THE INSTITUTIONAL JUSTIFICATION FOR THE PRINCIPLE OF LEGALITY, REVISITED

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This article defends the 'institutional account' of the principle of legality published in a previous volume of the Melbourne University Law Review *against the criticisms made by Julian R Murphy in this issue. The principle of legality is best understood as a judge-made tool for protecting judge-made law, justified by the constitutional role of the courts as both the makers of the common law and the interpreters of legislation. Intentionalist and 'democracy-enhancing' accounts of this interpretative presumption are both flawed, and it is far from clear that the alternative approach to the principle that Murphy briefly sketches would be legitimate or sound.*

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It is a great thing to see one's work being read, let alone engaged with as thoughtfully as Julian Murphy does in his response to my article, 'An Institutional Justification for the Principle of Legality'.[1] I welcome this opportunity to respond to his response. I am sure that my article is open to questions and criticisms, but I am confident that it withstands the criticisms that Murphy makes, which either misstate what was said in it or else are simply unpersuasive. I begin with a brief overview of the argument that I presented, before addressing the

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1 Julian R Murphy, 'Institutionally-Informed Statutory Interpretation: A Response to Crawford' (2023) 46(3) *Melbourne University Law Review* 780.

primary criticisms that Murphy makes. I conclude with some questions about the alternative institutional justification for the principle of legality that Murphy very briefly sketches in the final pages of his response.

I The Institutional Justification for the Principle of Legality

My article articulated a new justification for the canon of statutory interpretation known as the principle of legality.[2] In other words, its aim was to explain why courts may justifiably make interpretative choices to preserve the common law. The principle of legality is an important canon of construction in Australia and elsewhere, but its normative foundations and operation remain contested, and recent doctrinal developments have raised new questions.[3] Some judges have stated that, unlike prior cases that applied the principle of legality in the style of a robust clear statement rule, the principle should instead have 'variable impact'.[4] This called for fresh inquiry into the principle of legality, and I argued that recent case law provided some support for the alternative justification of the principle that I presented in my article.[5]

I began by demonstrating that existing justifications for the principle of legality were inadequate, hence the need for a new account.[6] That argument built upon the work of others who have also cast considerable doubt upon (what I labelled) the 'intentionalist' and 'democracy-enhancing' justifications for the principle that have so far been offered by academics and the courts.[7] According to the intentionalist justification, the principle of legality is a heuristic for ascertaining what the enacting parliament intended a statute to mean.[8] It reflects a standing assumption that Parliament does not usually intend to abrogate fundamental parts of the common law, and it is justified because it is the

[2] Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511 ('An Institutional Justification').

[3] Ibid 512, 514. See, eg, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 23 [59] (Gageler J), 42 [102] (Edelman J) ('*Probuild*').

[4] *Probuild* (n 3) 42 [102] (Edelman J). Variations of this approach endorsed by other judges and broader shifts in the way the principle is applied are explained at length in my article: Crawford, 'An Institutional Justification' (n 2) 541–7. For a more recent contribution, see generally Dan Meagher, 'On the Wane: The Principle of Legality in the High Court of Australia' (2021) 32(1) *Public Law Review* 61.

[5] Crawford, 'An Institutional Justification' (n 2) 514.

[6] Ibid 514–26.

[7] Ibid. See also at 514–26 nn 15–84.

[8] Ibid 514.

constitutional function of the courts to give effect to those intentions.[9] According to the democracy-enhancing justification, the principle of legality is a tool for enhancing the democratic process by securing an appropriate degree of attention to legislative attempts to abrogate fundamental common law rights.[10] In other words, by requiring Parliament to express any intention to abrogate fundamental rights (or similar) with irresistible clearness, the courts ensure that Parliament does not do so inadvertently and that any abrogation that does occur is brought to the attention of the public so that they may exact the appropriate political cost.[11] These labels capture the main strands of thinking about the normativity of the principle, though of course there are cases and scholarly work in which the two accounts have been relied upon in some combination, and slightly alternative ways in which each has been described.[12] However, neither of these justifications are sound.

