INSTITUTIONALLY-INFORMED STATUTORY INTERPRETATION: A RESPONSE TO CRAWFORD

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As part of what can now be recognised as an increasing 'constitutional turn' in the law and literature of statutory interpretation, Lisa Burton Crawford has recently provided an 'institutional justification' for the principle of legality. There are, however, significant limits to Crawford's justification for the principle, which mean that the principle that survives on Crawford's account is so weak as to be barely recognisable. This responsive article identifies the limits to Crawford's account before posing an improved institutional justification for the robust principle of legality as it exists today.

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I Introduction

In a recent issue of this journal, Lisa Burton Crawford articulated an 'institutional justification' for the principle of legality.[1] Crawford's contribution is important because it offers to justify the principle of legality in constitutional terms.[2] It also represents the most recent example of the 'constitutional turn' in the literature and case law on statutory interpretation. There are, however, significant limits to Crawford's justification for the principle of legality. In particular, the justification does not account for many features of the principle, including: the 'fundamentality' threshold to the principle's engagement; the principle's extension beyond vested common law (and equitable)[3] rights to protect 'values' and 'principles'; the principle's protection of *statutory* rights and *statutory* features of the general system of law; and the principle's independent existence as a forceful presumption additional to considerations of statutory context. In the result, Crawford 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.[4] This is the most significant limitation of Crawford's account. A second limitation of Crawford's account is that it is incapable of application to the many other principles of statutory interpretation that have traditionally been understood to resemble, and be related to, the principle of legality. Unlike more established justifications for the principle of legality rooted in legislative intention and constitutional functionalism,[5] Crawford's justification is sui

[1] Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511, 526–41 ('An Institutional Justification for the Principle of Legality'). The label 'institutional justification' is used in the title, but never in the text.

[2] Ibid 526. For previous scholarship canvassing various rationales for the principle of legality: see 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) 2, 5–9.

[3] *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687, 700 (Kirby P, Meagher JA agreeing at 716). For the suggestion of an 'equity-protective principle of interpretation' in the United States, see generally T Leigh Anenson, 'Statutory Interpretation, Judicial Discretion, and Equitable Defenses' (2017) 79(1) *University of Pittsburgh Law Review* 1.

[4] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 513.

[5] Ibid 514.

generis and thus raises issues of fit and coherence in the law of statutory interpretation that a better justification might avoid. Finally, the idea that the principle of legality depends upon the courts' 'dual constitutional role'[6] of interpreting statutes and developing the common law is thrown into doubt by the comparative experience of the United States ('US'), where there is no general authority for federal courts to develop common law, but courts still employ interpretative presumptions to protect rights and values.

Accordingly, unless the High Court is prepared to adopt an uncomfortably sui generis justification for the principle of legality that requires it to be radically refashioned (and essentially discarded as an independent principle), it seems unlikely that Crawford's will be the last word on the subject. However, by prompting deeper inquiry into the institutional concerns of the principle, Crawford has directed our attention at a worthy target, and provided a foundation for further inquiry. In particular, the case law and literature in this area (including some of Crawford's own earlier work) contain the threads of a justification for the principle of legality as we know it. This alternative institutional justification conceives of the principle as an aspect of the ch III judicial power to exercise interpretative pressure on statutory text in order to protect structural principles and systemic values. This article's ultimate aim is to uncover that alternative justification. Before doing so, it is necessary to situate Crawford's account in the case law and literature on the constitutional dimensions of statutory interpretation, which is done in Part II. Then, in Part III, the limits of Crawford's account are discussed. Part IV identifies issues of fit, coherence and comparative experience which, while not fatal, should also cause us to mark down Crawford's justification. Having done all of that, Part V advances a more robust institutional justification for the principle of legality. This justification takes seriously the century of case law that has given us the current principle, and discerns from that case law a rationale for the principle rooted in judicial protection of both the institutions and structural norms of our constitutional, statutory and common law legal system.

II Situating the Debate

In order to appreciate the significance of Crawford's institutional justification for the principle of legality, it is necessary to see it in the context of the constitutional turn in statutory interpretation. This phenomenon will be explained in some depth, because the concerted and widespread move towards constitutional justifications for statutory interpretation suggests that Crawford

[6] Ibid 513, 533.

is onto something in her intuition that there might be an institutional justification for the principle of legality. Against this background, I will ultimately argue that Crawford's justification of the principle of legality falls short because it is insufficiently institutional, and that a better institutional justification is possible. Before doing so, I will first summarise Crawford's account and attempt to present it in its best light.

