The Constitutional Principle of Legality

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Abstract

The principle of legality is thought to have begun in Australia as a democratic principle. It did not. It began here as a liberal, constitutional principle. The implications for the *Constitution* are significant. In 19th century Britain, and in the High Court of Australia in the decades after Australia's Federation, the principle was conceived as an incident of the common law's protection of the 'liberty of the subject'. The 'liberty of the subject' was a constitutional concept. It denoted the frontiers of individual freedom past which state action — including democratically enacted legislation — would offend British constitutional principles of justice. To remember this is to remember what the principle of legality is. It is, most plausibly, an expression of constitutional principles of justice.

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* LLB (Monash), LLM (Cambridge). Email: jamieblaker@vicbar.com.au. The article has benefited greatly from the comments of Justice Jacqueline Gleeson, and from exchanges with Trevor Allan, Tiffany Gibbons, Julian Murphy, Duncan Wallace and the Editors and reviewers. The article challenges a position put or supposed by a number of authors who, I want to record here, are an inspiration to me. These authors include Lisa Burton Crawford, Jeffrey Goldsworthy, Brendan Lim and Dan Meagher. All views are my own.

I Introduction

In our law, there is a principle that 'the enactments of the Parliament [are construed] as to maintain ... fundamental freedoms'.[1] That principle — the principle of legality — is thought to have had a certain history. According to the accepted account, the principle of legality started its life in Australia as a presumption that the legislature, being steeped in a liberal political culture, would not intend to enact legislation that would infringe the fundamental freedoms of individuals. In other words (it is said), the principle of legality was once a genuine presumption as to what legislators — the wielders of democratic legitimacy — intended the law to be. I call this account the 'intentionalist origin story'.

The intentionalist origin story does not withstand any scrutiny. Even in those academic contributions where the story is most developed, the story is, perhaps surprisingly, found to rest narrowly upon one judgment of a single High Court Justice: the judgment of O'Connor J in *Potter v Minahan*.[2] The critical statement in that judgment was repeated once by Griffith CJ in 1915, and then not again in the High Court until 1976.[3] If O'Connor J's judgment weighs in favour of the intentionalist origin story (and for reasons later given, it may not), it is thoroughly outweighed by evidence of a different history — a history in which the principle of legality was received and practised in federated Australia as a liberal, constitutional principle. The principle of legality is, in its origins, not the servant of democracy or parliamentarianism,[4] but the servant of the liberal idea that there are frontiers of individual freedom that not even the democratic Parliament should cross without enhanced scrutiny and appropriate resistance.[5]

The discovery that the principle of legality is, in its origins, a purely liberal and not a democratic or parliamentarian principle, should not be surprising.[6] The principle of legality defends a distinctive set of rights that, as a matter of the history of ideas, belong to the liberal tradition. As these rights are understood in the liberal tradition, their essential purpose, in the context of a democracy, is to designate appropriate limits to popular sovereignty.

What is perhaps surprising is the liberal constitutional heritage that the principle of legality (as that evolving collection of judicial practices is now called) brought with it — from Victorian Britain, to federated Australia. In Victorian Britain, and then in early federated Australia, there was an understanding that the

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1 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J) ('*Re Bolton*').

2 *Potter v Minahan* (1908) 7 CLR 277, 304 ('*Potter*').

3 See below Part II.

4 On the political tradition of parliamentarianism (as distinct from that of democracy), see William Selinger, *Parliamentarianism: From Burke to Weber* (Cambridge University Press, 2019).

5 Cf Isaiah Berlin, 'Two Concepts of Liberty' in Michael Sandel (ed), *Liberalism and its Critics* (New York University Press, 1984) 15, 17; David Strauss, 'Reply: Legitimacy and Obedience' (2005) 118(6) *Harvard Law Review* 1854, 1854–5.

6 A philosophic exploration of how liberalism and democracy come apart is found in Gordon Graham, 'Liberalism and Democracy' (1992) 9(2) *Journal of Applied Ethics* 149. The practical demonstrations of the same are, these days, all too frequent. As to which, see Marc Plattner, 'Illiberal Democracy and the Struggle on the Right' (2019) 30(1) *Journal of Democracy* 5; Francis Fukuyama, *Liberalism and its Discontents* (Macmillan, 2022).

principle of legality (*avant la lettre*) was not just any common law practice. It was a common law practice that conformed statutes to the requirements of liberal, constitutional principles of justice, collectively referred to as the 'liberty of the subject'. Therein lies the profundity of the principle of legality. The principle, it seems, tells of the neglected, liberal substratum of the *Australian Constitution*.[7]

Parts II–IV set out the history. Part V recalls, in light of the history, what the principle of legality is: an expression of constitutional principles of justice.

II The Intentionalist Origin Story

It is difficult to know where the intentionalist origin story was first told.[8] But it was told most influentially, and comprehensively, in a well-regarded article written by Brendan Lim.[9] In his article, Lim wrote that, in Australia, the principle of legality 'once was [a factual prediction]';[10] that, in Australia, the principle of legality

> was first articulated as a set of *positive* claims about the improbability of legislative abrogation of rights. The claims were 'positive' in the sense that they sought to describe authentic legislative intentions — that is, what the legislature actually meant or intended. … Founded upon a combination of political trust and forensic experience, the claims originally underpinning the clear statement principle [that is, the principle of legality] were addressed to what legislatures were in fact likely to have intended in relation to the displacement of the general law, including common law rights.[11]

The evidence that Lim cited for this historical proposition (what I've called 'the intentionalist origin story') was the judgment of O'Connor J in *Potter*.[12] That judgment contained the following passage, itself a quote drawn from the then current edition of a British textbook, *Maxwell on Statutes*. The passage (hereafter 'the statement in *Potter*') read: '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.'[13]

As Lim correctly observed, the principle of legality has, in recent times, been justified on a different basis. The principle's rationale, on this contemporary view, is that the principle ensures that a Parliament may only abrogate rights in a way that will be publicly recognisable, and so susceptible to democratic scrutiny.[14] One can

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7 Cf Arthur Popple, 'Constitutional Liberties' (1917) 37 *Canadian Law Times* 639, 639 (where, in respect of the inheritance into Canada of the 'constitutional ... liberty of the subject', the author writes: 'lest we forget').

8 Although, the earliest intimation appears to be in *Malika Holdings v Stretton* (2001) 204 CLR 290, 304 (McHugh J).

9 Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372.

10 Ibid 373.

11 Ibid 374 (emphasis in original).

12 Ibid 378, 382–4.

13 *Potter* (n 2) 304 quoting Sir Peter Benson Maxwell and J Anwyl Theobald, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) ('*Maxwell on Statutes*') 121.

14 Lim (n 9) 389–94, and the authorities referred to there.

call this the 'democracy-forcing' rationale for the principle of legality.[15] In light of Lim's understanding of the earlier history of the principle, Lim described the emergence of the principle's democracy-forcing rationale as marking a 'transformation from fact to value'.[16] As to that, Lim wrote:

> [The principle of legality's] legitimating underpinnings shifted over the course of the 20th century. … The courts have transformed the principle's very constitutional justification. … [A]s the reach of the activist regulatory state expanded during the 20th century, th[e positive] claims [originally underpinning the clear statement principle] became increasingly implausible. … The courts have renovated the principle of legality to accommodate the sociological changes that accompanied the rise of the regulatory state.[17]

Since Lim's article, the intentionalist origin story has become pervasive. The intentionalist rationale for the principle of legality, apparently stated by O'Connor J in *Potter*, has been claimed as the principle's 'original rationale', and its 'traditional justification'.[18] These claims have underpinned the accusation, made by some, that the High Court has now departed from the principle of legality's 'traditional' justification so as to, conformably with an alternative justification, increase the force of the principle of legality, and thereby increase the judiciary's practical power to decide what the law will be.[19] Wherever the intentionalist origin story has been affirmed, the primary source cited for it (when a primary source has been cited) has been the famed statement of O'Connor J in *Potter*.[20]

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15 To borrow an Americanism popularised by Neal Devins, 'The Democracy-Forcing Constitution' (1999) 97(6) *Michigan Law Review* 1971. Lim (n 9) discriminates between different species of democracy-forcing rationale: ibid 390, 392. For the purposes of this article, it suffices to identify the democracy-forcing rationale at a higher level of generality.

16 Lim (n 9) 373–4.

17 Ibid.

18 See, eg, Jeffrey Goldsworthy, 'Is Legislative Supremacy under Threat?' (2016) 60(11) *Quadrant* 56, 59 (referring to '[t]he traditional justification for this principle'); Lorraine Finlay, 'A Judicial Fiction? Retrospectivity and the Role of Parliament' (2019) 45(2) *Monash University Law Review* 435, 442 ('This traditional rationale was set out in 1908 by O'Connor J in *Potter v Minahan*'); Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40, 40 ('Historically, that rights protective approach was justified by reference to a presumed legislative intention'); Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 418 ('the ... justification for applying the principle of legality was, originally to ascertain the meaning of legislation as intended by the enacting Parliament.'); Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511, 514 ('the principle of legality was traditionally conceptualised as a heuristic for ascertaining parliamentary intention', citing French (n 18) and *Potter* (n 2)); Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 1 ('The traditional answers to this set of questions were clear. The rules of statutory construction, including what we now call the principle of legality, were justified on the basis that they were calculated to give effect to the intention of the legislature'); Bruce Chen, 'The Principle of Legality: Protecting Statutory Rights from Statutory Infringement' (2019) 41(1) *Sydney Law Review* 73, 76, 78.

19 See, eg, Goldsworthy, 'Is Legislative Supremacy under Threat?' (n 18) 59; Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46.

20 See the pages cited above at n 18.

The statement in *Potter* was the statement of a single Justice. And while the statement has been treated as establishing a rule of law ('the rule in *Potter*')[21], there is no basis in principle to suppose it did. In the 67 years after the statement was uttered by O'Connor J, the statement (or more accurately, the sentence from *Maxwell on Statutes* that was the substance of the statement) was quoted once in the High Court, in 1915 by Griffith CJ,[22] another single Justice, and in aid of interpreting a constitutional, and not a mere statutory, provision. In the State Supreme Courts, the statement in *Potter* was likewise apparently repeated only once and by a single Justice, during the same 67-year period.[23]

In apparent contradiction to the intentionalist origin story,[24] it was well into the second half of the 20th century, as the regulatory state rose precipitously, that the statement in *Potter* appears to have begun to be affirmed and quoted — albeit infrequently and sporadically, even then. In 1976, Murphy J ended the statement's 60-year quietude in the High Court[25] by quoting the statement approvingly.[26] The statement was next quoted in the High Court in 1983, by Brennan J.[27] These decisions of Murphy J and Brennan J also contained elaborations of the principle of legality that seemed in tension with the proposition that the principle is a genuine presumption as to legislative intent.[28] The statement in *Potter* was not otherwise repeated in the High Court in the 1970s or the 1980s. It was in these decades that the statement began increasingly (though still infrequently) to be affirmed in the State Supreme Courts.[29]

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21 *Malika Holdings v Stretton* (n 8) 299 [31]; Lim (n 9) 380. See similarly JJ Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79(12) *Australian Law Journal* 769, 780; Dan Meagher, 'The Common Law Principle of Legality' (2013) 38(4) *Alternative Law Journal* 209, 209.

22 *R v Snow* (1915) 20 CLR 315, 322–3.

23 *Ex parte Grinham; Re Sneddon* (1959) 61 SR (NSW) 862, 875 (Walsh J) ('*Re Sneddon*'). Before this period, the substance of the statement in *Potter*, being the passage from *Maxwell on Statutes* (n 13), was quoted once in *Johansen v City Mutual Life Assurance Society* [1904] St R Qd 288, 322 (Rutledge AJ). See further the history set out at below n 29.

24 *Contra* Lim (n 9) 373 ('as the reach of the activist regulatory state expanded during the 20th century, [the positive] claims [originally underpinning the clear statement principle] became increasingly implausible. … The courts have renovated the principle of legality to accommodate ... the rise of the regulatory state').

25 The 60 years commencing from Griffith CJ's use of the statement in 1915.

26 *Johnson v The Queen* (1976) 136 CLR 619, 669 ('*Johnson*'). A part of a paragraph in *Maxwell on Statutes* (n 13), from which the statement in *Potter* is drawn, was quoted approvingly seven years earlier by Windeyer J in 1969. However, the text so quoted by Windeyer J did not contain the statement in *Potter* as I have identified it. That is, it did not contain an intentionalist justification for the principle of legality: *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 185.

27 *Sorby v Commonwealth* (1983) 152 CLR 281, 316 ('*Sorby*').

28 In *Johnson* (n 26) 669, Murphy J described the statement in *Potter* as describing an 'approach [that] attributes to' (rather, I interpolate, than identifies as existing in) 'the Parliament' the relevant intention. In *Sorby* (n 27) 322, Brennan J also spoke of the intention being 'attribut[ed]'.