The intentionalist justification for the principle of legality suffers the same flaws of intentionalist accounts of statutory interpretation in general. These are well covered in the literature and case law, and summarised in my article.[13] Questions include: what is parliamentary intention? Does it exist? Can courts find it, and how? And is it the right objective of statutory interpretation? The democracy-enhancing justification emerged as a supposedly superior alternative, but I argued that it is also flawed for four reasons. First, the democracy-enhancing account rests on unrealistic assumptions about the way that people (parliamentarians and the public) engage with statutory texts, and in particular, the extent to which they read the specific words of those texts in order to exercise their respective democratic powers.[14] Secondly, it is not clear that the constitutional power of the court to interpret legislation can be exercised for the purpose of protecting the democratic process.[15] Thirdly, and

[9] Ibid 512.

[10] Ibid 516.

[11] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann) ('*Simms*').

[12] Crawford, 'An Institutional Justification' (n 2) 516–17, discussing *Coco v The Queen* (1994) 179 CLR 427, 436–8 (Mason CJ, Brennan, Gaudron and McHugh JJ); Crawford, 'An Institutional Justification' (n 2) 521, citing Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 403, 407 ('Normativity').

[13] Crawford, 'An Institutional Justification' (n 2) 514–18. See also at 514–15 nn 15–23, 517–18 nn 37–42.

[14] Ibid 523–4.

[15] Ibid 519.

> [r]elatedly, it is unclear whether the judicial power to interpret statutes extends to the creation of rules which effectively dictate the form of language that Parliament must use to achieve certain outcomes.[16]

Finally, the democracy-enhancing justification does not fit the case law.[17] Amongst other things, the principle of legality is neither confined to rights, values and so forth that are democratically vulnerable, nor calibrated to reflect the extent to which they are so.[18]

This does not mean the principle of legality lacks justification. I argued that it can be justified, though on alternative grounds, which I called an 'institutional' justification because it primarily rested on constitutional ideas about the respective constitutional powers of Parliament and the courts.[19] I argued that the principle of legality is not a tool for giving effect to parliamentary intention or enhancing democratic scrutiny of legislative texts; rather, I argued 'that the principle of legality is a judge-made tool for protecting judge-made law — and legitimately so'.[20]

That legitimacy derives from the *Constitution*[21] — from 'the institutional setting in which statutory interpretation takes place, and the dual constitutional role of the courts as both law-interpreters and lawmakers'.[22] Of course, I did not mean by this that one can open the *Constitution* and find some section that expressly directs courts to interpret legislation in this way, nor that the principle of legality could be explained as an implication in the way that is understood in constitutional jurisprudence. It is the very fact that the *Constitution does not* tell us how statutes should be interpreted that creates the need for analysis of this kind. But it is part of the judicial power — no doubt in many constitutional orders, but in the Australian context conferred by ch III of the *Constitution* — to ascertain the law in order to resolve disputes about its application.[23] The law here means a complex mixture of norms, principles and values, created by both Parliament and the courts (and for completeness, we might add the executive, when such lawmaking power is delegated by Parliament). In such a constitutional context, it is logical for courts to read statutes in light of the common law. This is an important part of the context into which statutes are enacted. It is

[16] Ibid.

[17] Ibid 519–21.

[18] Ibid 520–1.

[19] Ibid 526.

[20] Ibid 548.

[21] *Constitution* ch III.

[22] Crawford, 'An Institutional Justification' (n 2) 513.

[23] Ibid 529.

moreover legitimate for courts to treat the common law as something that *ought* to be protected, and this may guide the interpretative choices that they make. Courts may always refine and alter the common law, subject to the strictures of the common law method. Legislative intervention may prompt the court to recognise that some part of the common law ought to be changed. But generally speaking,

> [t]he common law comprises norms and principles that courts have, over time, fashioned to reflect what they consider to be good devices for resolving disputes. The judge is therefore institutionally committed to the view that the common law they apply is valuable and correct, either for first-order reasons (it is actually a good device for resolving disputes) or second-order reasons (it is a well-established device for resolving disputes, and the harm caused by departing from it would outweigh any deficiencies in the device itself).[24]

Thus, courts can choose to read legislation in such a way that leaves the common law intact, where such an interpretative choice is open to them. The interpretative weight that any given part of the common law bears will vary, depending on the courts' assessment of its fundamentality. 'Fundamentality' was explained to mean

> not principled importance as revealed by some abstract moral philosophising, but the quality of forming a well-established and important part of the common law, determined via standard common law analysis of the kind described above.[25]

This will often include judicial consideration of the purposes or values that the relevant part of the common law is understood to serve.