A *The Constitutional Turn in Statutory Interpretation*

Crawford's justification of the principle of legality by reference to the 'institutional setting'[7] in which it takes place aligns with the recent trend in case law and literature to conceive of statutory interpretation in constitutional terms. This constitutional turn in statutory interpretation was first evident in statements made at a high level of generality, such as in 2002 in *Wilson v Anderson* ('*Wilson*'), where Gleeson CJ described the focus on the 'intention of the legislature' as one that 'reflects the constitutional relationship between the legislature and the judiciary'.[8] Also in 2002, French J in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* ('*NAAV*') described the task of statutory interpretation as directed to ensuring that 'the interpretation adopted is legitimate in a representative democracy characterised by parliamentary supremacy and the rule of law'.[9] Seven years later, in 2009, a unanimous High Court in *Zheng v Cai* ('*Zheng*') endorsed the earlier statement in *NAAV* and explicitly framed it in the terms of a 'constitutional relationship' (albeit without citing Gleeson CJ in *Wilson*), writing:

> [J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. … [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[10]

Further echoes of Gleeson CJ's judgment in *Wilson* and French J's judgment in *NAAV* (as brought together in *Zheng*) can be heard in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*, where '[t]he principles and

[7] Ibid 527–30.

[8] (2002) 213 CLR 401, 418 [8]. See also *Singh v Commonwealth* (2004) 222 CLR 322, 335–6 [19] (Gleeson CJ).

[9] (2002) 123 FCR 298, 411 [430] ('*NAAV*').

[10] (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) ('*Zheng*'), citing ibid 410–12 [430]–[432] (French J).

presumptions of statutory construction' were described as 'the product of … the interaction between the three branches of government' and 'reflect[ing] the operation of the constitutional structure'.[11] The High Court has referred to French J's comments in *NAAV* on a number of other occasions to similar effect,[12] and a number of lower court judges have reflected extra-curially on the constitutional dimension to statutory interpretation.[13]

Looking back on some of these judgments, Justice Robert Mitchell has written extra-curially that

> [a] central theme of the High Court's approach during the tenure of Chief Justice French has been to identify the process of statutory construction as an expression of the constitutional relationship between different arms of government, and between government and the governed.[14]

Aside from the 'constitutional relationship' framing, French J in his time on the Federal Court also spoke of statutory interpretation taking place in a 'constitutional … setting', which has particular resonance for Crawford's analysis. That idea was present in French J's seminal judgment in *NAAV* — where his Honour said that '[o]verarching the specific rules governing interpretation there is a *constitutional and societal setting* in which statutes are to be construed'[15] — although that aspect of French J's judgment had not received the same attention as the more celebrated passage quoted earlier. Later, in *Evans v New South Wales*, French J (together with Branson and Stone JJ) also referred to legislative power being exercised in the '*constitutional setting* of "a liberal democracy founded on the traditions and principles of the common law"'.[16] To similar effect — and again with resonance for Crawford's analysis —

[11] (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

[12] See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 85 [146] (Gummow J) ('*Momcilovic*'), quoting *Zheng* (n 10) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Zheng* (n 10) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

[13] See generally Justice Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (2014) 1 *Judicial College of Victoria Online Journal* 4; Justice John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Speech, Centre for Comparative Constitutional Studies Constitutional Law Conference, 24 July 2015) ('Constitutional Dimensions of Statutory Interpretation').

[14] Justice RM Mitchell, 'Statutory Construction as an Expression of Constitutional Relationships: Approaches of the French High Court' in Henry Jackson (ed), *Essays in Honour of Chief Justice French* (Federation Press, 2019) 1, 1.

[15] *NAAV* (n 9) 415 [443] (emphasis added).

[16] (2008) 168 FCR 576, 594 [71] (emphasis added) ('*Evans*'), citing *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn) ('*Pierson*').

Justice Kenneth Hayne has written extra-curially of the 'constitutional framework' as providing relevant 'context' for the purposes of statutory interpretation.[17] The idea of *Constitution*-as-context was explored in detail by Kirby J in *Chief Executive Officer of Customs v El Hajje*, where his Honour wrote:

> It is impossible to disjoin interpreting a federal law … from the Constitution. The basic law provides the most important contextual element for elucidating the meaning to be attributed to a statutory provision whilst remaining constitutionally valid. It provides the life-blood of power and it charts the constraints and restrictions that necessarily inform the law's meaning. Attempts to disconnect the task of interpretation from the constitutional source are merely extreme examples of the belief, now generally discredited, that words alone in the written law yield legal meaning. Context is as important as text. In the Australian Commonwealth, in respect of federal laws, context inevitably includes the Constitution. Some of the dicta in the reasons of this Court in its early days, suggesting disregard for constitutional considerations, can only be understood today as relics of the former literalistic and purely verbal approach to statutory interpretation that focused on words and ignored context. We should not now restore that approach for it is not the way meaning is derived from written language in everyday life.
>
> This is why today *the starting point for legislative construction is commonly a consideration of any applicable constitutional norms*.[18]