29 The statement was affirmed for the first time (since Federation) in the authorised reports of South Australia in *Christie v Bridgestone Australia Pty Ltd* (1983) 33 SASR 377. In Victoria, the equivalent milestone was reached in 1978 in *Harrison v Lederman* [1978] VR 590. In Western Australia, it was in 2009 (*Western Australia v BLM* (2009) 40 WAR 414) and in Tasmania it was as late as 2016 (*Arnold v Hickman* (2016) 28 Tas R 152). In the authorised reports of the State of New South Wales, the statement appeared first in 1959 (see *Re Sneddon* (n 23)) and then the second time in *Balog v Independent Commission Against Corruption* (1989) 18 NSWLR 356. In the authorised reports of Queensland, there was a 106-year gap between the substance of the statement first appearing in 1904

It was then not until the year 1990, in the decision of *Bropho v Western Australia*,[30] that a majority of the High Court endorsed the statement in *Potter*.[31] In that sense, authoritative support for the statement in *Potter* — putatively the 'original justification' for the principle of legality — was first given in the year 1990, a little less than four years before the alternative, democracy-forcing rationale for the principle of legality received majority support (by a similarly composed Bench) in the case of *Coco v The Queen*.[32]

All that being so, in the years and decades leading up to the articulation of the principle of legality's contemporary rationale in *Coco*, the statement in *Potter* was not canonical. Its ascendance was new. And that is to notice one part of a larger, forgotten picture.

III A Liberal Constitutional Inheritance, from Victorian Britain

Upon a fresh look at the legal history, one finds that the principle of legality, as it existed in the decades either side of Australian Federation, was a liberal principle. It was not a democratic or parliamentarian principle. In the decades before Federation, the principle (*avant la lettre*) was understood in Victorian Britain as a bulwark of the 'liberty of the subject' — a renowned constitutional principle that tracked evolving ideas, within liberal thought, as to the moral limits of legitimate state action. That liberal and constitutional justification for the principle of legality was recommitted to by the early High Court, and by the Supreme Courts of the newly federated States. As to the idea that the principle of legality manifests the intentions of legislators, the intentionalist conceptions underlying that idea, and on occasions the idea itself, were rejected by the early High Court.

In forgetting this history (set out in this Part, and in Part IV), the profession has forgotten what the principle of legality is (see Part V).

A *Liberty in Victorian Britain*

The Victorian era in Britain was a century long.[33] In so many years of history, much changes. The era was the site of significant evolutions in Britain's society, and in the forms of Britain's public institutions.[34] One thing that unified the era, however, was

(see *Johansen* (n 23)), prior to *Potter*, and appearing for the second time in *Williams v Carlyle Villages* [2010] 2 Qd R 379.

30 *Bropho v Western Australia* (1990) 171 CLR 1 ('*Bropho*').

31 Ibid 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

32 *Coco v The Queen* (1994) 179 CLR 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ).

33 The era spanned 'the period between approximately 1820 and 1914': Susie Steinbech, 'Victorian Era': *Encyclopedia Britannica* (online at 12 March 2021) <https://www.britannica.com/event/Victorian-era>.

34 Britain's 19th century saw democratic, liberalising and welfarist reforms sometimes described collectively as the 'nineteenth-century revolution in government': Donald Winch, 'Review of Richard Bellamy, ed, *Victorian Liberalism: Nineteenth-Century Political Thought and Practice*' (1991) 3(2) *Utilitas* 326, 328. See also Angus Hawkins, *Victorian Political Culture: Habits of Heart and Mind* (Oxford University Press, 2015) 367 ('Victorian politics was about the management of

a diffuse commitment to a concept of liberalism, or 'British liberty', as providing the foundational principles of British government.[35] This foundational, liberal concept itself evolved throughout the 1800s, and different political parties and movements advanced different ideas of the concept over that time.[36]

The idea of British liberty had, however, a relatively stable core 'throughout the century'.[37] It was the idea that 'centralized institutions and statist interventions were [to be] curbed to preserve the self-governing liberties of individuals and local communities'.[38] Here, the concern was not simply that people be free to sell their goods and services, and to accumulate and exploit capital — although that was an aspect of the concern.[39] The larger concern was republican and classically liberal in character,[40] and 'obtained … its focus in opposition to the autocracy, militarism, and socialism that were perceived to flourish abroad',[41] as well as (socialism aside) in Britain's past.[42] The concern was that citizens' lives not be dominated by autocratic government, and that citizens retain such political liberties as are inconsistent with domination by autocracy.[43] The Victorian concept of liberty, as such, was the ability to plan and live one's life within the framework of 'stable and just laws',[44] as

change'). A general history of the constitutional and social changes occurring over the 19th century is contained in Simon Schama, *A History of Britain (Volume 3): The Fate of Empire 1776–2000* (Penguin, 2012).

35 Hawkins (n 34) 16 (writing that the 'political culture *mediated* the social and economic structural changes transforming Victorian Britain', emphasis added). As to the central place that a conception of liberty had in that culture, as well as in the projected ideals of British foreign affairs, see Hawkins (n 34) 1–2, 12, 34, 45; Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton University Press, 2016). For a mid-Victorian attempt at definition of 'British liberty', see the unattributed catechism annexed in DC Harvey, 'Education for Responsible Government' (1947) 27(3) *Dalhousie Review* 335, 338.

36 There was in this sense 'a variety of "liberalisms" that cohabited or succeeded one another in the history of the theory and practice of government in nineteenth century Britain': Winch (n 34) 326.

37 Lauren Goodlad, *Victorian Literature and the Victorian State: Character and Governance in a Liberal Society* (John Hopkins University Press, 2003) vii–viii.

38 Ibid.

39 For historiographical texts that trace Victorian attitudes to economic freedom, see, eg, GR Searle, *Morality and the Market in Victorian Britain* (Clarendon, 1998); WH Greenleaf, *The British Political Tradition, Vol 1: The Rise of Collectivism* (Methuen, 1983). In the mid-Victorian era especially, laissez faire dominated, so that perhaps '[n]o industrial economy can have existed in which the State played a smaller role': HCG Matthew, *Gladstone 1809–1874* (Oxford University Press, 1986) 169.

40 A partial history of the distinct republican and classical liberal threads of British political thought is found in Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press, 2014).

41 JP Parry, 'Liberalism and Liberty' in Peter Mandler (ed), *Liberty and Authority in Victorian Britain* (Oxford University Press, 2006) 73. Cf AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Liberty Fund, 2008) 58.

42 Robert Lowe, 'Imperialism' (1878) 24(142) *Fortnightly Review* 453, 463 ('the history of the English constitution is a record of liberties wrung and extorted bit by bit from arbitrary power').

43 Parry (n 41) 72 ('Suspicion of potential State oppression was fundamental to nineteenth-century liberalism'). As Parry explains, whereas historians had previously viewed ideas of economic freedom as being at the centre of the Victorian political ethic, that view of the history came to be largely discredited. 'Consequently, it is now more generally argued that Liberalism was at heart concerned with *political* relationships and *political* liberties': at 72 (emphasis in original).

44 ER Conder, *Liberty* (Hodder and Stoughton, 1879) 3–4. Cf Earl of Meath and Edith Jackson, *Our Empire: Past and Present* (Harrison and Sons, 1901) 92 (celebrating England's 'constitutional freedom and ... ordered liberty'); Dicey (n 41) 60 ('fixity of law is the necessary condition for the maintenance of individual rights and of personal liberty').

opposed to having one's life be subject constantly to the projects and whims of a despotic, extractive government.[45]

The anti-autocratic conception of British liberty pre-dated Victorian Britain.[46] But the conception became radiant in Victorian Britain because it achieved a broader expression in the forms and actions of Britain's main public institutions. As Dicey records in his history of the liberalisation of British law in the early to mid-Victorian period, the British Parliament of that period, dominated by the Whig Party (and its Liberal offshoot), enacted laws to extend the franchise, to enhance freedom of contract, and of marriage and dealings with property, and to remove constraints on religious freedom and freedom of speech, among other liberalising measures.[47] Dicey wrote of those reforms:

> The extension of individual liberty as an object of [the] … legislation include[d], no doubt, that freedom of person … protected by the Habeas Corpus Acts … but it include[d] also the striking off of every unnecessary fetter which law or custom imposes upon the free action of an individual citizen.[48]

The liberal mood of parliamentary government continued into the Gladstonian years of the latter Victorian period.[49]

The British judiciary was another institution that gave expression, in its practices, to the 'very wide'[50] and anti-autocratic conception of liberty, in the Victorian era. Among the most significant of those practices was a general practice of statutory construction that was described in varying ways and at varying levels of abstraction over the years, and to which a number of canons of construction were attributable. That general practice required statutes to be read strictly, or otherwise in favour of liberty, where the statute would on the alternative construction interfere more severely with the 'liberty of the subject'.[51] The practice was an expression of

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45 See further the descriptions of Victorian Britons' 'hatred ... of the collective and autocratic authority of the state' (in Dicey's words) in Dicey (n 41) 125 and Walter Bagehot, *The English Constitution* (Kegan Paul, Trench, Trubner & Co, 6th ed, 1891) 387.

46 For the early parliamentary history, see, eg, JH Hexter (ed), *Parliament and Liberty: From the Reign of Elizabeth to the English Civil War* (Stanford University Press, 1992). The Victorian conception of individual liberty also owed much to the earlier traditions of the common law, going back to Coke: Dicey (n 41) 125. A more encompassing intellectual history is Frederic William Maitland, *A Historical Sketch of Liberty and Equality: As Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge* (Liberty Fund, 2000).

47 Dicey (n 41).

48 Ibid 135, the reforms then being described at 135–49.

49 In the latter part of the Victorian era, there was (as it was conceptualised by reformers of the period) 'an overdue extension to the electoral arena of the liberty that existed in other areas of life': Gregory Conti, *Parliament the Mirror of the Nation: Representation, Deliberation and Democracy in Victorian Britain* (Cambridge University Press, 2019) 236; *Representation of the People Act 1867* (Imp); *Representation of the People Act 1884* (Imp). In other areas of legislation and governance, and into the years of Gladstone, '[a] persistent suspicion of the oppressive, morally degrading tendencies of government ... ensured that "intervention was resisted because of its feared political consequences"': Margot C Finn, 'Book Review of *Liberty, Retrenchment, and Reform: Popular Liberalism in the Age of Gladstone, 1860–1880* by EF Biagini' (1995) 67(1) *The Journal of Modern History* 148, 148, summarising and, in part, quoting that part of Biagini's history.

50 Dicey (n 41) 135.

51 That general practice (lengthily described in the rest of this Part) was sometimes described as one of interpreting laws in a way 'favourable to the liberty of the subject': as in, eg, *Henderson v Sherborne*

the liberal values with which Victorian judges, like other institutional actors, were 'imbued'.[52] An understanding of the practice begins with an understanding of the practice's core concept: the constitutional 'liberty of the subject'.

B *The Constitutional Liberty of the Subject*

The 'liberty of the subject' was a renowned principle of the English and (as it then became) the British Constitution.[53] By the Victorian period, the liberty of the subject had come to be regarded by the legal profession as a principle of Britain's 'constitutional law',[54] and (as one professor put it at the close of the Victorian

(1837) 150 ER 743, 744 (Lord Abinger). It was at other times described as requiring 'that any enactment dealing with [the liberty of the subject] must be construed strictly' as in, eg, *Re Marks* (1866) LR 1 Ch App 334, 335. Those two descriptions of the practice may have referred to distinct conceptions or modes of the practice. With respect to the former conception of the rule, it had sub-applications to statutes dealing with, among other things, liberty to sell one's labour, freedom of movement, freedom of commerce and of contract, and freedom of thought including on religious matters: see below nn 86–93. Regarding the latter conception, in his *Treatise on the Rules which Govern the Interpretation and Application of Statutes* (John S Voohries Booksellers and Publishers, 1857), the American lawyer Theodore Sedgwick (whose work was respected and cited in England's courts and leading cognate text: see Henry Hardcastle, *Treatise on the Construction and Effect of Statute Law*, ed William Feilden Craies (Stevens and Haynes, 3rd ed, 1901) 3–17, 114, 456; *Attorney-General v Sillem* (1863) 159 ER 178, 202) described the practice of interpreting certain statutes strictly as proceeding on the basis that 'the judiciary have a right to make distinctions between different ... classes of statutes; [so] ... that some are to be strictly construed and rigidly enforced' to the end of blunting 'provisions [that] are sweeping and arbitrary, and where its literal operation and application involve really innocent parties in great suffering' (Sedgwick at 291–2). On those pages, the author also described this as a 'power' in the judiciary. The classes of statutes to be so construed were nominated by Sedgwick (on the foundational basis of English authorities) to include the following classes relatable, on their face, to the liberty of the subject: statutes conflicting with a fundamental law (such as the right to trial by jury in England) (at 312–13); penal statutes (at 324); laws of taxation (at 334–5); laws affecting property rights (at 346); and statutes authorising summary judicial proceedings (at 347). A number of these practices have been justified as protecting the liberty of the subject. Regarding penal statutes, see below n 110. Regarding laws of taxation, see *Edgar v Greenwood* [1910] VLR 137, 144 (Madden CJ, justifying the courts' approach to taxation statutes as causing 'less interference with the liberty of the subject'). See similarly the discussion in Donald J Johnston, 'The Taxpayer and Fiscal Legislation' (1961) 8(2) *McGill Law Journal* 126, 131. The imputation of mens rea also came to be regarded as protecting the liberty of the subject (see below n 151).

