of legality] can be regarded as 'constitutional' in character"[273] and, furthermore, what it means to say in doctrinal and normative terms that the Australian High Court constructed a *quasiconstitutional* common law bill of rights.[274]

CONCLUSION

This article traced the evolution of fundamental human rights protection provided by the courts in Australia. It is a fascinating and controversial story that, at its most critical moments, was and continues to be informed by U.S. constitutional law design and statutory interpretation principles. On one hand, this is no surprise when "roughly speaking, the Australian Constitution is a redraft of the U.S. Constitution of 1787 with modifications

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> [m]uch of the debate in Australia about the virtues and drawbacks of a national statutory charter of rights has missed the point. While the debate has raged, the High Court has carried on uninterrupted and largely unnoticed by the general community the process of interpreting Ch[apter] III of the *Constitution* to entrench a constitutional bill of rights. It is true that the Ch[apter] III bill of rights created by the High Court is not and can never be comprehensive. But it is far less deferential to the will of elected Parliaments than a statutory charter of rights.

Id. The author expanded on this theme in 2013, noting:

> The three areas in which counter-majoritarian influence is most evident – entrenched judicial review of administrative decisions, the incompatibility doctrine (in its various forms) and the implied freedom of political communication – share common characteristics. They each rest, in whole or in part, on contestable implications drawn from what is said to be the text and structure of the *Constitution*. In each case, the application of the principal norm often involves the exercise of contestable value judgments. The norms are framed in such a way as to maximize the potential for further anti-majoritarian intrusions into areas hitherto the province and executive governments.

Ronald Sackville, *An Age of Hegemony,* 87 AUSTL. L.J. 105, 119 (2013).

273. French, *supra* note 245, at 827.

274. *See* Meagher, *supra* note 170, at 422–29.

found suitable for the more characteristic British institutions and for Australian conditions."[275] On the other hand, what *is* extraordinary is that the decision of the framers of the Australian Constitution to consciously reject U.S. notions of formal rights guarantees was not ultimately decisive in this regard. As Sir Anthony Mason[276]—one of the leading figures central to the new judicial rights consciousness in Australia—portentously noted in 1995: "Just as the courts can protect common law rights by applying presumptive rules of construction, so they can protect fundamental rights, even in the absence of constitutional entrenchment and statutory backing."[277] Australian jurisprudence has proven this to be true.

The Australian High Court transformed an old interpretive canon (with U.S. roots) into a strong Australian species of clear statement rule for fundamental human rights called "the principle of legality." It did so to fill the lacuna in formal rights protec-

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275. Dixon, s*upra* note 1, at 102.

276. Sir Anthony Mason was a justice of the Australian High Court from 1972–1987 and the chief justice from 1987–1995. Sir Anthony led a court that was considered progressive and groundbreaking (by its supporters) but activist and politically controversial (by its critics). *See* JASON L. PIERCE, INSIDE THE MASON COURT REVOLUTION: THE HIGH COURT OF AUSTRALIA TRANSFORMED (2006).

277. Mason, *supra* note 123, at 286. As detailed above, in 1939, Professor Willis described strikingly similar developments that occurred in (pre-Charter) Canada, where the courts used their interpretive powers to establish a common law bill of rights. Willis, *supra* note 140, at 274. Professor Willis further noted: "The main device employed to side-step a provision which purports to render unreviewable the acts of an administrative body, is to apply to that provision the well-known presumption that the legislature does not intend to deprive the subject of his access to the courts." *Id.* at 275. But, when the Canadian courts encountered legislation with precisely that aim, they (like their contemporary Australian counterparts) refashioned the interpretive presumption as Willis observed:

> To set up the presumption in the teeth of that course of legislative history is to fly in the face of the legislature. That is exactly what the courts have done. They now use it, not as a means of discovering an unexpressed intent but as a means of controlling an expressed intent of which they happen to disapprove. *The presumption is now, in substance, a rule of constitutional law masquerading as a rule of construction.*

Id. at 276 (citation omitted) (emphasis added).

tion in Australia and to temper—if not outright resist—increasingly common legislative attempts to eradicate fundamental human rights. The court's application of the principle of legality constructed a quasiconstitutional common law bill of rights, which is protected robustly from legislative encroachment. In order to justify these normative developments, the Australian High Court has now turned toward the inherently contested principles of the Australian Constitution to anchor the principle of legality and the interpretive process more generally. Controversially, this occurred as part of a foundational shift in judicial doctrine and practice that considered legislative intention to be the product—not the lodestar—of statutory interpretation.