(It should be noted that Kirby J was very much alone on this issue: the plurality in that case did not discuss the relevance of constitutional context to statutory interpretation.)[19] There has also been a line of scholarship picking up the idea of *Constitution*-as-context. Cheryl Saunders has suggested that '[the *Constitution*] provides *critical context* by reference to which the principles of statutory interpretation are, or should be, shaped'.[20] In a book chapter written with Patrick Emerton, Crawford expressed a similar idea, namely, that principles of statutory interpretation should be thought of as 'shorthand

[17] Justice Kenneth Hayne, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) 13(2) *Oxford University Commonwealth Law Journal* 271, 272.

[18] (2005) 224 CLR 159, 186 [74]–[75] (emphasis added) (citations omitted).

[19] Ibid 170–1 [27]–[30] (McHugh, Gummow, Hayne and Heydon JJ).

[20] Cheryl Saunders, 'Constitutional Dimensions of Statutory Interpretation' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 27, 47 (emphasis added) ('Constitutional Dimensions of Statutory Interpretation').

phrases for the contribution that the constitutional context makes to interpretative considerations'.[21]

Elsewhere in academia, general statements have been made to the effect that '[a]t bottom, statutory interpretation is controlled by constitutional principle.'[22] Refinements on these statements typically focus on the separation of powers. For example, Jeffrey Goldsworthy has echoed French CJ's comments in *Momcilovic v The Queen* ('*Momcilovic*'), observing that 'common law principles of statutory … interpretation can … be called constitutional, because they "help … define the boundaries between the judicial and legislative functions"'.[23] Again in a general manner, Crawford and the other authors of *Public Law and Statutory Interpretation* state that 'principles of statutory interpretation … must reflect the constitutional distribution of powers, and the limits of the judicial role'.[24] Reference to 'the judicial role' is also found in the writing of Dan Meagher, who has highlighted 'the centrality of the principles of statutory interpretation … to the exercise of (federal) judicial power pursuant to Chapter III of the *Constitution*'.[25]

Other academic contributions have focused more closely on the interaction between the *Constitution* and the principles of statutory interpretation. In the chapter earlier referred to written with Emerton, Crawford suggests that there are 'some tenable bases on which it might be said that the principles of statutory interpretation are grounded in the constitutional structure'.[26] The authors

[21] Patrick Emerton and Lisa Burton Crawford, 'Statutory Meaning without Parliamentary Intention: Defending the High Court's "Alternative Approach" to Statutory Interpretation' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 39, 59 ('Statutory Meaning without Parliamentary Intention').

[22] Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1101.

[23] Jeffrey Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25(4) *Public Law Review* 265, 279 ('The Constitution and Its Common Law Background'), quoting *Momcilovic* (n 12) 46 [42] (French CJ). See also Jeffrey Goldsworthy, 'Determining Constitutional Boundaries: Problems and Controversies' (Speech, Centre for Comparative Constitutional Studies and University of Oxford Faculty of Law Workshop on Constitutional Boundaries, 25 August 2017) 20–1.

[24] Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 218 [9.2].

[25] Dan Meagher, 'The "Modern Approach" to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?' (2018) 46(3) *Federal Law Review* 397, 423 ('The "Modern Approach"').

[26] Emerton and Crawford, 'Statutory Meaning without Parliamentary Intention' (n 21) 40. See also at 47; Patrick Emerton and Lisa Burton Crawford, 'Parliament, the People and Interpreting the Law: *Miller v Secretary of State for Exiting the European Union*' (2016) 35(2) *University of Queensland Law Journal* 331, 335–7.

expand in a footnote, writing: 'The idea that some interpretative principles might be grounded in the *Constitution* seems relatively uncontentious … The claim that *all* can be is obviously more ambitious.'[27] Emerton and Crawford suggest that the presumption of prospectivity and certain administrative law presumptions may be rooted in the *Constitution*,[28] but acknowledge that a 'full defence' of the constitutional basis for interpretative rules has not yet been attempted and is a 'task for another occasion'.[29] Dale Smith has made similar comments, suggesting that interpretative practices may require explanation of the 'interaction between statutory provisions and other legal norms … found in … the common law … or even in the *Constitution*'.[30]