52 Dicey (n 41) 142 ('The best and wisest of the judges who administered the law of England during the fifty years which followed 1825 were thoroughly imbued with Benthamite liberalism'). The Benthamite liberalism there referred to was, as Dicey wrote, opposed to legislative restraints upon liberty. It 'assaulted restraints imposed by definite laws': Dicey (n 41) 107.

53 Regarding the liberty's constitutional status, see, beyond the works of Amos and Dicey discussed in the coming pages: Popple (n 7) 640; Sir William Blackstone, *Commentaries on the Laws of England* (JB Lippincott, Sharswood edn, 1893) vol 1, 127. The liberty was very often described in and around the Victorian period as the 'constitutional liberty of the subject' or the 'constitutional liberties of the subject'. Representative examples are *Dawkins v Lord Rokeby* (1866) 176 ER 800, 811 (Willes J, describing 'the absolute necessity, of the maintenance of the constitutional liberties of the subjects of this country'); *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 614 (Earl of Birkenhead, referring to 'the evolutionary development of the constitutional liberty of the subject'); Sir John Walsh, *Chapters of Contemporary History* (John Murray, 1836) 12 (describing legislation said to 'infring[e] ... the constitutional liberties of the subject'). Reference was also frequently made to a 'constitutional liberty', as in, eg, William Edward Hartpole Lecky, *Democracy and Liberty, Vol 1* (Longmans, Green & Co, 1896) 256–7. See further below Part V.

54 *Gardner v Dymock* (1865) 5 Irvine 13, 35–6 (Lord Neaves describing an Imperial statute 'perilous to the liberty of the subject' as being, in point of that, 'opposed to our view of constitutional law';

period), within 'the Constitution', 'a third species of matter, besides positive law and the Conventions'.[55] More than other British constitutional principles of the time, the liberty's renown extended beyond the legal profession. As the jurist James Paterson wrote in 1877, the 'liberty of the subject' was then a principle latent in (or 'liv[ing] in') 'most of the departments of the law' of England, but also 'a sounding phrase and a watchword with which to conjure the multitude'.[56]

Among Victorian British lawyers, the principle of the 'liberty of the subject' was found stated at different levels of abstraction. At its lower level of abstraction, the liberty of the subject was taken to comprise that gamut of civil liberties, or 'popular rights', that were associated with British soil[57] — 'certain rights which a British subject [had]'.[58] According to one catalogue of these rights, they (the 'liberties of the subject') were:

> the right to personal liberty, secured by the writ of habeas corpus, except in case of a contravention of the law; the right of freedom of speech, subject to the law of libel, sedition and slander; the freedom of the Press; and the right of public meeting and public discussion.[59]

At a higher level of abstraction, the liberty was, in Victorian Britain, conceived not by reference to its constituent bundle of rights, but rather as a sphere of individual freedom girded by just law: 'the greatest protection extended to the body, the property, and ordinary pursuits … — the liberty of shaping one's conduct by laws confessedly just'.[60] The sphere of liberty denoted by the 'liberty of the subject' was, more particularly, a sphere of liberty from oppressive government, 'especially as …

Sheldon Amos, 'Law Lecture on the Liberty of the Subject' (1836) 2(25) *The Westminster Hall Chronicler and Legal Examiner* 65, 65 (describing the 'liberty of the subject' as a 'branch of [Britain's] constitutional law').

55 Sir Maurice Sheldon Amos, *The English Constitution* (Longmans, Green and Co, 1930) 30. The view was apparently assented to by Lord Hewart (the Lord Chief Justice of England) in his 'Introduction' to the book (at vi, viii).

56 James Paterson, *Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person* (1877, Macmillan), xi, xii. See also at xiv ('the central idea involved in the English Liberty of the Subject becomes, on a complete analysis, the polar axis upon which all the municipal laws revolve'). As to the liberty's public face, see further below n 78.

57 William Henry Curran, *The Life of the Right Honorable John Philpot Curran, Late Master of the Rolls in Ireland* (WJ Widdleton, 1855) 172; Homersham Cox, *The Institutions of the English Government* (H Sweet, 1863) 431 (referring to 'those popular rights which are frequently designated "the liberty of the subject"'). For an attempt at a catalogue, see Michael Tugendhat, *Liberty Intact: Human Rights in English Law* (Oxford University Press, 2016).

58 Sir George Cornewall Lewis, *Remarks on the Use and Abuse of Some Political Terms* (Clarendon Press, new ed, 1898) 151 ('Thus we speak of the liberty of the British subject, meaning certain rights which a British subject may exercise').

59 Lord Chief Justice Hewart (n 55) vi. A partial (and overlapping) catalogue (from more squarely within the Victorian period) is found in AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889) chs 5–7 addressing, respectively, 'The Right to Personal Freedom', 'The Right to Freedom of Discussion' and the 'Right of Public Meeting'. Dicey considered these rights 'part of the law of the Constitution': at 25. For a more recent attempt at catalogue, see Tugendhat (n 57).

60 Paterson (n 56) 77. See similarly Sheldon Amos, *Fifty Years of the English Constitution, 1830–1880* (Longmans, 1880) 423 (referring to the liberty of the subject as being 'the independence guaranteed by the Constitution to every citizen'. Cf Blackstone (n 53) vol 1, 125 ('the absolute rights of man … are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature').

secured against arbitrary imprisonment, against confiscation of property, and against suppression of free speech and thought'.[61]

Significantly, the liberty of the subject was conceived as a liberty defined by its vulnerability not only to the actions of the executive, but also to the legislative choices of the increasingly democratic Parliament,[62] and indeed to courts in the exercise of their powers.[63] The liberty was treated as setting, for each of these organs, certain limits of constitutional propriety, if not of constitutional authority. It is a picture largely captured by Professor Sheldon Amos, by then retired from the Chair of Jurisprudence at the University of London, when he wrote in 1880:

> The liberty of the subject, when properly understood, is an independent principle in the [English] Constitution, and lies far deeper than any expression of it ... There is a limit not only to the rights of the Executive, but even to the rights of the Legislature itself, when the exercise of either class of rights threatens to encroach on the independence guaranteed by the Constitution to every citizen ... In the case of the legislature, the limits are incapable of being fixed by any legal standard.[64]

Amos's great contemporary, Albert Venn Dicey, recorded an analogous, albeit highly (and characteristically) distinctive, understanding in Dicey's magnum opus, *Introduction to the Study of the Law of the Constitution*.[65] There, Dicey described the Imperial Parliament's powers of legislation as being total,[66] but as also being potentially (that is, in some of the power's possible exercises) inconsistent with the 'liberties of this kingdom'.[67] According to Dicey, those liberties — the Victorian liberal 'right[s] to personal liberty ... [and] of public meeting, and many

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61 Paterson (n 56) 77, and then see at 75 (describing 'the liberty of the subject' as a weapon 'against all evil designs tending to [bodily pain, imprisonment and deprivation of property], whether on the part of the subject or of the sovereign, *but more especially the latter as being the most powerful*', emphasis added). The same reasons of history were at play. See Popple (n 7) 640 (writing that '[t]he true origin' of the legal concept of the liberty of the subject 'may be found in oppression by those in authority').

62 That an Act of Parliament could be at odds with the liberties of the subject was, for example, contemplated in *Looker v Halcomb* (1827) 4 Bing 183; 130 ER 738, 740–1 (Best CJ) (referring to '[a]n Act of Parliament which ... abridges the liberty of the subject'); *Bows v Fenwick* (1874) LR 9 CP 339, 344 (Lord Coleridge CJ) ('This statute is ... an interference with the liberties of the subject'). Many similar judicial pronouncements are quoted throughout this article. See also, eg, the allegory told by Bagehot, concerning the supposed incursions of the liberty of the subject authorised by the *Census Act 1850* (Imp) 13 & 44 Vict, c 53: Bagehot (n 45) 387; Charles Bell Taylor and William Paul Swain, *Observations on the Contagious Diseases Act* (F Banks, 1869), which Act they said (in the extended title to the pamphlet) 'destroys the liberty of the subject'. To the extent that the liberty of the subject was framed as a general standard of political legitimacy, it, by reason of that framing, necessarily engaged all state action: cf *Bryce v Graham* (1826) 2 WS 481, 496 (Lord Balgray) ('The rights of personal liberty are to be guarded, and the right of everyone to manage his own affairs. Those are rights flowing from the law of nature, and are to be protected in every well-governed country').

63 Joseph Collinson, *Lawlessness on the Bench* (Humanitarian League, 1908) 2.

64 Amos (n 60) 423.

65 Dicey (n 59).

66 Ibid 38 (describing the Parliament's constitutional 'right to make or unmake any law whatever').

67 Ibid 40, quoting with approval Blackstone (n 53) vol 1, 160–1. In the passage that Dicey quotes, Blackstone adds that England's 'liberty ... w[ould] perish whenever the legislative power shall become more corrupt than the executive'.

other rights'[68] — were, despite their vulnerability to legislative abrogation, 'part of the law of the constitution'.[69]

Dicey, like Amos, did not treat the constitutional liberal rights as being constituted by the ordinary law. The rights were, in Dicey's view, independent from the ordinary law, so that they might be 'protected'[70] or indeed disappointed[71] by that law. On the other hand, Dicey (like Paterson) perceived a connectedness between England's ordinary laws — in particular, the general law administered by the courts — and the more specific content of the constitutional liberties. The 'so-called principles of the [English] constitution'[72] concerning basic rights were not, in Dicey's view, laid down as common law to be discerned by application of ordinary principles of *stare decisis*; but the principles were (as is a different thing) 'inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals'.[73] That whole apparatus of law and latent principle then itself expressed, in the Diceyan vision, a certain public 'spirit', involving notions 'of justice, and of the relationship between the rights of individuals and the rights of the government'.[74] The question, then, was whether the contemporary laws of England were reconcilable with the constitutional rights latent in the law's historic course. If they were, then Dicey apparently granted that the contemporary law, including statute law, was itself capable of fixing the more particular, variable contents of the liberal constitutional rights.[75]

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68 Dicey (n 59) 25.

69 Ibid 25. On that page, Dicey relates 'most' of those conventional rights to one of the more concrete forms of Britain's constitutional law, being the 'general law or principle' of due process in criminal proceedings. This vision of Britain's constitutional morality as being nascent in the forms of its constitutional law — as being, one can say, the angel in the architecture, or (in Dicey's imagery) the 'principles on which [the constitutional] fabric is wrought' and which transcend that fabric (Dicey (n 62) 3 — was an ancient vision. Cf William Penn, 'The Excellent Priviledge of Liberty and Property Being the Birth-Right of the Free-born Subjects of England' (1687, pamphlet printed by William Bradford); Blackstone (n 53) vol 1, 127 ('The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government'), vol 1, 143 (describing 'political or civil liberty' as 'the direct end of [England's] constitution').

70 Dicey (n 59) 186 (speaking of certain rights being 'protected' under English law).

71 Ibid 185 (contemplating a scenario where, by reason of the content of English law, 'the rights of individuals are [not] really secure').

72 Ibid 185.

73 Ibid. The understanding reflected Dicey's position that the constitutional liberal rights are 'secured by the decisions of the Courts': at 184. While Dicey treated statutes such as the *Habeas Corpus Act* as guaranteeing liberties (at 187), he did not see those Acts as load bearing in constitutional terms: see, eg, at 189 '[t]he *Habeas Corpus Act* may be suspended and yet Englishmen may enjoy almost all the rights of citizens'. That discounting of Parliament's role in girding the constitutional rights distinguished Dicey's account. Cf *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 568 (Lord Parmoor) ('The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments.')

74 Cf Dicey (n 59) 130–1. And see at 175 (describing 'the habit of self-government, the love of order, the respect for justice and a legal turn of mind' as being 'intimately allied'). Dicey's deeper reflections on the relationship between 'public opinion', as he called it, and the content of the Victorian English law are given in Dicey's *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (n 41).

75 Dicey (n 59) 186 ('there runs through the English constitution [an] inseparable connection between the means of enforcing a right and the right to be enforced'). And regarding legislation, see further above n 73.