I have framed this in terms of 'constructional choice'. This is a pivotal concept, but it remains largely unexplored. I use this phrase to mean that many statutes are open to more than one interpretation, and it is the role of the courts to decide which of those interpretations is 'the law' — the legally binding and authoritative interpretation. I think that this can be reconciled with the current constitutional orthodoxy, that courts lack constitutional authority to decide what the content of (statute) law shall be, though it does require us to accept that the content of a statute is not coextensive with its linguistic meaning. Murphy does not criticise this aspect of my account and so I will leave my own exploration of it to another day.

[24] Ibid 533 (citations omitted).

[25] Ibid 539.

II A Constitutional Turn?

I was interested in the way that Murphy characterised my article, along with some of my previous work and that of others, as representing a 'constitutional turn' in thinking about statutory interpretation.[26] My work clearly has a constitutional focus. Particularly, it focuses on the way that constitutional norms and values, and the overarching structure established by the *Constitution*, might inform the way in which courts interpret statute law. But I am not sure what Murphy thinks is being turned away *from*, because statutory interpretation has long been explained in constitutional terms.

It is true that, for many years, the leading scholars of statutory interpretation have drawn heavily on the philosophy of language. I am thinking particularly here, in the Australian context, of the pioneering work of Jeffrey Goldsworthy.[27] But the reason why scholars like Goldsworthy are so concerned with the philosophy of language is a constitutional one.[28] Their concern reflects a particular understanding of the constitutional relationship between Parliament and the courts, according to which the constitutional function of the courts is to give effect to the statute enacted by Parliament.[29] Further, it reflects that 'the statute' is its meaning[30] and further still reflects that the meaning of a statute is its utterance meaning, which may be roughly understood as the meaning that one would reasonably conclude the speaker intended to mean,[31] and which crucially includes publicly available evidence of their *intentions*.[32] It is for these

[26] Murphy (n 1) 781, 786–9. See also at 786–8 nn 22–39.

[27] Lisa Burton Crawford, Patrick Emerton and Dale Smith, 'Introduction' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 1, 1.

[28] Arguably the best example of which is Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 42 ('The Case for Originalism'). Although this chapter focuses on constitutional interpretation, most of the arguments presented translate to the statutory context: see, eg, at 44, 46–8, 61. See generally Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, which focuses on statutory interpretation and clearly articulates the constitutional norms and values implicated by the debate on intentionalism. For a recent and important contribution to this debate as to how the philosophy of language should inform statutory interpretation, see Paolo Sandro, *The Making of Constitutional Democracy: From Creation to Application of Law* (Hart Publishing, 2022) ch 5. Sandro argues that legislation is no ordinary 'speech-act', but rather a 'text-act': at 195; to which we cannot 'straightforwardly apply Gricean and post-Gricean pragmatic theories': at 200.

[29] Ekins and Goldsworthy (n 28) 42.

[30] Goldsworthy, 'The Case for Originalism' (n 28) 44.

[31] Ibid 46, 48.

[32] Ibid 48, 50.

reasons that scholars like Goldsworthy conclude that the principle of legality 'must be a matter of inferred legislative intention'.[33] The democracy-enhancing justification for the principle of legality is a constitutional justification, too. It simply reflects a different set of constitutional ideas about the rightful objective of statutory interpretation and the respective roles of Parliament and the courts. As Paul Scott put it, that account of the principle of legality portrayed it as a tool for 'leverag[ing] the legal constitution in service of its political counterpart'.[34]

It seems mistaken, then, to suggest scholars are now attempting to explain the principle of legality and other canons of construction on constitutional terms, as if this has never been done in the past. The current wave of scholarship (assuming, for the sake of argument, that it represents a coherent movement) reflects dissatisfaction with the constitutional ideas that have animated statutory interpretation to date. Its evident goal is a more coherent and persuasive account of the constitutional norms and values which underpin the interpretative process, which may in turn require refinements to specific canons of construction (like the principle of legality) along the way. Murphy's summary of the 'constitutional turn' — and in particular, the way that the interpretative process was explained and justified in some important High Court judgments during the era of French CJ[35] — seems to miss what was most important here: that some judges and academics had begun to doubt not only the idea that there was some 'thing' extraneous to the statute called parliamentary intention that courts could reliably find, but that it was their constitutional function to interpret statutes in accordance with it.