More detailed scholarship on particular principles of interpretation has, however, begun to develop the building blocks of that 'full defence' to which Emerton and Crawford referred. David Hume's contribution was motivated by the idea that 'the *Constitution* could intersect with statutory interpretation … through requiring the development of principles of statutory interpretation which help implement constitutional values'.[31] To explore that idea, Hume analysed 'the role which one particular constitutional value, the rule of law, could play in identifying the contours of one particular principle of statutory construction — the presumption of valid meaning'.[32] Emily Hammond has similarly excavated the 'constitutional dimensions' of one particular presumption of statutory interpretation — the presumption that Parliament does not intend an administrative decision to be invalid due to immaterial error.[33] A collection edited by Crawford (together with Janina Boughey) exemplifies the recent trend in Australian academia to think about principles

[27] Emerton and Crawford, 'Statutory Meaning without Parliamentary Intention' (n 21) 52 n 62 (emphasis in original) (citations omitted).

[28] Ibid 59–60. Emerton and Crawford discuss the presumption against an interpretation that would relieve the executive of complying with generally applicable laws with reference to *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 366–7 [85]–[87] (Hayne J): ibid 61–2.

[29] Emerton and Crawford, 'Statutory Meaning without Parliamentary Intention' (n 21) 63.

[30] Dale Smith, 'Is the High Court Mistaken about the Aim of Statutory Interpretation?' (2016) 44(2) *Federal Law Review* 227, 255.

[31] David Hume, 'The Rule of Law in Reading Down: Good Law for the "Bad Man"' (2014) 37(3) *Melbourne University Law Review* 620, 621.

[32] Ibid.

[33] Emily Hammond, 'Materiality and Jurisdictional Error: Constitutional Dimensions for Entrenched Review of Executive Decisions' [2021] (6) *University of New South Wales Law Journal Forum* 1. For a more general look at the centring of the *Constitution* in administrative law, see generally Debra Mortimer, 'The Constitutionalization of Administrative Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 696.

of interpretation in constitutional terms. Within that collection, Boughey sought to justify interpretative principles of judicial deference by reference to the *Constitution*[34] and Brendan Lim wondered whether

> presumptions of interpretation … may be justified not because they necessarily track expected meaning, but because they lend additional normative force to the substantive policies or values on which they are based and which the legislative process is thereby compelled to observe.[35]

The most ambitious contribution to the debate so far has been a book chapter by Cheryl Saunders entitled 'Constitutional Dimensions of Statutory Interpretation'.[36] Saunders identifies 'three ways in which the *Constitution* affects, or might be understood to affect, the principles and practice of statutory construction', which she labels 'mandate, influence and catalyst'.[37] Saunders explains the idea thus:

> There are some obvious instances in which the *Constitution* drives, or mandates, exercises in statutory interpretation adding, in effect, to the pantheon of interpretative principles derived from the common law. There are others in which the *Constitution* operates rather as an influence, informing the principles of statutory interpretation and the manner in which they are explained and understood. And I suggest that there may be a third category as well, in which the *Constitution* acts as a catalyst for ideas about legislation and the legislative process that by extension also affect statutory interpretation.[38]

(The idea of the *Constitution*-as-catalyst is also apparent in some of Saunders' earlier work, where it was applied to the judicially developed principles of administrative law.)[39] For present purposes, it is unnecessary to assess the plausibility of each of the above interventions in the debate. It is sufficient to note that Crawford is far from alone in perceiving a constitutional foundation to the principles of statutory interpretation. Nor, as will now be

[34] Janina Boughey, 'The Case for "Deference" to (Some) Executive Interpretations of Law' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 34, 41–4.

[35] Brendan Lim, 'Executive Power and the Principle of Legality' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76, 83–4 ('Executive Power').

[36] Saunders, 'Constitutional Dimensions of Statutory Interpretation' (n 20).

[37] Ibid 28.

[38] Ibid 28–9.

[39] Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10(2) *New Zealand Journal of Public and International Law* 143.

explained, is she alone in her attempt to discern such a foundation for the principle of legality.