Around the writings of Dicey, Amos, Paterson and others, one traces the following, wide conception, which accommodates differences in description. The liberty of the subject, in sum, denoted what we would today describe as a set of basic liberal principles of justice that, in the public culture and in England's constitutional law, were understood to set the outer limits of legitimate state action. To the extent that legislation and the general law embodied a plausible conception of those principles, those positive laws were apt to be pointed to, by the Victorian lawyer, as sustaining the liberty of the subject. But where instead the law was irreconcilable with the concept of the 'liberty of the subject', that constitutional concept (which, disembodied from the ordinary law, was a thing of pure principle — in that sense an '"unknown quantity" of latent fire'[76]) provided the popular and constitutional standard against which the law fell to be censured.[77] Like contemporary liberal principles of justice, the liberal principles constituting the 'liberty of the subject' were publicly affirmed by the basic institutions of government, and in kind they were affirmed in the broader public discourse.[78] Because these liberal principles derived ultimately from the public culture, '[t]he origin, growth and development [of the liberty of the subject] coincided with the origin, growth and development of society'.[79]

C *The Liberty of the Subject and the Victorian British Courts*

Dicey, it was mentioned, saw the British courts as the prime protectors and, within moral bounds, the curators of the liberty of the subject. Regardless of whether one accepts that particularised vision, one sees in the British law reports (more closely visited later in this Part) that the principle of the liberty of the subject did have, in the hands of judges, a counter-majoritarian potential. In 'times when the ... liberty [was] ... disregarded by those' in Parliament or those responsible to Parliament, the understanding was that 'it ... remained for the judicial bench' to be the liberal check — 'to combat the ... forces which would have trampled ... the sacred rights of the people', which rights constituted the liberty of the subject.[80]

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[76] Paterson (n 56) vol I, xi.

[77] That the 'liberty of the subject' was a thing of principle capable of being girded by positive laws was perhaps implied in Lord Ardmillan's statement: 'The sacredness of personal liberty is protected by law' (*HM Advocate v Keith & Milne* (1875) 3 Coup 125, 14). See similarly John Burridge, *A Concise and Impartial Essay on the British Constitution* (E Peall, 1819) 44 ('statutes were passed to preserve the inestimable liberty of the subject'); James W Wall, *Speeches for the Times* (J Walter & Co, 1864) 24–5 (describing the 'personal liberty of the subject' as a 'natural inherent right', 'coeval with the first rudiments of the English constitution' and then 'established' upon certain statutory and other landmarks in English law).

[78] Cf Paterson (n 56) vol I, xi ('[W]hether used in the senate and the courts, or shouted by the mob, this household phrase seldom fails to call up a crowd of noble associations.'); Amos (n 60) 422 ('There is no expression ... more familiar in the popular mouth, when adverting to ... the English constitution, than that of the liberty of the subject').

[79] Popple (n 7) 640. Then see *Secretary of State for Home Affairs v O'Brien* (n 53) 614 (Earl of Birkenhead) (referring to 'the evolutionary development of the constitutional liberty of the subject'); *Attorney-General v De Keyser's Royal Hotel Ltd* (n 71) (Lord Parmoor) (referring to '[t]he growth of constitutional liberties').

[80] Popple (n 7) 641. The Victorian British judiciary's methods, in that regard, are described in the remainder of this Part. Similar thoughts are expressed in *R v Vine Street Police Station Superintendent* [1916] 1 KB 268, 279 (Low J) ('this Court is specially charged as between the Crown and subject to

The liberty of the subject, in this of its applications, seemed often to take on the general form of a 'right' that was abstracted from positive law, and good against all elements of the British government[81] — albeit, the right was the traversable stuff of constitutional principle.[82] The liberty of the subject, as such, invited comparisons (made by Amos) to the constitutional protections of rights then existing in the constitutions of America and its constituent States.[83] And it reflected the experience of the time that 'legislative assemblies are not the less despotic for being democratised',[84] or not necessarily — a point made resoundingly in the period by John Stuart Mill.[85]

Consistent with this overall understanding, the British judicial practice of interpreting statutes in favour of the liberty of the subject was, in the Victorian period, a practice conducted not only for the protection of the 'personal liberty' of the individual[86] (a phrase that connoted freedom from arbitrary imprisonment).[87] The practice was also employed to protect other facets of the individual's liberty then and thereafter acknowledged within liberal thought as marking the frontiers of legitimate state action. These other facets of liberty, protected by the method of construction, included liberty to sell one's labour,[88] freedom of movement,[89] freedom of commerce[90] and of contract,[91] and freedom of thought including on religious matters.[92] Although there was apparently no occasion for the interpretive principle to be applied in conservation of the 'liberty of the press', the principle

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exercise the greatest care in safeguarding the subject's liberty'); *Transcript of the Swearing in of Justice Dawson* (Adelaide, 16 August 1982) 10 (Shaw QC describing 'the historic function of the courts' as being 'to stand four-square between the subject and the State, sensitive especially ... to vindicate the liberties of the subject and sensitive to detect and disallow any abuse of power on the part of government and its officers'). Cf Dicey (n 59) 17 ('The fictions of the Courts have ... served the cause ... of freedom .... when it could have been defended by no other weapon').

81 Popple (n 7) 640–1. The 'liberty of the subject', in this of its applications, could be declared by courts to be 'put ... in danger', 'derogate[d]' from, 'abridged', or 'interfer[ed] with by legislation, without the court necessarily having identified a particular legal right that the legislation interfered with. See, eg, and respectively: *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ); *Macbeth v Ashley* (1874) LR 2 ScDiv 352, 359 (Brinsden J); *Looker v Halcomb* (n 62) 740–1 (Best CJ); *Butler v Turley* (1827) 2 CAR & P 585, 589 (Best CJ). Reflecting the 'liberty of the subject's' nature as a standard of legitimacy, even a statute that conferred 'unusual powers' over the individual could be adjudged not to be an 'infringement of the liberty of the subject', where the powers served 'a great good'. Or that was the approach in *Hope v Evered* (1886) 17 QBD 338, 340–1 (Lord Coleridge CJ, Mathew J).

82 With the consequence that judges could act on their 'jealous[y] to protect the liberties of the people, but if the legislation in derogation of those rights exists on the statute book, they [the judges] cannot do other than follow the law': Popple (n 7) 650. See similarly *Gardner v Dymock* (n 54) 35–6 (Lord Neaves, accepting that the *Summary Procedure Act* of the time 'is opposed to our view of constitutional law, and might be so administered as to be perilous to the liberty of the subject', but that 'still, the terms of the Act are clear, and the enactment must receive effect').

83 Amos (n 60) 422–3.

84 Ibid 424.

85 John Stuart Mill, *On Liberty* (Batoche Books, 2001) 8. See similarly Lecky (n 61) 256–60.

86 Though the practice was protective of personal liberty. See, eg, *Ex parte Martin* (1879) 4 QBD 212, 215 (Kelly CB, Pollock B agreeing).

87 Dicey (n 59) 194–5.

88 *Rex v Chase* [1756] 2 WILS KB 41, 41 (seemingly per Lord Mansfield).

89 *Butler v Turley* (n 81) 589 (Best CJ).

90 *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ).

91 *Scott v Avery* (1856) 10 ER 1121, 1138 (the Lord Chancellor).

92 *Bute v More* [1870] 1 Coup 495, 545 (Lord Neaves).

presumably could have been so applied in circumstances where the common law treated that liberty as 'no greater and no less than the liberty of every subject of the Queen'.[93]

Of some importance to the history of the principle of legality, the Victorian ancestor of that principle was justified, by the Victorian British courts, on liberal bases. It was not justified on the majoritarian basis that the practice somehow gave effect to the intentions of legislators.[94] The liberal justifications that were given might be categorised as being sometimes deeper, and sometimes shallow.

The deeper liberal justifications spelled out their premises, however curtly. In giving these deeper justifications, the British judiciary often explained the interpretive practice as being the upshot of attitudes of 'jealousy' and 'tenderness' toward the liberty of the subject.[95] These attitudes were variously attributed to the judiciary itself or to the common law generally (and notably not to the Parliament).

An early justification along those lines is in the decision of Lord Chancellor Eldon in *Crowley's Case*.[96] In that case, the Lord Chancellor had occasion to consider the 'course in which the Court of Common Pleas acquired the general power of issuing the writ [of habeas corpus]'.[97] In the Lord Chancellor's recounting of that course, the Court of Common Pleas read the *Habeas Corpus Act of 1640*[98] as conferring on that Court a general jurisdiction to issue the writ through a spurious line of interpretive reasoning which, without threshing its intricacies here, hung upon a reference in the statute to 'the ordinary fees usually paid'[99] for a writ of habeas, and the history of the Court of Common Pleas in charging such fees in exercising its historically limited jurisdiction to issue the writ. Lord Eldon justified this not as an accomplishment in discerning the Parliament's intention, but as '[a] remarkable example of the strength of the principle which our law has in it, that, with respect to the liberty of the subject, *the courts are to struggle to secure it*'.[100]

Justifications of that general kind were then given in Britain throughout the 19th century. In *Andrew v Murdoch*, Lord Holland referred to a judicial practice of 'construing every thing in the manner most favourable to the liberty of the subject'.[101] His Honour identified the motivation of that practice as being a 'bias which is generally enjoined by law' and capable of 'enforce[ment]' by individual judges.[102] In words that linked that bias to the Victorian guardedness against

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93 *R v Gray* (1900) 2 QB 36, 40 (Lord Russell CJ).

94 That is not to say that the interpretive practice was oblivious to the apparent intended meanings of legislative texts. As with the modern-day principle of legality, there was an acceptance that where 'the terms of the Act are clear' in derogating from the 'liberty of the subject', those terms were to be given effect: *Gardner v Dymock* (n 80) 35–6 (Lord Neaves). Cf Lord Halsbury LC in *Cox v Hakes*, who might be read as having reached an interpretation favourable to the liberty of the subject on the purported basis of speculation (seemingly figurative) as to legislative intent: *Cox v Hakes* (1890) 15 App Cas 506, 519–20. See similarly *Washer v Elliott* [1876] 1 CPD 169, 174 (Archibald J).

95 See, eg, *Wilkins v Wright* (1833) 149 ER 728, 733 (Vaughan B); *Re Marks* (n 51) 335.

96 *Crowley's Case* (1818) 36 ER 514.

97 Ibid 533.

98 *Habeas Corpus Act of 1640*, 16 Car 1, c 10.

99 Ibid s 6.

100 *Crowley's Case* (n 96) (emphasis added).

101 *Andrew v Murdoch* (1814) 2 Dow 401; 3 ER 909, 921 [430].

102 Ibid.

autocratic rule, the Judge in the same passage criticised a 'contrary tendency' as liable to deprive the 'injured individual [of] the redress to which he is entitled against the arm of power exercised with oppression'.[103] In *Re Marks* — a case giving another example — Lord Cranworth LC is reported as having said 'that the Court was tender of the liberty of the subject'.[104] Lord Cranworth evidently understood that tenderness as motivating the principle stated immediately thereafter: 'that any enactment dealing with [the liberty of the subject] must be construed strictly'.[105] A further example is in *Dale's Case*, where the Queen's Bench had cause to consider the rule that statutory formalities preconditioning the issue of writs affecting liberty 'must', as a silk in that case put it, 'be literally and strictly enforced'.[106] In upholding the issue of a writ of habeas corpus by application of that principle, Brett LJ wrote of the interpretive rule: 'I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of her Majesty's subjects.'[107]

A related form of deeper justification seemed to explain the interpretive practice as giving force, in the law, not so much to the courts' own biases, but rather to the 'liberty of the subject' understood as a standard of political legitimacy widely endorsed as such among the British public. That kind of justification was given by Maul J in *Stead v Anderson*, where the Justice is reported as saying that '[t]here is no doubt that, in this country, the liberty of the subject is very much regarded and talked about, and that all statutes are to be so construed as to favour it, rather than otherwise'.[108] One finds in *Henderson v Sherborne*[109] a similar justification for what was a sub-principle of the more general principle that statutes be construed in favour of liberty. That sub-principle was '[t]he principle ... that a penal law ought to be construed strictly'.[110] There, Lord Abinger said that this sub-principle 'is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so.'[111] That passage was cited and approved on numerous occasions in the hundred years after it was written.[112]

A final species of deeper, liberal justification was to be found in judgments that justified their interpretive approach by reference to the particular harms that