III Responding to Murphy's Critique

Murphy's overarching criticism of my account, as I read it, is that it

> does not justify the principle of legality as we know it, but rather defends the idea (which was never in need of defence) that the common law forms part of the 'context' against which statutes are interpreted.[36]

[33] Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43(1) *Statute Law Review* 79, 87 ('Lord Burrows on Legislative Intention'). See also 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.

[34] Paul F Scott, 'Once More unto the Breach: *R (Privacy International) v Investigatory Powers Tribunal*' (2020) 24(1) *Edinburgh Law Review* 103, 107.

[35] Murphy (n 1) 783–91. See also at 783–5 nn 9–13, 15–16, 18–19, 789–90 nn 41, 43, 46–7.

[36] Ibid 781.

Perhaps Murphy meant, by the second clause quoted here, that Australian courts have always accepted that the common law forms part of the context that informs statutory meaning. Even if that is so, it does not mean this approach is axiomatic. For example, it is plainly implicated by the broader debate about intentionalism and its role in statutory interpretation. As Goldsworthy put it, '[i]f a speaker or author had no … intention, there would be no good reason to take into account the context in which their utterance was made'.[37] One of the primary aims of my article was to provide a non-intentionalist justification for contextual interpretation — and more specifically, an account of why courts could interpret legislation in light of the *common law context* into which it was enacted.

What of Murphy's criticism that my account would only justify some unrecognisable version of the principle of legality? Let us assume for a moment that this is an apt description of my account. Two wrongs do not make a right, in academic writing or in life, but I would argue that Murphy is equally guilty of defending a version of the principle of legality that bears little resemblance to current case law. The structure of my argument reflected the way in which the principle of legality has itself developed. I argued that there was much to be gained by returning to the starting point: that the principle of legality is a tool judges have long used to protect the law that they have made.[38] Murphy adopts a very different approach, starting from an expansive vision of the principle of legality, quite untethered from the heartland of common law rights, the function of which is to 'advance structural principles and systemic values of the legal system' which he links to Ely-ish ideas about the courts' role in encouraging the proper function of legal institutions.[39] This account is only very briefly sketched,[40] but it is plainly contentious. For example, it would seem to suggest that the principle of legality protects a far broader catalogue of principles and values than many would accept, and that it should be used to *advance* those principles and values rather than merely protect them from legislative incursion. There could well be some support for these ideas to be found in the case law (the courts' approach to interpreting statutory conferrals of executive power — which Murphy suggests, drawing upon Lim, is motivated by a

[37] Goldsworthy, 'Lord Burrows on Legislative Intention' (n 33) 83.

[38] Crawford, 'An Institutional Justification' (n 2) 533, 548.

[39] Murphy (n 1) 812. See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

[40] Murphy (n 1) 812–14.

concern with executive well-functioning — seems a fruitful line of inquiry) but neither are clearly accepted propositions of Australian law.[41]

More importantly, I would reject the premise that my account would only support some unrecognisable version of the principle of legality.[42] Indeed, it is not clear where Murphy thinks the main points of difference between my account and the current case law lie. At times his complaint seems to be that my institutional justification would only support an anaemic version of the principle that is simply not robust enough, such 'that the principle that survives on Crawford's account is so weak as to be barely recognisable'.[43] It is true that I tended to focus on the idea that has emerged in recent case law that the principle of legality would sometimes operate only weakly. This pulled focus because it was interesting: a presumption that, the courts had said, was so robust that it could only be rebutted by express words of irresistible clarity was found in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* to be so weak that it was rebutted by mere implication.[44] Murphy does not really engage with this case law. If he had, he would realise that his disagreement lies with several members of the courts as well as me. In any event, it is wrong to say that this nascent approach has simply *weakened* the principle, or that my argument would lead to that result. The point is that the strength of the principle would *vary*, and so in some cases it may well be strong.