B *The Constitutional Status of the Principle of Legality*

The principle of legality's relationship to the *Constitution* was perhaps first considered by the High Court in 1987, when Brennan J wrote in *Re Bolton; Ex parte Beane*:

> The *Constitution* of the Australian Commonwealth does not contain broad declarations of individual rights and freedoms which deny legislative power to the Parliament, but the courts nevertheless endeavour so to construe the enactments of the Parliament as to maintain the fundamental freedoms which are part of our constitutional framework.[40]

In 2004, in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, Gleeson CJ endorsed the idea that the principle of legality 'governs the relations between Parliament, the executive and the courts',[41] again using the language of constitutional relationships that his Honour had used in *Wilson* (discussed above).[42] Chief Justice Gleeson elaborated:

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.[43]

To describe the principle of legality, as Gleeson CJ did, as 'an aspect of the rule of law' is to associate it with the idea that the rule of law is an assumption against which the *Constitution* itself was framed.[44] To similar effect, another former Chief Justice of Australia, Sir Anthony Mason, has written extra-curially that '[t]here is at least an arguable basis for thinking that [the principle of legality] should be recognised as an assumption on which the *Constitution* was based'.[45]

[40] (1987) 162 CLR 514, 523.

[41] (2004) 221 CLR 309, 329 [21] ('*Electrolux*'), citing *Pierson* (n 16) 587, 589 (Lord Steyn).

[42] See above n 8 and accompanying text.

[43] *Electrolux* (n 41) 329 [21].

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

[45] Sir Anthony Mason, 'The Coherence of Statutory Interpretation: A Commentary' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 39, 48.

Another way in which the principle of legality has been described as having a 'constitutional dimension'[46] is in its quasi-entrenchment of rights against legislative change. In this vein, in *Momcilovic*, French CJ wrote that

> [t]he rights and freedoms of the common law should not be thought to be unduly fragile. They have properly been described as 'constitutional rights, even if … not formally entrenched against legislative repeal'.[47]

Extra-curially, Dyson Heydon has commented (not entirely happily) that

> [t]he requirement that certainty of language exist before fundamental rights can be overthrown can be treated so intensely as *to go close to constitutionalising those rights as entrenched* — virtually rendering them immune from legislative change.[48]

To similar effect, Dan Meagher suggested that interpretative canons like the principle of legality might legitimately operate to modify ordinary meaning or contextually compelling meaning if the canons vindicate 'higher constitutional values'.[49] Exactly how this might work, however, was left unexplored, perhaps because Meagher acknowledges that

> whilst the High Court's contemporary jurisprudence may contain the analytical threads for treating the principle [of legality] as a quasi-constitutional clear

[46] *Evans* (n 16) 594 [70] (French, Branson and Stone JJ). See also Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40, 45 ('The Principle of Legality and Legislative Intention').

[47] *Momcilovic* (n 12) 47 [45] (French CJ), quoting TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148. See also French, 'The Principle of Legality and Legislative Intention' (n 46) 45; Chief Justice Robert French, 'Protecting Human Rights without a Bill of Rights' (2010) 43(3) *John Marshall Law Review* 769, 788; Chief Justice RS French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech, Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, 5 July 2012) 22 <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>, archived at <https://perma.cc/5APA-FZC2>.

[48] Dyson Heydon, 'The "Objective" Approach to Statutory Interpretation' in John Sackar and Thomas Prince (eds), *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 332, 345 (emphasis added).

[49] Meagher, 'The "Modern Approach"' (n 25) 421. For discussion of 'constitutional values', see also Ki On Alex Wong, 'Parliamentary Intention: Deciphering Its Role in Statutory Interpretation in the Australian Constitutional Context' (2021) 44(1) *Statute Law Review* 1.

> statement rule for fundamental rights, such a justification would be controversial and requires clear and reasoned explanation.[50]

A different way in which the principle of legality has been described in constitutional terms is as a 'constitutional courtesy'.[51] Robert French, after his retirement from the bench, wrote that the principle

> is invoked as an assertion that the court's constructional choice lies within the constitutional boundaries of the judicial function. It has been called a constitutional courtesy.[52]

Similarly, Sir Harry Gibbs has also written extra-curially that the process of statutory interpretation is informed by 'principles of constitutional propriety'.[53] These descriptors capture the sensitive balancing act by which courts will assume the best of Parliament (thus the presumption that Parliament does not intend to overthrow rights) but will also acknowledge the ultimate authority of Parliament to disappoint that expectation (thus the rebuttable nature of the presumption).

A final description of the principle of legality's constitutional valence comes from Lim, who suggests that the principle should be understood to 'internalise … conceptions of executive power'.[54] Lim sees the principle as the product of 'enduring anxieties about how to constrain executive power'.[55] For Lim, the 'traditional usage'[56] of the principle of legality shows it to be concerned with 'legislation that confers asymmetric power on the government', rather than 'legislation that adjusts symmetrical relationships between subjects'.[57] Thus Lim concludes his analysis by saying that

[50] Meagher, 'The "Modern Approach"' (n 25) 398. See Dan Meagher, 'The Judicial Evolution (or Counter-Revolution) of Fundamental Rights Protection in Australia' (2017) 42(1) *Alternative Law Journal* 9, 12.