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103 Ibid.
104 *Re Marks* (n 51) 335.
105 Ibid.
106 *The Reverend Thomas Pelham Dale's Case* (1881) 6 QBD 376, 442 ('*Dale's Case*').
107 Ibid 463.
108 *Stead v Anderson* [1850] 9 CB 263, 264–5.
109 *Henderson v Sherborne* (n 51).
110 Ibid 744. As to the proposition that this was a sub-principle of the broader principle that a construction consistent with liberty is to be favoured, see *M'Leod v Buchanan* (1835) 13 S 1153, 1165 (treating the 'rules of strict interpretation' applicable to penal statutes as giving 'the benefit of the common principles which apply to the liberty of the subject'). See also *Liversidge v Anderson* [1942] AC 206, 263 (characterising the rule as a 'rule as to construing penal statutes in favour of the liberty of the subject'); *Birch v Allen* (1942) 65 CLR 621, 626 (Latham CJ, for the Court) ('penal Acts must be construed strictly, that is to say, that the Court is not to adopt an interpretation against the liberty of the subject unless the words are clear').
111 *Henderson v Sherborne* (n 51).
112 See, eg, *Attorney General v Lockwood* (1842) 152 ER 160, 166; *R v Norman* [1924] 2 KB 315, 327; *R v Templeton* (1875) 1 VLR (L) 55, 56.

would (in the judges' estimations) be visited upon the liberty of the subject were some alternative construction, perhaps more consonant with the plain meaning of the statute, to be given.[113]

Compared to the deeper liberal justifications, the shallower liberal justifications did not spell out their premises. They took the form of utterances such as, in *Butler v Turley*: 'an Act of Parliament which puts the liberty of the subject in danger, ought to receive a strict construction'.[114] Or in *Bows v Fenwick*: '[t]his statute is, no doubt, an interference with the liberties of the subject, and is therefore to be construed strictly'.[115] Utterances such as these were abundant in the British 19th century courts.[116]

Although shallow, these justifications for the interpretive practice could only reasonably be understood as resting upon unstated liberal (as opposed to majoritarian or otherwise intentionalist) premises. That is, first, because these shallow justifications always implicitly, but often explicitly, held out the statutory rule of construction as (to adapt a phrase) 'provid[ing] an impregnable foundation for its own observance'.[117] That legalistic conception of the rule leaves room for inquiry into the principles of justice that might explain the content of the rule. But it is at odds with an intentionalist conception of the rule. On an intentionalist conception, the rule of construction is not an 'impregnable foundation' for an interpretive practice, but rather a tenuous heuristic whose use must yield to the facts as known about the intentions of legislators.[118]

Second, the shallow justifications must be read in the context of the broader position taken by the Victorian British courts that the liberty of the subject is 'sacred'

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113 *Macgregor v Somerville* [1889] 27 SLR 52, 52 (Clark LJ); *Looker v Halcomb* (n 62) 740–1 (Best CJ).

114 *Butler v Turley* (n 81) 589 (Best CJ).

115 *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ).

116 See, eg, *Re Leak* (1829) 3 Y & J 46, 55 (Vaughan B) ('being a formidable power, and one directed at the liberty of the subject, all agree it must be strictly pursued'); *Bowditch v Balchin* (1850) 5 Exch 378, 381 (Pollock CB) ('In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.'); *Looker v Halcomb* (n 62) 740–1 (Best CJ) ('An Act of Parliament which … abridges the liberty of the subject, ought to receive the strictest construction'). See further *Parker v The Great Western Railway Company* (1844) 7 M & G 253; 135 ER 107, 123 (Tindal CJ); *Nash's Case* [1821] 4 B & Ald 295; 106 ER 946, 947 (Abbott CJ); *The Speaker of the Legislative Assembly of Victoria v Hugh Glass* (1871) 17 ER 170, 172; *Re Ferrige* (1875) LR 20 Eq 289, 290 (Bacon CJ).

117 *Bropho* (n 30) 21 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). For the more explicit statements, see, eg, *Milnes v Bale* (1875) LR 10 CP 591, 597 (Denman LJ) (in reference to penal statutes, 'the courts have always held themselves bound to construe the statute strictly'); *Lewis v Carr* [1876] 1 ExD 484 (Cleasby B) ('I have come to this conclusion ... feeling bound to give a somewhat strict interpretation to the language'); *Ex parte Bardwell; Re Venables* (1834) 47 ER 157, 164 (Lord Chancellor) ('But where the matter in question is the power of commitment, it behoves us to enlarge whatever tends to throw guards around the liberty of the subject, and to take most strictly whatever confers the authority to imprison. That is the ordinary and sound rule of construction.)'; *Re Jones* (1852) 155 ER 1082, 1083 (Pollock CB) ('Where the liberty of the subject is concerned ... we are bound to take care that the important but very stringent power … is not exceeded').

118 That is because, if a factual 'assumption [as to legislative intent] be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed': *Bropho* (n 30) 18–21 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

and is to be protected by the courts.[119] That broader position informed a number of common law practices unrelated to the interpretation of statutes, and which (as was said of one of them) 'c[ould] only be accounted for by the tenderness of the Courts ... towards the liberty of the subject'.[120] These practices included: the manner in which the Courts exercised their jurisdiction to discharge under a writ of habeas corpus those detained unlawfully;[121] the principle that restrictive clauses in deeds of entail 'must receive a strict interpretation ... in favour of liberty';[122] the strict standards of validity applied to documents filed to procure the arrest of a defendant to a civil action;[123] and consideration of the liberty of the subject in the exercise by judges of discretionary powers,[124] in the development of the common law,[125] and in fixing the standard of proof.[126] These liberty-protecting practices were of the common law, and were emanations of the common law's conception of the liberty of the subject as being a constitutional principle of legitimacy explaining features of England's laws and constitution. The familial resemblance between, on the one hand, these practices and, on the other hand, the liberty-protecting canons, is so plain that the latter's common law parentage and liberal spirit can scarcely be doubted.[127]

Third and lastly, it is to be noted that the shallower statements of principle commenced not with a suggestion that the legislature generally intends to preserve fundamental liberties, but, often, with an almost opposite hypothesis. That hypothesis was that the legislation in question *does* 'put ... in danger', 'derogate' from, 'abridge', or 'interfer[e] with the liberties of the subject', it being that very interference which, in the courts' opinion, occasioned the application of the liberty-protecting canons.[128]

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119 *Ex parte Reynolds; Re Reynold* (1882) 20 Ch D 294, 297 (Bacon CJ) ('the liberty of the subject is at all times a sacred matter'). See also *HM Advocate v Keith & Milne* (n 77) 14 (Lord Ardmillan) ('The sacredness of personal liberty is protected by law'); *Bryce v Graham* (n 62) 196 (Lord Balgary) ('The rights of personal liberty are to be guarded ... Those are rights flowing from the law of nature'). As to the British judiciary's traditional role of protecting the liberty, see, beyond the authorities on that matter already cited, *Butt v Conant* (1820) 129 ER 834, 849 (Dallas CJ); *Cox v Coleridge* (1822) 107 ER 15.

120 *Lee v Sellwood* (1821) 147 ER 106, 111 (Baron Garrow).

121 *Cox v Hakes* (n 94) 527 (Lord Herschell); *Dale's Case* (n 106) 442 (Brett LJ) ('the books [are] full of cases in which, in favour of the liberty of the subject, writs have been set aside on the most technical grounds').

122 *Earl of Kintore v Lord Inverury* (1863) SC 32, 33 (Lord Chancellor) ('It has been settled by a long series of decisions, that the restrictive clauses in deeds of entail must receive a strict interpretation, so that if the words taken per se admit of a grammatical construction which is in favour of liberty, that construction must be preferred.'). See also *Ogilvy v Airlie* (1855) 2 Macq 260.

123 *Lee v Sellwood* (n 120) 111 (Baron Garrow).

124 See, eg, *Price v Hutchison* (1870) LR 9 Eq 534, 536 (Malins VC).

125 See, eg, *John Banks v Malcolm M'Lennan* (1876) 4 R (J) 8, 9 (Lord Young).

126 See, eg, *Ex parte Langley* (1879) 13 Ch D 110, 119 (Thesiger LJ).

127 Cf Amos's association of the common law courts' 'interpretation of statutes and their announcement of the principles of common law' as both being areas in which the courts have enforced the constitutional principle of the liberty of the subject against 'the Executive at least': Amos (n 60) 423.

128 See respectively the four cases, and pinpoints, above n 81.

IV The Principle's Continued Liberalism in Federated Australia

In the decades preceding Australian Federation, the British courts understood the liberty-protecting canons of construction as manifesting the judiciary's concern to protect the liberty of the subject. The liberty of the subject, in turn, was understood as a constitutional concept denoting a sacred sphere of freedom from state interference. In the decades following Australian Federation (the focus of this Part), there was no break with that understanding, either in the High Court or in the Supreme Courts of the States. In the dawn of Australia's Federation, the principle of legality (*avant la lettre*) was understood as an expression of the constitutional liberty of the subject. The principle of legality today, most plausibly, remains an expression of that constitutional liberty (see Part V).

A *The Early High Court's Rejection of an Intentionalist Conception*

The beginning point in this history is the early High Court's seeming embrace of a negative proposition. It was that the liberty-protecting canons are *not* directed to effecting legislators' intentions. Or, as the unanimous High Court put an aspect of the position in *McLaughlin v Fosbery*: 'in the interpretation of a [s]tatute affecting personal liberty, supposition as to the intention of the legislature has no place'.[129]

Some of the High Court's first statements on this subject were given in 1904, in *Nolan v Clifford*.[130] One of those statements, given by Griffith CJ (with Barton J's agreement), approached an express denial that the principle of legality (*avant la lettre*) is a heuristic for ascertaining legislators' mental states. Read in the light of the intentionalist origin story, the apparently forgotten statement is (like the above-quoted statement in *McLaughlin*) extraordinary.

The case of *Nolan* concerned the power, contained in s 352 of a consolidating Act (the *Crimes Act 1900* (NSW)) to arrest without warrant: persons committing offences punishable 'by indictment, or on summary conviction' (s 352(1)(a)); persons that have 'committed a felony' (s 352(1)(b)); or person who 'with reasonable cause, [are] suspect[ed] of having committed any such crime' (s 352(2)(a)). The question was whether the words 'any such crime' in s 352(2)(a) referred, as the plain terms of s 352 suggested, to crimes punishable upon either indictment or summary conviction (the first construction), or whether the words should instead be read as referring only to crimes punishable by 'death or penal servitude' (the second construction).[131] The second construction gave the words the meaning that they had within a historical provision notionally consolidated within

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[129] *McLaughlin v Fosbery* (1904) 1 CLR 546, 559 (Griffith CJ, delivering the opinion of the Court) ('*McLaughlin*'). See similarly *Lyons v Smart*, where Barton J referred to the same caution against 'conjecture' in the course of justifying the principle that '[i]f the legislature desire' to interfere with an individual's possession of goods, 'it must say so plainly' — a principle also justified on that page on the basis that '[t]he substratum of the British law is liberty': *Lyons v Smart* (1908) 6 CLR 143, 177.

[130] *Nolan v Clifford* (1904) 1 CLR 429 ('*Nolan*').

[131] Ibid 443. A crime punishable by 'death or penal servitude' had been the statutory definition of a 'felony': at 446.

the Act under interpretation.[132] Only the second construction was plausibly consistent with the common law on the subject.[133] The picture was then complicated by the existence of a note, written by the consolidating commissioner, apparently suggesting that the first construction revealed the provision's intended meaning.[134]

On the path to upholding the second construction, the Chief Justice wrote this — the important passage:

> If I were at liberty, speaking for myself, to conjecture what was the intention of the draftsman or legislature, merely from all the information that is in one sense at our disposal ... I should be inclined to think that it was intended that the word 'crime' should mean any offence whether punishable on indictment or on summary conviction. …
>
> [B]ut the common law and the Statute law should not be taken to be abrogated, especially on matters affecting the liberty of the subject, unless a plain intention on the part of the legislature to make so important a change was to be found. … [I]t is impossible, applying recognized rules of construction, to say that 'crime' is intended to mean 'misdemeanour'. It might be that, if I were left to my own speculation as to what the framers [of the statute] intended, I should come to a different conclusion, but, applying judicial rules of interpretation, I cannot do otherwise.[135]

Barton J was 'of the same opinion'.[136] In passages contained in Barton J's supplementary reasons, his Honour too proceeded to construe the statute 'in favour of the liberty of the subject'.[137] In those passages, Barton J expressly eschewed an intentionalist approach to the construction of the statute. Barton J disregarded the intentions of the draftsman, the approach being one of 'leaving out all questions about the draftsman, and confining oneself to the meaning of the terms used'.[138] Barton J also disregarded the note of the consolidating commissioner's intentions — which intentions were perhaps attributable, by extension, to the Parliament. As to that, Barton J wrote:

> We have been asked to refer to the brevier, the note of the consolidating commissioner, to find out what he meant. I do not think this reference is of any value, because we are not to consider what the commissioner thought, but what Parliament has said, and what it meant by what it has said.[139]