Thus I wrote that the common law

> is not merely part of the context that may assist to resolve an ambiguity or fill a gap, but something that *a judge may legitimately reason ought to exist, unless and until Parliament clearly manifests an intention to override it*.[45]

Whether or not it would be appropriate for the court to so conclude would depend upon the statute at hand and the court's assessment of the fundamentality of the part of the common law that the statute engaged. I made clear that the

[41] Ibid 791–2, quoting Brendan Lim, 'Executive Power and the Principle of Legality' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76, 89.

[42] Murphy (n 1) 794–805.

[43] Ibid 780.

[44] *Probuild* (n 3) 23 [59] (Gageler J), 42 [102], 44–5 [108] (Edelman J). I noted that the presumption had sometimes been rebutted by implication in prior case law, but argued that *Probuild* (n 3) nonetheless indicated a perceptible shift in approach: Crawford, 'An Institutional Justification' (n 2) 546–7. This shift in approach to 'necessary implication' in *Probuild* (n 3) and subsequent cases has since been described and analysed at length by Dan Meagher: see generally Dan Meagher, 'Fundamental Rights and Necessary Implication' (2023) 51(1) *Federal Law Review* 102.

[45] Crawford, 'An Institutional Justification' (n 2) 533 (emphasis added).

principle, as I envisage it, has its limits: 'The common law should not be afforded so much weight that it leads courts away from the meaning indicated by all other relevant evidence.'[46]

This means that the principle could not be applied as robustly as it had been in some earlier cases, like *Lacey v Attorney-General (Qld)*,[47] but I am not alone in questioning the way that the principle of legality was applied in that case.[48] I gave the approach of Edelman J in *BVD17 v Minister for Immigration and Border Protection*[49] as an example of how this variable presumption could apply strongly. This case concerned legislation which purported to abrogate the principles of procedural fairness.[50] As I said, '[u]nlike in *Probuild*, the aspect of the common law engaged by the legislation was so important that it could not be abrogated by implication. Rather, clear words were required'.[51] It seems perfectly clear, then, that the version of the principle of legality that I aimed to explain and justify could provide robust interpretative protection to some parts of the common law — just not all of it. I do not think there is anything in my article that suggests differently, but I welcome the opportunity to clarify this important claim.

This clarification neutralises most of the concerns that Murphy raises about the links I draw between the principle of legality and that broader canon of construction that statutes should be read consistently with the common law. These canons have traditionally been separated by a threshold of fundamentality. Fundamental common law rights, principles and so forth enjoy the robust protection of the principle of legality, which can only be rebutted by clear indication.[52] Non-fundamental parts of the common law enjoy only the far weaker protection of the presumption of consistency, which is little more than an interpretative tie breaker.[53] I argued that we should think of these as manifestations of one overarching principle: courts can make interpretative choices to preserve the common law. However, the interpretative weight that can be ascribed to the common law depends upon its fundamentality, understood as a 'sliding scale'.[54]

[46] Ibid 536.

[47] (2011) 242 CLR 573, 583–4 [20], 598 [61]–[62] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[48] See, eg, Ekins and Goldsworthy (n 28) 40–2, 57.

[49] (2019) 268 CLR 29, 51–2 [55]–[56] ('*BVD17*').

[50] Ibid 46–7 [43], discussing *Migration Act 1958* (Cth) ss 473DA(1), 473GA–473GB.

[51] Crawford, 'An Institutional Justification' (n 2) 544.

[52] Ibid 547.

[53] Ibid.

[54] Ibid 538.

Murphy argues that we should continue to distinguish these presumptions: first, because some judges have stated that there remains a fundamentality threshold for the principle of legality, even if its strength varies once that threshold is met;[55] secondly, because it would be normatively desirable to do so.[56] On the first point, Murphy may be right. But what turns on it? I do not see much point in maintaining a fundamentality threshold if passing that threshold does not determine the way in which the principle of legality applies. The variable significance of the different parts of the common law can readily be accommodated by one principle of varying intensity that treats fundamentality as a spectrum, instead of purporting to draw bright-line distinctions between two separate categories of rights and principles.