[51] French, 'The Principle of Legality and Legislative Intention' (n 46) 40.

[52] Ibid.

[53] Sir Harry Gibbs, 'Foreword' in Donald Gifford, *Statutory Interpretation* (Law Book, 1990) vii, vii. For earlier use of the language of 'constitutional propriety' in statutory interpretation, see *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 629–30 (Lord Wilberforce).

[54] Lim, 'Executive Power' (n 35) 76.

[55] Ibid 77.

[56] John Basten, 'The Principle of Legality: An Unhelpful Label?' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74, 74.

[57] Lim, 'Executive Power' (n 35) 78.

> the concept of 'legality' in the 'principle of legality' embraces that *broader set of constitutional precepts* according to which governmental actions can be undertaken only under positive authorisation. The central concern of the principle is what counts as sufficient positive authorisation for a lawful assertion of executive power, and not the adjustment of rights as between subject and subject.[58]

Whether or not one agrees with Lim, his account is an example of the way in which scholars are increasingly seeking to understand and justify the principle of legality — and define its limits — with reference to the *Constitution*. Crawford's institutional justification adds to this body of literature.

C *Crawford's Account*

Crawford commences her account by critiquing existing rationales for the principle of legality — in particular, the intentionalist and democracy-enhancing rationales[59] (the latter in fact entailing 'twin justifications').[60] These rationales hold, respectively, that the principle of legality is an accurate predictor of authentic legislative intention[61] and that the principle of legality enhances the democratic process by (i) requiring that Parliament act deliberately (and deliberatively) to infringe rights; [62] and (ii) ensuring Parliament is transparent, and thus accountable to the electorate, when it infringes rights.[63] No doubt defenders of those accounts would have things to say in response (and I will say something more about the democracy-enhancing account in Part IV), but my focus for the first half of this article is on meeting Crawford's alternative account on its own terms, so I will pass over her critique of the existing rationales for the principle of legality.

Crawford's institutional justification for the principle of legality is grounded in what she calls a 'constitutional fact', namely, 'that courts must resolve disputes by ascertaining and applying the law, notwithstanding the likelihood of ambiguity or legislative "gaps"'. [64] The judicial duty to resolve disputes by applying the (statutory) law necessitates the judicial practice of interpretation, because Parliament can only legislate by enacting statutory text (not by, for

58 Ibid 89 (emphasis added).

59 Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 514–26.

60 Jason NE Varuhas, 'The Principle of Legality' (2020) 79(3) *Cambridge Law Journal* 578, 604.

61 Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 514–15.

62 Ibid 515–16.

63 Ibid 516.

64 Ibid 529.

example, extra-legislative statements about how a previously enacted statute should be interpreted) and text can never be so detailed or precise as to clearly apply to every possible circumstance.[65] To assist in their duty of interpretation, the courts have developed 'specific interpretative rules' that assist in the resolution of interpretative disputes while still 'coher[ing] with the constitutional distribution of powers'.[66] This is the general sense in which statutory interpretation, on Crawford's account, is 'informed by the institutional setting in which it occurs' and 'reflects the accepted constitutional functions of Parliament and the courts'.[67] More specifically, Crawford directs attention to 'two key features' of the 'institutional setting of statutory interpretation', which provide 'further guidance' on the way 'the common law might inform statutory interpretation'.[68]

One feature is 'the constitutionally assumed relationship between statute and common law'.[69] Crawford refers to the remedies in s 75(v) of the *Constitution*, the common law concept of a 'jury' in s 80 and the common law of 'property' in s 51(xxxi) as examples of the way in which '[t]he *Constitution* assumes the prior and ongoing existence of the common law'.[70] Drawing upon the rich body of literature on the topic, Crawford refers to a number of ways in which statute and common law interact so as to form a complex and interrelated web of legal norms which together form 'the law'.[71] Within this web of legal norms, Crawford notes that statute has priority over common law, but that the constitutionally assumed coexistence of the two means that 'there is no constitutional reason why courts should presume that Parliament' would necessarily override the common law.[72]

Crawford's other key institutional feature, which builds upon the first, is 'the role of the courts to resolve legal disputes about "the law"'.[73] Crawford contends that, 'in the Australian constitutional context' with its 'mix of statutory and common law norms and principles', there are two reasons why courts may refer to pre-existing common law when resolving such disputes.[74] First, 'the common law is part of the legal context in which statutory texts operate' and so

[65] See Kenny (n 13) 4–7.

[66] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 529.

[67] Ibid 530.