In passages that are remarkable for their coherence with the democracy-forcing rationale for the principle of legality that would be stated nearly a century later, Barton J justified the Court's liberty-promoting construction partly on the basis that 'an Act for th[e] purpose [of consolidation] is the last place in which you would look for a substantive change in the law imposing new liabilities on Her Majesty's

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132 Ibid 445.
133 The position at common law was described by Griffith CJ: ibid 444.
134 Ibid 434.
135 Ibid 443, 447–8.
136 Ibid 448.
137 Ibid 448.
138 Ibid 451.
139 Ibid 449.

subjects'.[140] '[T]he public', his Honour said 'and the profession would not be in the least degree on their guard to look for it'.[141]

O'Connor J, in a concurring decision, acknowledged that, were the Court's construction 'urged anywhere outside of a court of justice ... it would be thought rather a straining of the English language'.[142] His Honour did not decide the question of construction by express application of a liberty-protecting canon. A year later in *Beath, Schiess & Co v Martin*,[143] however, O'Connor J did have occasion to acknowledge the cleavage between such canons and legislators' intentions. At a time when freedom of contract and commerce was thought 'essential to individual freedom',[144] and a matter affecting the liberty of the subject,[145] O'Connor J wrote:

> But, although we are bound to carry out the intention of the legislature in all respects in which we can reasonably infer it from the language used, at the same time *we cannot on that principle allow* the rights, which other persons have at common law to make their own contracts in their own way, to be infringed to any greater extent than the legislature has expressed by its language.[146]

There were then further occasions on which members of the early High Court seemed actively to demonstrate that the liberty-protecting canons were not tools for discerning legislators' intentions. Among them were the occasions on which the Court applied an approach of strict construction to taxation statutes (taxation statutes being understood, traditionally, as a species of statutes affecting the liberty of the subject).[147] The special approach to taxation statutes was, as Griffith CJ wrote in *Heward v The King*, that '[i]n the case of a taxing Act we have no right to conjecture what is meant ... Our only duty is to see what Parliament has done or said.'[148]

On other occasions, the High Court Justices' jealousy of liberty was openly described as motivating a mode of interpretation that was uncooperative with the legislature. In *National Mutual Life Association of Australasia Ltd v Godrich*, Isaacs J suggested that the presence in a statute of provisions 'work[ing] ... [an] invasion of liberty or property' would be a 'legal reason to apply a *grudging*

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140 Ibid.

141 Ibid 452.

142 Ibid 453.

143 *Beath, Schiess & Co v Martin* (1905) 2 CLR 716.

144 *R v Associated Northern Collieries* (1911) 14 CLR 387, 457 (Isaacs J) quoting approvingly a then recent decision of the US Supreme Court: *United States v American Tobacco Co*, 221 US 106, 178 (1911).

145 See, eg, *Bows v Fenwick* (n 62) 344 (Lord Coleridge CJ); *Re Bakers and Pastrycooks' Board* [1912] SALR 208, 215 (Murray J) and the authorities cited there.

146 *Beath, Schiess & Co v Martin* (n 143) 734 (emphasis added).

147 See above n 51.

148 *Heward v The King* (1905) 3 CLR 117, 123 (Griffith CJ). The Chief Justice went on to indicate that a departure from this approach to taxing statutes would 'be violating the rule of interpretation to which [his Honour] referred', being the rule that an 'intention to impose a charge on the subject must be shown by clear and unambiguous language': at 124–5. Barton J quoted approvingly a passage from Hardcastle's *Treatise on the Construction and Effect of Statute Law* (n 51) that treated the common law's strict approach to taxation statutes as being, in truth, nothing more than an application of the general interpretive approach in 'matters as to which rights are concerned': at 127–8. See similarly *R v Atkinson* (1906) 3 CLR 632, 639 (Griffith CJ, Barton and O'Connor JJ agreeing): 'In the construction of a taxing Act we have nothing to go by as to the intention of the legislature except what they have said. We are not at liberty to speculate'.

construction, or to place upon the words of the legislature a narrower interpretation than their ordinary sense requires'.[149] Another example appears in the judgment of Powers J in *Ferrando v Pearce*.[150]

A final point is that, often, the early High Court's justifications for the liberty-protecting canons were shallow in the sense described in Part III(C) above.[151] These shallow justifications (often citing Hardcastle's *Treatise on the Construction and Effect of Statute Law* — a text more favoured in the Griffith High Court than *Maxwell on Statutes*, and that advanced a black-letter conception of the interpretive canons that it described)[152] could only reasonably be understood as resting on unstated liberal, as opposed to majoritarian, premises. This is for the same reasons of context and form attending the equivalent justifications given by the British courts of the time, and discussed in Part III(C) above.[153]

B *The High Court's Original, Liberal Formulations of the Principle of Legality*

In the early High Court, the perceived disjunct between legislators' intentions and the liberty-protecting canons, was one thing. The early High Court's positive, liberal formulations of the liberty-protecting canons were another. As early as *Nolan*, there was found in High Court decisions the expressed understanding that the canons protected a liberty of the subject that transcended and was protected by statute and

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149 *National Mutual Life Association of Australasia Ltd v Godrich* (1909) 10 CLR 1, 34 (emphasis added).

150 *Ferrando v Pearce* (1918) 25 CLR 241, 269–70, quoting passages from the speech of Lord Shaw in *R v Halliday* [1917] AC 276.

151 *Great Fingall Consolidated Ltd v Sheehan* (1905) 3 CLR 176, 186 (Griffith CJ) ('Now, it is a general rule, which we have had occasion to lay down more than once in this Court, that when a Statute interferes with the liberty of the subject ...'), then see similarly at 194 (O'Connor J); *Woodstock Central Dairy Co Ltd v Commonwealth* (1912) 15 CLR 241, 250 (O'Connor J); *Ferrando v Pearce* (n 150) 287 (Powers J); *Committee of Direction of Fruit Marketing v Collins* (1925) 36 CLR 410, 428 (Starke J); *Scott v Cawsey* (1907) 5 CLR 132, 141 (Griffith CJ); *R v Mahony* (1931) 46 CLR 131, 140 (Starke J). In giving these shallow justifications, the liberty-protecting canons were sometimes spoken of as placing upon the legislature what amounted to a manner-and-form requirement legitimated by judicial precedent affecting constitutional liberties; as in the statement: 'That can be done only by express words of the enactment or by necessary implication, as appears from the case of *Massey v Morriss*': *Ferrier v Wilson* (1906) 4 CLR 785, 794 (Barton J; where *Massey* was authority for the imputation of mens rea — a presumption considered 'of the utmost importance for the protection of the liberty of the subject': *Brend v Wood* (1946) 62 TLR 462, 473 (Lord Goddard CJ), approved in *Lim Chin Aik v The Queen* [1963] AC 160, 173 (Lord Evershed for the Court). Another example is in *Australian Tramway Employees Association v Prahran & Malvern Tramway Trust* (1913) 17 CLR 680, 687 (Barton ACJ).

152 Hardcastle explained his black-letter approach as being intended to help achieve intellectual clarity against the backdrop (as Hardcastle saw it) of the traditional use of the canons as strategic tools to improve the justice of the statutes, or to achieve just outcomes: Hardcastle (n 51) 14. See, eg, the rules stated in Hardcastle, quoted in *Smith v Watson* (1906) 4 CLR 802, 819 (Barton J); *Nolan* (n 130) 448–9 (Barton J); *Webb v McCracken* (1906) 3 CLR 1018, 1022 (Griffith CJ, Barton and O'Connor JJ agreeing). The editions of Hardcastle cited by the early High Court contained no statement like the statement in *Potter* (n 2).

153 The early High Court's commitment to defending constitutional liberty, which commitment informed these shallow justifications, is discussed in Part IV(C) below. The British legal history described in Part III(C) above can also be taken to have informed the High Court's shallow justifications, given the early 20th century context of empire.

common law. This tripartite relationship between statute, common law and liberty was implicit when the Chief Justice wrote in *Nolan* (with Barton J's agreement) that

> the common law and the Statute law should not be taken to be abrogated, especially on matters affecting the liberty of the subject, unless a plain intention on the part of the legislature to make so important a change was to be found.[154]

Other High Court decisions of the period similarly, and without much introspection, proceeded on the same basis as did the recent century of English precedents: that the liberty-protecting canons apply by force of the common law, to the end of upholding liberal, 'first principles of justice';[155] that it was for the courts to mind and say 'when a statute interferes with the liberty of the subject'[156] or 'abridges' it,[157] or 'inva[des]' it;[158] that certain statutes and common law rights 'affected' (as opposed to 'constituted') the liberties in question;[159] and that these were 'constitutional liberties'.[160] The abundant references in these authorities to the 'liberty of the subject' were, in light of the British history earlier recounted, references to a renowned principle in the British Constitution, evidently supposed by the Court to have been inherited into Australia's constitutional framework.

One of these High Court decisions — the decision in *Clancy v Butchers' Shop Employees' Union*[161] — was particularly significant, as it (unlike O'Connor J's statement in *Potter*) did state an authoritative rule of construction that was an ancestor of the modern-day principle of legality, and that was, in the years following its enunciation, applied on a number of occasions in the High Court[162] and in the Supreme Courts of the States.[163] The statement of principle in *Clancy* (hereafter 'the statement in *Clancy*') was:

> In construing the Act it should be borne in mind that it is an Act in restriction of the common law rights of the subject, and, though that is no reason why

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154 *Nolan* (n 130) 448.

155 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518, 568 ('*Macfarlane*') (Higgins J, describing the liberty-protecting canons as being concerned with 'first principles of justice'). Indeed, at the High Court's opening ceremony, faith was placed in the Justices to 'spread the light of justice upon the ways of men': Speech of the Attorney-General, recorded in Address at the Opening Ceremony of the High Court of Australia at Melbourne on 6 October 1903, *The Argus* (7 October 1903) 9. Cf *Speech on the Retirement of Chief Justice Griffith, Brisbane, 25 July 1919* (1919) 26 CLR v, vii (message of Sir Edmund Barton).

156 *Great Fingall Consolidated Ltd v Sheehan* (n 151) 186 (Griffith CJ). See similarly: *R v Mahony* (n 151) 140 (Starke J).

157 *Woodstock Central Dairy Co Ltd v Commonwealth* (n 151) 250 (O'Connor J).

158 *Ingham v Hie Lee* (1912) 15 CLR 267, 273 (Barton J).

159 *McLaughlin* (n 129) 559 (Griffith CJ for the Court) ('a Statute affecting personal liberty'); *Nolan* (n 130) 443–4 (Griffith CJ) ('but the common law ... should not be taken to be abrogated, *especially* on matters affecting the liberty of the subject') (emphasis added). See similarly *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 140 (Starke J) ('*Re Yates*'). See further below n 216.

160 *Macfarlane* (n 155) 568 (Higgins J).

161 *Clancy v Butchers' Shop Employees' Union* (1904) 1 CLR 181 ('*Clancy*').

162 *Master Retailers' Association of NSW v Shop Assistants Union of NSW* (1904) 2 CLR 94, 107 (Griffith CJ for the Court); *Trolly, Draymen and Carters Union of Sydney and Suburbs v Master Carriers Association of NSW* (1905) 2 CLR 509, 515 (Griffith CJ) ('*Carters Union*'); *Bishop v Chung Brothers* (1907) 4 CLR 1262, 1274 (Barton J); *Australian Tramway Employees Association v Prahran & Malvern Tramway Trust* (n 151) 687 (Barton ACJ).

163 See, eg, *Re Coultas* (1905) 7 WALR 276, 278 (McMillan J); *Re Bakers and Pastrycooks' Board* (n 145) 215 (Murray J); *R v Industrial Court (Qld); Ex parte Federated Metal Workers Union* [1967]

> the fullest effect should not be given to its provisions, it is a reason why the meaning should not be strained as against the liberty of the subject.[164]

This statement in *Clancy* was curiously framed. The statement associated 'the common law rights of the subject' with the constitutional 'liberty of the subject', but without defining that association.[165] The statement, moreover, provided no guidance beyond that given by ordinary approaches to statutory interpretation. After all, those ordinary approaches did not counsel the judge to 'strain ... against' the language of the statute, whether to the end of preserving liberty or to any other end. The statement in *Clancy* bore close similarities to, and was perhaps a simulacrum of, softening statements of the liberty-protecting canons made in the late 1800s in some decisions of the British judiciary.[166]

But the facial innocuity of the statement in *Clancy* — perhaps attributable to judicial statesmanship — belied the principle's strength. In its application, the statement was treated as conveying a substantive principle capable of applying 'strongly';[167] even 'very forcibly'.[168] The statement in *Clancy* was also, on more than one occasion, equated with simpler formulations of principle, such as that 'we must not ... strain the language of the Statute against the liberty of the subject',[169] or that '[s]tatutes ... in derogation of the liberty of the subject ... are, therefore, not to receive a strained construction against the pre-existing law'.[170]

As to the rationale underlying the statement in *Clancy*, it is significant that the statement, in its own terms, treats the fact that an 'Act [is] in restriction of the common law rights of the subject' as itself the operative 'reason why the meaning should not be strained against the liberty of the subject'.[171] That is, on the face of this statement, the interpretive practice that the statement describes is justified by the very constitutional liberty of the subject, correlated with certain common law rights, that the practice protects. Consistent with that understanding of the statement in *Clancy*, the statement was in one unanimous High Court decision associated with, not a principle of democracy, but English constitutionalism's liberal self-image: that the '[t]he great fundamental principle of our jurisprudence is liberty'.[172]

Over the years in which the statement in *Clancy* had currency in the High Court, and in the decades following, members of the Court, like the courts in England, affirmed 'the strict jealousy of the law in favour of personal liberty'.[173] The

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Qd R 349, 356 (Stable J). See further *The Carpenters and Joiners' Case* (1917) 1 SAIR 170, 189 (President Brown).