The more interesting claim, that it would be normatively desirable to maintain two separate canons of construction, is only very weakly put. Murphy claims that this would go towards providing greater guidance to Parliament and the public about how statutes were likely to be interpreted by the courts.[57] But once again, if the strength of the principle of legality varies once the fundamentality trigger is pulled, there will still be considerable doubt about how Parliament must express itself to abrogate even the 'relatively closed and ascertainable set' of fundamental rights and principles, and in turn, how the statute will be interpreted by the courts.[58] Further, the set of rights and principles that might be considered fundamental is plainly not closed and ascertainable, and ought to be open to (reasonable) judicial reassessment. (On this point, Murphy travels far beyond my account. He argues that the principle of legality should be constituted by a broad and nebulous set of systemic principles and values, the identity of which would no doubt create judicial disagreement for years to come.)[59]

The only other argument that Murphy presents is that the

> abolishment of … the distinction between the principle of legality and the interpretative approach favouring consonancy with the common law would add an undesirable further element of uncertainty into what is already a difficult area of law.[60]

This does not persuade me. One variable canon that protects the common law seems far wieldier to me than the maintenance of two canons which would

[55] Murphy (n 1) 797, citing *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434, 467 [101] (Edelman J).

[56] Murphy (n 1) 796–8.

[57] Ibid 797–8.

[58] Ibid.

[59] Ibid 812–14.

[60] Ibid 798.

together produce very similar results: one that protects parts of the common law categorised as fundamental, albeit with varying strength, and one that protects the other parts of the common law that are not categorised as fundamental, but only weakly. But again, this does not seem to either be a significant issue, or undermine the justification for the principle of legality that I provide.

Murphy more clearly articulates two parts of the principle of legality that, he thinks, my account cannot justify. First, he states that my institutional justification would not lend any interpretative protection to common law values and principles.[61] That is so, he states, because the constitutional function of the courts to resolve disputes only extends to determining and developing common law *rights*, and not values or principles.[62] That is unpersuasive because, as I explained, the constitutional function of ascertaining and applying the law has always required courts to articulate the norms and principles that inform common law norms, and that those norms in turn sustain.[63] This, I argue, lends a degree of continuity and legitimacy to a principle of legality the strength of which varies from case to case, because courts would need to have regard to such principles and values in order to assess the relative fundamentality of the part of the common law that has been engaged.[64] I draw on examples that cannot neatly be described as 'common law rights' but must surely be considered part of the 'common law', such as the principles of procedural fairness which presumptively constrain statutory conferrals of executive power (which would be readily justified by my account).[65] Murphy is right, however, that my account does not readily justify the interpretative protection of other *statutes*.[66] It made no attempt to do so, and it probably does not. Some other justification would need to be found for this interpretative practice, or else it should be abandoned. But I question whether the interpretative protection of fundamental statutes is really the heartland of the principle of legality, and hence whether it is fair to say that the modifications my account would seem to require would cause the principle to be changed beyond recognition.

For these reasons, I do not think it is right to say that my institutional justification would only support some unrecognisable (and specifically, far weaker) version of the principle of legality than that presently applied by Australian courts, which rather casts doubt on the purpose of Murphy's rejoinder.

[61] Ibid.

[62] Ibid.

[63] See Crawford, 'An Institutional Justification' (n 2) 527–8, 531.

[64] Ibid 538–40.

[65] Ibid 512, 544, quoting *BVD17* (n 49) 52 [56] (Edelman J).

[66] Murphy (n 1) 801.

I was intrigued by the statement, in the opening passages of Murphy's article, that

> the idea that the principle of legality depends upon the courts' 'dual constitutional role' of interpreting statutes and developing the common law is thrown into doubt by the comparative experience of the United States … where there is no general authority for federal courts to develop common law, but courts still employ interpretative presumptions to protect rights and values.[67]

The comparative point is well taken. While my article examined the position in Australia, I do not think that the account of the principle of legality that I provided is only applicable in that jurisdiction. Prima facie, the principle of legality may well be justified along the lines that I articulated in any constitutional order where the courts have authority to make common law *and* to interpret legislation in order to resolve disputes about the law. But this would be subject to consideration of the myriad differences in institutional arrangements between legal systems (including the presence or absence of a national common law).