Shortly upon his retirement from the Australian High Court, Justice Dyson Heydon—the antipodean Justice Scalia[278]—made

278. During his tenure on the Australian High Court, Justice Heydon was the sole proponent of originalism as the method by which the Australian Constitution must be interpreted and said that statutes must be given their original or historical (not dynamic) meaning. Just prior to his judicial appointment, Justice Heydon railed against, what he considered to be, the illegitimate and undemocratic activist tendencies of the Australian High Court when Sir Anthony Mason was its chief justice. *See* John Dyson Heydon, *Judicial Activism and the Death of the Rule of Law*, 47 QUADRANT 9 (2003). His judgments on the Australian High Court were often brilliantly written and mostly in dissent, genuinely funny, and usually alone. *See Momcilovic v The Queen* (2011) 245 CLR 1 (Austl.). In a dissenting opinion to a judgment that invalidated a statutory bill of rights operating in the State of Victoria, he observed that

> [t]he odour of human rights sanctity is sweet and addictive. It is a comforting drug stronger than poppy or mandragora or all the drowsy syrups of the world. But the effect can only be maintained over time by increasing the strength of the dose. In human rights circles there are no enemies on the left, so to speak. . . . The judges of this country assert and apply the doctrine of precedent with a stern and unbending rigidity—except so far as it may affect their own conduct. The function of ordinary judicial work is to protect the rule of law. But, though vital, the task can be dreary and mundane. Often interest can only be found in rearranging the conventional order of legal clichés, or tinkering with the tired language of legal tests, or trying to avoid the sterile conflict of stale metaphors. Judicial fires which have sunk low may burn more brightly in response to a call to adventure. Where judicial appetites have been jaded or lost, the call may stimulate and freshen them to grow with what they feed on.

the following observations on these developments in contemporary Australian law:

> There are other even more mysterious utterance[s] about the principle of legality. As justified by Gleeson CJ, the principle appears to be connected with a form of legislative intention. In *Zheng v. Cai* five justices of the High Court said '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.' . . . Is this portentous pronouncement banal or profound? To start with, whenever the High Court starts talking about its constitutional position, or that of the courts generally, it is time to reach for one's gun. . . . The difficulty with the principle of legality is that it is not hard for the courts, on experiencing distaste for a particular statute in its ordinary meaning, to identify a collision between it and some supposedly fundamental right, but to hold that the ordinary meaning is not clear enough to satisfy the principle of legality. The cry goes up: 'Yes, of course it's fairly clear, but not quite clear enough.' . . . The requirement that certainty of language exist before fundamental rights can be overthrown can be treated so intensely as to go close to constitutionalizing those rights as entrenched – virtually rendering them immune from legislative change. That, perhaps, is why some people call the principle of legality "a common law Bill of Rights." When abused, the principle of legality thwarts the legislature and fails to give effect to the true meaning of its legislation. Yet that is the task of legislative construction.[279]

The quasiconstitutional strength of fundamental human rights protection in Australia that judges now provide—*without a constitutional bill of rights*—is an achievement as striking as it is problematic from a normative, doctrinal, and constitutional perspective. Ultimately, it has shaken the very foundations of—and the principles that attend to—the proper judicial role in the construction and application of statutes in a constitutional system of separated powers.

Id. at 356–57.

279. John Deyson Heydon, *The 'Objective' Approach to Statutory Construction*, *in* QUEENSLAND LEGAL YEARBOOK 164–65 (2015) (citations omitted), http://media.sclqld.org.au/documents/publications/queensland-legal-yearbook/2014/queensland-legal-yearbook.pdf.