164 *Clancy* (n 161) 201 (Griffith CJ, Barton and O'Connor JJ agreeing).

165 The relationship between the common law and the constitutional liberty, as understood around the time of Australian Federation, is addressed in Part V below: see especially pp. 589–90.

166 See *Pharmaceutical Society v London and Provincial Supply Association Ltd* [1880] 5 App Cas 857, 867; *Re Pookes Royle* [1881] 7 QBD 9, 10 (Lord Selborne); *Dean v Green* (1882) 8 PD 79, 89–90 (Lord Penzance); *Scott v Morley* (1887) 20 QBD 120, 129 (Bowen LJ).

167 *Bishop v Chung Brothers* (n 162) 1274 (Barton J).

168 *Re Coultas* (n 163) 277 (McMillan J).

169 Ibid 278 (McMillan J).

170 *Re Bakers and Pastrycooks' Board* (n 145) 215 (Murray J).

171 *Clancy* (n 161) 201 (Griffith CJ, Barton and O'Connor JJ agreeing).

172 *Master Retailers' Association of NSW v Shop Assistants Union of NSW* (n 162) 107 (Griffith CJ for the Court).

173 *Re Yates* (n 159) 100 (Isaacs J).

Justices spoke of how the liberty of the subject was 'a matter of the very highest concern to the law'[174] — of 'the anxious care of the British Courts with regard to liberty of the subject'[175] — of 'the power of a Court to protect individual rights of liberty from unauthorized violation'.[176] This declared function of protecting the constitutional liberty of the subject informed the character of the liberty-protecting canons, even when the High Court's stated justifications for those canons were shallow.

The connections between those contextual statements, on the one hand, and the High Court's less developed statements of the principle of legality, on the other, were sometimes apparent from their proximity to one another on the page.[177] On other occasions, the common law's jealousy of liberty was seen manifested in apparent expressions, by Justices, of their own liberal dispositions when interpreting statutes.[178]

If the liberty-protecting canons were not presented as preserving a constitutional liberty, they were presented as licensing judicial resistance to already admitted invasions of rights associated with that liberty. An instance is this passage written by Latham CJ (Dixon and Evatt JJ agreeing), which describes an interpretive approach protective of the right to a jury. The passage implicitly justifies that practice on the lone basis that the right (traditionally understood as the 'palladium' of the 'liberties of England')[179] is 'one of the fundamental rights of citizenship', whose curtailment 'abridges the liberty of the subject':

> The right to a jury is one of the fundamental rights of citizenship and not a mere matter of procedure, and so the courts have said. In *Looker v Halcomb*, per Best CJ, it is said: 'An Act of Parliament which takes away the right of trial by jury, and abridges the liberty of the subject, ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act'.[180]

In the Supreme Courts of the newly federated States, the overall position was the same.[181]

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174 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 136 (Latham CJ).

175 *Macfarlane* (n 155) 566 (Higgins J).

176 Ibid 540 (Isaacs J). Cf Sir Garfield Barwick, Transcript of Speech, *On the Occasion of a Welcome to the Rt Hon Sir Garfield Barwick in Queensland* (2 June 1964) 3 ('When I say the work of the Court, I mean the protection of the citizens's [sic] rights and his liberties').

177 One of a number of examples is Higgins J's judgment in *Lyons v Smart* (n 131) 177, where his Honour wrote: 'The substratum of the British law is liberty … If the legislature desire to make unlawful the acquisition of unlawfully imported goods with the knowledge that they have been unlawfully imported, it must say so plainly'. Further examples are *Co-operative Brick Co Pty Ltd v City of Hawthorn* (1909) 9 CLR 301, 306 (Griffith CJ); *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464 (O'Connor J) ('*Progress Advertising*').

178 *Macfarlane* (n 155) 538 (Isaacs J) ('I am disposed to give the largest scope to the section, consistent with its express terms, that I can in favour not only of liberty but of all rights invaded'). See similarly: *Ingham v Hie Lee* (n 158) 273 (Barton J); *McArthur v Williams* (1936) 55 CLR 324, 331 (Latham CJ).

179 Blackstone (n 53) vol 4, 343–4.

180 *Newell v The King* (1936) 55 CLR 707, 711–12.

181 See *Woodcock v Woodcock* (1909) 9 SR (NSW) 630, 635. There the Full Court of the Supreme Court of New South Wales (Cohen J, Sly and Pring JJ agreeing) identified the rule that 'the Court should be satisfied beyond all doubt and by the clearest language that the Legislature has intended to interfere with [the liberty of the subject]' (at 635). It accounted for that rule, not on an intentionalist basis, but as springing from the fact that 'the liberty of the subject is so sacred' (at 635). The Supreme Courts

C *Revisiting the Statement in* Potter

It is amid all the foregoing history that, in 1908, the statement in *Potter* was made. The statement, to repeat it, was that: '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.'[182] The statement, borrowed from an English textbook, belonged to a small class of similar statements made around that time in England,[183] and made there in times since.[184] An evident purpose of these English statements is to achieve a level of congruity between two principles. The first is a principle frequently stated in the following, broad terms to reflect the breadth of its associated conception of unlimited British parliamentary sovereignty. It is that '[i]n all cases the object is to see what is the intention expressed by the words [of the statute]'.[185] The second principle is the principle of legality itself, comprising the liberty-protecting canons of construction, which, as a matter of both history and effect, are directed to the protection of liberty conceived as a constitutional principle incompatible with illiberal exercises of British parliamentary sovereignty. The accord between these principles, which the statement quoted in *Potter* and similar statements seek to strike, has proved unstable[186] and, some would say, unsustainable.[187]

The early High Court did not seek to reconcile the liberty-protecting canons to any conception of parliamentary supremacy that would have required the denial of those canons' liberal systemic functions. For that reason, the statement in *Potter* stands out as an anomalous transplant, inconsistent even with O'Connor J's own conceptions of the liberty-protecting canons, and of the legal meaning of 'legislative intention', communicated by him in other decisions.[188] The statement in *Potter* was

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of the States otherwise gave shallow, and in context clearly liberal justifications for the liberty-protecting canons. As to which see, eg, *Potter v Black* (1902) 2 SR (NSW) 325, 331 (Simpson J) ('This is an Act of Parliament that seriously interferes with the liberty of the subject, and must therefore be strictly construed'). Then see similarly, eg, *Ex parte Eiffe; Newcastle Stevedoring Company* (1905) 5 SR (NSW) 118, 121 (Darley CJ, Owen and Pring JJ agreeing); *Ex parte Brown* (1914) 14 SR (NSW) 182, 188 (the Chief Justice); *Ex parte Brickmasters and Pipe Manufacturers' Union* (1904) 4 SR (NSW) 226, 229 (Darley CJ, Owen and Pring JJ agreeing); *O'Donnell v Heslop* [1910] VLR 162, 169 (Madden CJ).

182 *Potter* (n 2) 304 quoting *Maxwell on Statutes* (n 13) 121.

183 See, eg, *Re Boaler* [1915] 1 KB 21, 38–9 (Scrutton J). Another example may be (though the proposition there is so fantastic as to be of doubtful sincerity) *Cox v Hakes* (n 94) 518 (Lord Halsbury LC), quoting *Stradling v Morgan* (1560) 1 Plowden 199; 75 ER 305, 314. By the 9th edition of *Maxwell on the Interpretation of Statutes*, that text had come to endorse the liberal justification for the principle given in *Henderson v Sherborne* (n 51): *Maxwell on the Interpretation of Statutes* (Sweet and Maxwell, 1946) 288–9.

184 Cf Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55(1) *Cambridge Law Journal* 122, 136–7 ('Under our present constitution judicial review does not challenge but fulfils the intention of Parliament').

185 *River Wear Commissioners v Adamson* [1877] 2 App Cas 743, 763 (Lord Blackburn). A number of similar statements are collected in Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 39–40.

186 See, eg, the so-called 'ultra vires debate' detailed in Forsyth (n 184).

187 See, eg, John Laws, *The Constitutional Balance* (Hart, 2021).

188 In addition to the opinions of O'Connor J already referred to, see *Tasmania v Commonwealth* (1904) 1 CLR 329, 358-9 ('the only safe rule is to look at the Statute itself, and to gather from it what is its intention. If we depart from that rule we are apt to run the risk of … "assum[ing] the province of

first stated authoritatively eight decades later at a time when the democratic spirit of the statement undoubtedly resonated with the unbridled democratic spirit of the time — a unique sense, coinciding with the fall of the Soviet Union, that democracy was the 'end of history'[189] — that democracies, once consolidated, would 'last forever'[190] — that liberal checks were not very load bearing.[191]

Whatever the reason for the statement's modern resurrection, it may be that, in its original context in 1908, the statement in *Potter* was not to be read as conceiving the principle of legality as any guide to legislators' actual intentions. The early High Court was sceptical of an approach to interpretation that involved conjecture as to the intentions of Parliament.[192] 'Courts', it was said, 'are not at liberty to speculate as to the intention of Parliament',[193] especially on matters affecting liberty.[194] Yet an intentionalist justification for the principle of legality supposes that judges do and may speculate in a most expansive way. Namely, by speculating as to lawmakers' knowledge of, and commitment to, fine-grained, indefinite and developing common law principles protective of a constitutional liberty.

Consistent with this aversion to intentionalist modes of statutory interpretation, the early High Court treated the notion of 'legislative intention' as a legal term of art, descriptive not of the actual intentions of legislators, but rather of the output of an interpretive process regulated by common law rules.[195] The resulting

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legislation"); *Carters Union* (n 162) 522 ('Intention of the legislature is a common but very slippery phrase'); *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 279–80 (O'Connor J), quoting a literalist apothegm given by Jervis CJ in *Abley v Dale* (1851) 11 CB 377, 392; 138 ER 519, 525. Cf *Progress Advertising* (n 177) 464 (O'Connor J) (a certain liberty-protecting canon must be applied '[i]n ascertaining what was the real intention of the legislature'). However, the proposition that any substantive canon *must* be applied to discern the 'real intention' of the legislature seems so unreal on its face as to perhaps be a further indication of O'Connor J's conception of legislative intent as artifice.

189 Francis Fukuyama, 'The End of History?' (1989) 16 (Summer) *National Interest* 3, 18.

190 Adam Przeworski and Fernando Limongi, 'Modernization: Theories and Facts' (1997) 49(2) *World Politics* 155, 165.

191 Yascha Mounk, 'The End of History Revisited' (2020) 31(1) *Journal of Democracy* 22. It eventuated that they were, and are, load bearing: Larry Diamond, 'Democracy's Arc: From Resurgent to Imperilled' (2022) 33(1) *Journal of Democracy* 163.

192 See generally (a visibly undergraduate work of mine) Jamie Blaker, 'Is Intentionalist Theory Indispensable to Statutory Interpretation?' (2017) 43(1) *Monash University Law Review* 238, 258–62.

193 *Phillips v Lynch* (1907) 5 CLR 12, 27 (Isaacs J). See similarly Griffith CJ in *Bennett v Minister for Public Works (NSW)* (1908) 7 CLR 372, 378:

> It is suggested that that cannot have been the intention of the legislature ... No doubt that is extremely probable ... But that is mere conjecture, and there is no room for conjecture in construing Acts of Parliament ... We have to look at the language of the legislature, and ... we must give effect to that language, although we may conjecture that it was used through inadvertence'.

In a number of judgments, members of the Court affirmed the notion (first expressed in *Salomon v Salomon & Co* [1897] AC 22, 38) that the phrase, legislative intention, is a 'very slippery phrase'. See, eg (and further to *Sargood Brothers v Commonwealth* (n 188) 279–80 (O'Connor J)), *Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465, 536–7 (Isaacs J); *Baxter v Commissioners of Taxation* (NSW) (1907) 4 CLR 1087, 1170 (Higgins J).

194 *McLaughlin* (n 129) 559 (Griffith CJ, delivering the opinion of the Court).