In the end, the criticism that Murphy introduced above was not developed in the body of his article, which merely states that United States ('US') courts apply numerous (largely unspecified) canons of construction which 'do not rely at all on the dual constitutional role of courts in developing common law and interpreting statutes'.[68] This is interesting but it does not cast significant doubt on my argument. That would require Murphy to show that courts in other jurisdictions justifiably employ something akin to the principle of legality notwithstanding relevantly different constitutional arrangements. The fact that US courts interpret legislation to promote structural principles and values derived from the *United States Constitution* could potentially lend some support to Murphy's argument (very briefly sketched) that this is what Australian courts should do — but that is his argument, not mine.[69]

Murphy emphasises part of a quote from the US scholars William Eskridge Jr and Philip Frickey, who state that the canons of construction applied by US courts '*may even be democracy-enhancing by focusing the political process on the values enshrined in the* [United States] Constitution'.[70] This tells us little. Courts in many jurisdictions besides Australia explain the interpretative principles that

[67] Ibid 782.

[68] Ibid 811.

[69] Ibid.

[70] Ibid (emphasis in original), quoting William N Eskridge Jr and Philip P Frickey, 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' (1992) 45(3) *Vanderbilt Law Review* 593, 631.

they apply on broadly democracy-enhancing grounds.[71] That does not mean that they are right to do so — that the democracy-enhancing account is a tenable justification for the principle of legality, let alone superior to the alternative that I provide. While I would want to conduct further inquiry into the way that legislation operates in the US legal system to conclude the point (given my argument in this regard rests in large part upon my own empirical analysis of Australian legislation),[72] it may well be that US courts and commentators are equally misguided about the capacity for clear statement rules to improve the democratic scrutiny of legislation. As Murphy notes in his footnote, Eskridge Jr and Frickey 'do not necessarily endorse this account of the canons' themselves.[73]

IV Conclusion

If one is not persuaded by my account of the principle of legality, where else might they look? Murphy concludes by sketching another justification for the principle that adopts a similar starting point to mine but then diverges. While I emphasised the constitutional power of the courts to protect the common law, Murphy states:

> On my account, when the courts are faced with reasonably open constructional choices, they may push, but not force, the law in *directions that are conducive to institutional well-functioning*. To the extent that this creates a tension with notions of legislative intent, it represents a procedural, not substantive, constraint on parliamentary sovereignty that is historically justifiable as an interpretative aspect of ch III judicial power.[74]

These claims are not substantiated, though Murphy does say a little more about the constitutional parameters of statutory interpretation. He states that 'the power to interpret statutes is a constitutional one, conferred and constrained by Chapter III of the *Constitution*';[75] amongst other things, this power 'encompasses the authority to develop "second order" interpretative principles'.[76] This

[71] For example, one of the most famous statements of the democracy-enhancing justification for the principle of legality is found in the United Kingdom case of *Simms* (n 11) 131 (Lord Hoffmann). See Crawford, 'An Institutional Justification' (n 2) 513 n 8, 515–16.

[72] See Crawford, 'An Institutional Justification' (n 2) 519–26.

[73] Murphy (n 1) 811 n 206.

[74] Ibid 811–12 (emphasis added).

[75] Ibid 817, quoting Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 168 ('*The Rule of Law and the Australian Constitution*').

[76] Murphy (n 1) 817.

is consistent with the arguments I present at length in Parts IV(A)–(B) of my article;[77] the first statement is a quote from my earlier work.[78] Murphy then states that 'there is "a legitimate role for courts to be the guardians of long-wave constitutional principles, which moderate the short-wave excitability of ordinary democratic politics"',[79] though 'that role is ultimately subject to the overriding authority of Parliament'.[80] But how do we get from these general statements about the constitutional function of the courts to the more specific claims that courts should interpret statutes to 'push … the law in directions that are conducive to institutional well-functioning',[81] or to 'advance structural principles and systemic values of the legal system by requiring clear (or clearer) statements before they are eroded'?[82] And what exactly would this look like, in practice? These are important questions, which I look forward to seeing answered at length, at which point they may attract responses of their own. For now, I once again thank Murphy for his thoughtful engagement with my work and the Editors for the invitation to respond.

[77] Crawford, 'An Institutional Justification' (n 2) 527–34.

[78] Crawford, *The Rule of Law and the Australian Constitution* (n 75) 168.

[79] Murphy (n 1) 819, quoting Philip Sales, 'In Defence of Legislative Intention' (2019) 48(1) *Australian Bar Review* 6, 20.

[80] Murphy (n 1) 819.

[81] Ibid 812.

[82] Ibid.