[68] Ibid.

[69] Ibid.

[70] Ibid 530. See also at 530 n 102.

[71] Ibid 531.

[72] Ibid.

[73] Ibid 530.

[74] Ibid 530, 532.

'can inform the linguistic content of a statute'.[75] Second, based upon the courts' role in 'fashion[ing]' common law norms and principles as 'good devices for resolving disputes', Crawford characterises the courts as 'institutionally committed to the view that the common law they apply is valuable and correct'.[76]

Within the institutional setting earlier described, it is these two reasons that Crawford argue makes it 'legitimate for a court to treat the common law as something with its own intrinsic weight'.[77] More precisely, Crawford argues that the common law

> is not merely part of the context that may assist to resolve an ambiguity [in a statute] 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.[78]

Thus, it is the institutional role of the courts — 'the dual constitutional role of courts as law-interpreters and lawmakers' — that is initially suggested to justify the principle of legality and its requirement that Parliament 'clearly manifests [legislative] intention to override' fundamental rights.[79] Unfortunately, as I will now explain, in the course of elaborating her justification, Crawford drifts away from these strong statements towards treating common law as simply a matter of statutory context. (Later in this article I will argue that Crawford was correct in her intuition that the institutional role of the judiciary might justify the clear statement requirement of the principle of legality, and I will put forward a more robust elaboration of that justification.)

III An Unrecognisable Principle

At times in her justification, Crawford seems to be committed to defending the principle of legality as we know it — at least insofar as it involves a presumptive protection of the common law from anything but a clearly manifest statement to the contrary.[80] However, that resolve appears to waver over the course of the article. As Crawford acknowledges at various points in the article, what is ultimately justified might not even be called a presumption at all — rather, it is simply an aspect of the modern approach to statutory interpretation whereby the existing legal environment provides the context in which to ascertain the

75 Ibid 532–3.

76 Ibid 533.

77 Ibid.

78 Ibid (emphasis in original).

79 Ibid.

80 Ibid.

meaning of new statutory norms injected into that environment.[81] This, however, is nothing like the principle of legality that the Australian law has long cherished. In what follows, I elucidate four ways in which Crawford's justification does not account for the existing version of the principle of legality. However, later in this article I will suggest an alternative that will allow the salvage of many of the features of the principle that would need to be abandoned on Crawford's account.

A *The Rejection of a 'Fundamentality' Threshold*

Traditionally understood, the principle of legality protects 'fundamental'[82] common law rights and freedoms (as well as the general system of law, to which I will come later). Synonyms are occasionally used — the rights and freedoms protected have also been described as 'basic',[83] 'important',[84] 'commonly accepted'[85] and 'long established'[86] — but the effect is the same: only 'certain'[87] common law rights and freedoms are protected, not all of them. As a result, rights and freedoms that only have *some* support in the common law are found to be insufficiently fundamental to engage the principle of legality.[88] This limit to the coverage of the principle of legality has been emphasised in the past by those seeking to keep the content of the principle aligned to its rationale.[89]

[81] Ibid 534. See also at 511, 513–14.

[82] See, eg, *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes*, ed J Anwyl Theobald (Sweet & Maxwell, 4th ed, 1905) 122; *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Bropho*'); *Coco v The Queen* (1994) 179 CLR 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ) ('*Coco*'); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ) ('*North Australian Aboriginal Justice Agency*'); Allan (n 47) 153–4. In the United Kingdom, see also *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann) ('*Simms*').

[83] *Simms* (n 82) 131 (Lord Hoffmann).

[84] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ) ('*Lee*'); *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 51 [55] (Edelman J).

[85] *Momcilovic* (n 12) 46–7 [43] (French CJ).

[86] *Evans* (n 16) 593–4 [70] (French, Branson and Stone JJ).

[87] *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ) ('*Al-Kateb*').

[88] See *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182] (Crennan, Kiefel and Bell JJ); *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 467 [88] (Warren CJ, Hansen JA agreeing at 475 [133]).

[89] *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9 [28] (McHugh J). See also *Bropho* (n 82) 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); Brendan

The fundamentality threshold to the principle of legality's engagement has also traditionally served to distinguish the principle from the related (weaker) interpretative approach favouring statutory meanings 'consonant with the common law'.[90] Although occasionally expressed differently,[91] the thrust of the authorities appears to be that this is a tie breaker rule that is engaged when all other things are equal and 'two alternative constructions of legislation are open'.[92] This is in stark contrast with the principle of legality,[93] which — unlike some other interpretative principles, such as the principle of consistency with international law[94] or the strict construction of penal statutes[95] — does not require textual ambiguity before it is engaged.[96] By further contrast, while the principle of legality has largely gained in strength in recent times,[97] the principle favouring consonancy with the common law has been said to be 'outdated'[98] and 'of minimal weight'.[99]

Crawford's justification for the principle of legality is incapable of justifying the fundamentality threshold — indeed she explicitly doubts it[100] — and the traditional distinction between the principle of legality and the interpretative

Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 395–8 ('The Normativity of the Principle of Legality').