195 *Macfarlane* (n 155) 568 (Higgins J) ('There is the *highest authority, therefore*, for approaching this case with the prepossession that our Parliament did not intend to violate constitutional liberties')

conception of legislative intention was so artificial that it was acknowledged that there would be

> cases in which the intention of the legislature has to be decided according to principles which bind the Courts in the interpretation of Statute law, while they may be aware that it is very improbable that the intentions to be deduced from the words used were those which the legislature entertained when it adopted the course it did.[196]

In that light, the statement in *Potter*, as it appeared in the *Commonwealth Law Reports*, may be best understood as the mere continuation of a metaphor.

V What the Principle of Legality Is

To remember that the principle of legality was, in its origins, a liberal and constitutional principle, is, in a sense, to remember what the principle of legality is. In recent years, the principle has been placed upon a number of newly proposed justificatory footings that do not fit. Sometimes, these retrofitted justifications have 'not fitted' the principle of legality in the sense that the justifications (if taken seriously) would motivate a principle of a very different form. Sometimes, the retrofitted justifications have additionally 'not fitted' in the sense that the justifications have failed to supply a constitutional justification for the principle.

The first of these retrofitted justifications was, it turns out, that intentionalist rationale that was wrongly supposed to be the principle's 'original' justification. While that rationale is congruent with constitutional principles of parliamentary supremacy, it is, for reasons now well developed by Lim and Lisa Burton Crawford, incongruent with the form of the principle of legality. On the occasions of the principle of legality's application, judges become involved in an activity far removed from speculating as to the mental states of parliamentarians. The activity is instead a principle-governed activity that is continuous with the ordinary common law methods of adjudication.[197]

The second of the retrofitted justifications has been the democracy-forcing justification. According to that justification, the principle's justifying purpose is to ensure that statutes may only have illiberal legal effects that are clear on the faces of the statutes, where those effects are liable to attract due democratic scrutiny. This justification has a number of difficulties. They have recently been well surveyed by Burton Crawford.[198] The greatest among those difficulties is that the justification, when committed to, saps the principle of legality of a constitutional foundation. The *Australian Constitution* does not, in its terms, or as a matter of necessary implication, provide for a power in the judiciary to interpret statutes so as to force democratic scrutiny upon those statutes. As a matter of intellectual history, that conception of a

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(emphasis added); *Progress Advertising* (n 177) 464 (O'Connor J) ('*as* every citizen is at liberty prima facie to carry on his business in his own way within the law*, it will not be held that* the legislature has intended …') (emphasis added). Cf *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341] (Hayne J).

196 *Ferris v Martin* (1905) 2 CLR 525, 540–1 (Barton J).

197 See Lim (n 9) 383–5, 394; Burton Crawford (n 18) 514–18.

198 Burton Crawford (n 18) 514, 519–26.

desirable judicial function owes much to the work of the American academic, John Hart Ely, published in the 1980s.[199] It would be an error of intellectual history to count it among the 'traditional conceptions'[200] that formed assumptions upon which the *Australian Constitution* was framed, and that might inform the scope of the judicial powers of the States and the Commonwealth.

Certainly, the judicial resolution of disputes may, from time to time, require the judicial interpretation of these 'traditional conceptions'.[201] Those interpretations in turn may specify, up to a point, the textures of these conceptions.[202] But no account has been given of how the democracy-forcing rationale might flow from this kind of permissible development in constitutional principle.[203] The development of such an account (if it is possible) would, in light of the principle of legality's liberal constitutional history, seem an odd, even gratuitous, exercise in restumping the principle of legality. The democracy-forcing rationale may one day be remembered as a contrivance embraced when the profession had forgotten what the principle of legality was.

A third retrofitted justification has recently been offered by Burton Crawford. It is, in Burton Crawford's own 'outline',

> that courts are permitted to treat existing common law rights and principles as weights on the interpretive scale, which influence the constructional choices they make. If a statute can be interpreted in a way that leaves the common law intact, then, all things being equal, this is the interpretation that the court should prefer. … [T]his approach reflects the institutional setting in which statutory interpretation takes place, and the dual constitutional role of the courts as both law-interpreters and lawmakers. ... [T]his justifies a version of the principle of legality …[204]

The essence of Burton Crawford's view, as it then emerges, is that the principle of legality is to be justified on the broad basis, alone, that all common law has a constitutionally legitimate influence upon the proper construction of statutes.

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199 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). See further the discussion in Lim (n 9) 402–3.

200 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

201 That conceptual interpretation has most often occurred in connection with the enunciation of substantive implied constitutional doctrines (see, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137–41 (Mason CJ) ('*ACTV*')), and in ascribing meaning to the words of constitutional provisions that might be thought to express certain traditional conceptions (see, eg, *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1, 55–6 (Stephen J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)).

202 A matter well discussed in Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143.

203 See Lim (n 9) Part III(B)(2), where a worked-up account of the democracy-forcing rationale is advanced on the basis of (compelling and lucid) ideal theory, but not on the basis of elements of Australia's constitutional text and traditions. See also Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 16, where, having stated the principle's democracy-forcing rationale at 15 (and having earlier given a leading explanation of the concept of legislative intention), the author defends the principle of legality on the essentially ethical basis that it is 'hardly unreasonable'.

204 Burton Crawford (n 18) 513.

That justification goes some way, but is incomplete.[205] As Burton Crawford accepts, on that professor's pure common law account of the principle, 'the principle of legality almost loses its appearance as a standalone canon of construction'.[206] But as the dedication of so much attention to the principle accurately reflects, the principle is a singularly special canon that does stand out from the general influence of the common law upon statutes.[207] That is because the principle of legality gives effect to, and in that limited sense can itself be counted among,[208] constitutional principles.

The principles to which the principle of legality gives effect are, as Brennan J once wrote, 'fundamental freedoms which are part of our constitutional framework'.[209] The higher order concern of the principle of legality has historically been the conformity of statutes not to the common law, per se, but to what are fundamental liberal principles of justice — or in Sir Owen Dixon's locution, 'great precepts of constitutional liberty'[210] — affirmed in the public culture, and, in the history earlier recounted, recognised in our law as having a constitutional status. These constitutional principles, like any form of constitutional law, have accreted around them bodies of common law doctrine that specify aspects of the principles.[211] They have accreted around them 'common law rights' understood to be protective of the constitutional liberty of the subject.[212] In that way, the common law has given a degree of form to the liberty.[213] But to suppose that the principle of legality is principally concerned to place as a 'weight on the interpretive scale'[214] that common

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205 Though incomplete as a justification for the principle, there is much in Burton Crawford's excellent article (n 18) to be learnt about the general relationship between common law and statute. Previously I have criticised Burton Crawford's broader jurisprudential outlook in terms that I now regard as having only some merit, and as being intellectually a little immature: Jamie Blaker, 'The Hard Problem of Legality' (2019) 46(1) *University of Western Australia Law Review* 1. There is much in that youthful (and frankly, bad) article that I would now disclaim.

206 Burton Crawford (n 18) 534.

207 Cf, eg, *Nolan* (n 130) 443–4 (emphasis added) (Griffith CJ) ('but the common law ... should not be taken to be abrogated, *especially* on matters affecting the liberty of the subject'); *Re Burton; Ex parte Coghill* (1866) 3 Wyatt W & A'B 3, 5 ('The Court is bound to hold that view which harmonises with the greatest body of law, *especially* when such a construction favors the liberty of the subject') (emphasis added); *Re Bolton* (n 1) 520–1 (Brennan J) ('The law of this country is *very* jealous of any infringement of personal liberty... and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right') (emphasis added).

208 Rupert Cross, *Statutory Interpretation* (Butterworths, 3rd ed, 1995) 166 (describing assumptions comprising the principle of legality as 'operat[ing] ... as constitutional principles').

209 *Re Bolton* (n 1) 523 (Brennan J). Cf *Momcilovic v The Queen* (n 195) 46 [42] (French CJ).

210 Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 471 (writing there of certain 'great precepts of constitutional liberty' expressed in the terms of the *United States Constitution*, and that, in Australia, are in the nature of 'principles [that] govern our thinking … as the source of canons of interpretation').

211 See above Part III. With this has come some instability in the content of the principles as cognised by the common law. See, eg, the shifting views in respect of penal statutes: Hardcastle (n 51) 455–6. See further below n 216.

212 Burton Crawford (n 18) 520.

213 Amos (n 60) 423 (identifying the 'liberty of the subject' as an 'independent principle in the constitution', before writing, 'the Liberty of the Subject is [not] simply an indefinite claim to resist legislative or executive encroachments; since the Courts of Law, in their interpretation of Statutes and their announcement of the principles of the Common Law, have ... determin[ed] how far it can trespass on individual freedom').

214 Burton Crawford (n 18) 536–7.

law carapace,[215] rather than the constitutional principles from which the carapace extends, seems a category mistake.[216]

The better understanding, borne out by the history, is that the assumptions comprising the principle of legality operate 'at a higher level as expressions of fundamental principles governing civil liberties and the relations between Parliament, the executive and the courts'.[217] Or in the inverted imagery: the interpretive practice has an eye to the 'substratum of the … law'.[218] That substratum is a set of liberties inhering in an inherited 'principle in the Constitution',[219] referred to traditionally as the liberty of the subject. Where a common law right specifies or protects the constitutional liberty of the subject, the principle of legality *for that reason* will protect that common law right. The principle of legality's concern for these common law rights is, in that way, derivative, and second order: the common face, but not the deep animus of the principle.

The problems that attend the retrofitted justifications would be avoided by abandoning those justifications, and reuniting the principle of legality with its authentic raison d'être. The *Australian Constitution* 'is not an isolated document. It has been built on traditional foundations. Its roots penetrate deep into the past'.[220] Brought forward into the *Constitution* were 'principles of British ... government'.[221] One of those principles, it appears, was the liberty of the subject.[222] By the time Australia received that principle, the principle bore the affect of Victorian British liberalism — it being 'in [the] ... reign [of Queen Victoria that] we received the whole of our constitutional liberties'[223] — 'all those constitutional liberties which are our safeguards'.[224] The principle of legality was, and is today most plausibly, an expression of that constitutional inheritance — that is, the constitutional liberty described in Part III, possessing the same inherent evolutionary potential that the

[215] Ibid 548.

[216] For the proposition that the principle of legality protects constitutional principles independent from, albeit cognised by, the common law, see the history in Part III above. The proposition is also contemplated in, eg, *Re Bolton* (n 1) 520 (Brennan J) ('Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes'); *R v Lawrence* (1878) 43 UCR 164, 175 (Harrison CJ, describing 'checks provided by the general law for the constitutional liberty of the subject'). Cf, eg, *Nolan* (n 130) 443–4; *Clancy* (n 161) 201. It also seems contemplated in this seminal modern statement of the principle by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131: 'Parliament can, if it chooses, legislate contrary to fundamental principles of human rights [which principles were later referred to as 'principles of constitutionality']. … But the principle of legality means that Parliament must squarely confront what it is doing'. Cf *ACTV* (n 201) 139 n 12 (Mason CJ) (drawing on the Canadian dictum, '"Freedom of expression is not … a creature of the Charter". It is one of the fundamental concepts that has formed the basis of the historical development of the political, social and educational institutions of western society'). I have put this point forcefully, reflecting my present certainty in it. But one expects to learn much from any further reflections Burton Crawford might give on the subject.

[217] Cross (n 208) 166.

[218] *Lyons v Smart* (n 131) 177 (Higgins J).

[219] Amos (n 60) 423.

[220] John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) vii.

[221] Ibid.

[222] See Parts III–IV above.

[223] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 1903, 5022 (Mr Reid).

[224] Commonwealth, *Parliamentary Debates*, Senate, 21 July 1920, 2840 (Senator Pearce).

principle was understood to have when the Commonwealth of Australia inherited it.

If that is what the principle of legality is, then understanding the principle's justification and proper scope ceases to be a creative exercise. The task then, instead, is to become better students of our own constitutional traditions.[225] That would involve a renewed attentiveness to how each of the coordinate arms of the governments in Australia give expression to the constitutional principle of liberty. And it would involve renewing our memory of the liberal and civic ideals of that traditional, cooperative project.[226]

To place the principle of legality on its traditional footing is — it remains to say — not to render the principle an anachronism. As Hannah Arendt once wrote, the 'cause of freedom versus tyranny', has, unfortunately, at no time since the beginning of history, been an anachronism.[227] The rediscovery, now, of the liberal nature of the principle of legality, seems timely.[228]

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[225] As well as how those traditions inform the scopes of judicial powers. Cf *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J).

[226] A compelling synthesis of liberal thought on this subject is John Rawls, *Political Liberalism* (Columbia University Press, 1996).

[227] Hannah Arendt, *On Revolution* (Viking Press, 1963) 1.

[228] See Diamond (n 191); Fukuyama (n 6).