90 *Balog v Independent Commission against Corruption* (1990) 169 CLR 625, 635–6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) ('*Balog*'). See also *R v Bishop of Salisbury* [1901] 1 QB 573, 577 (Wills J) ('*Bishop of Salisbury*').

91 *Bishop of Salisbury* (n 90) 577 (Wills J); *Signorotto v Nicholson* [1982] VR 413, 417 (Fullagar J) ('*Signorotto*'), describing it as 'a strong general principle'.

92 *Balog* (n 90) 635–6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

93 Stephen McLeish and Olaf Ciolek describe the principles as 'different in kind': Stephen McLeish and Olaf Ciolek, 'The Principle of Legality and "the General System of Law"' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 15, 19.

94 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J) ('*Teoh*'), citing *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ) ('*Lim*').

95 *R v A2* (2019) 269 CLR 507, 525–6 [52] (Kiefel CJ and Keane J). See also Julian R Murphy, 'Oceans Apart? The Rule of Lenity in Australia and the United States' (2020) 9(2) *British Journal of American Legal Studies* 233, 239–40.

96 Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329, 340–1, citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ) ('*Plaintiff S157*').

97 See generally Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401.

98 *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451, 460 [40] (Basten JA).

99 *Harrison v Melhem* (2008) 72 NSWLR 380, 382 [3] (Spigelman CJ, Beazley JA agreeing at 403 [191]). See also *Gumana v Northern Territory* (2007) 158 FCR 349, 374 [96] (French, Finn and Sundberg JJ), quoting *R v Janceski* (2005) 64 NSWLR 10, 23 [62] (Spigelman CJ).

100 Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 538.

approach favouring consonancy with the common law. Crawford seeks to draw support from the recent case law emphasising the variability of the principle of legality.[101] However, those judges emphasising the variability of the principle of legality have not understood themselves to be discarding the fundamentality threshold or the distinction between the principle of legality and other interpretative presumptions. Indeed, the earliest statements of the variable impact of the principle of legality maintained the language of fundamentality.[102] To the extent Edelman J suggested the rejection of an 'all-or-nothing' approach in *Federal Commissioner of Taxation v Tomaras*, it is to be remembered that that comment was made in the context of a case not about the principle of legality but about the presumption that the Crown is not bound by statute.[103] Further, Edelman J quoted without doubt the statement of the principle of legality from *Bropho v Western Australia*,[104] which endorses the fundamentality threshold. The better view of Edelman J's approach, which is supported by his earlier judgment in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*, is that the fundamentality threshold continues to apply to whether the principle of legality is engaged but, once engaged, the strength of the principle is calibrated according to the degree to which the right is fundamental (and other matters, such as the extent to which the right would be infringed).[105]

There are good reasons to maintain the fundamentality threshold and the distinction between the principle of legality and the interpretative approach favouring consonancy with the common law (to the extent the latter still exists).[106] These features keep fundamental rights and principles to a relatively closed and ascertainable set, and thus provide a 'degree of certainty'[107] (for Parliament, the courts, government and their legal advisors, and the public) about when the principle of legality will be triggered. This assists Parliament in its task of properly deliberating on such rights and in overriding them (if it wishes to), assists courts in the application of the principle (or in determining

[101] Ibid 547.

[102] See, eg, *Electrolux* (n 41) 328 [19] (Gleeson CJ).

[103] (2018) 265 CLR 434, 467 [101] ('*Tomaras*').

[104] Ibid, quoting *Bropho* (n 82) 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[105] *Tomaras* (n 103) 467–8 [101]–[102] (Edelman J), quoting *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 34 [87], 42 [102] (Edelman J) ('*Probuild*'). See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 623 [159] (Nettle, Gordon and Edelman JJ); *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 654 [212] (Edelman J).

[106] This paragraph responds to Lim's suggestion that a non-intentionalist account of the principle of legality requires a justification for the fundamentality threshold: see Lim, 'The Normativity of the Principle of Legality' (n 89) 397.

[107] Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 217 [5.10].

that it is inapplicable), and assists those to whom the law applies in knowing *how* it is likely to be interpreted by courts.[108] The abolishment of the fundamentality threshold and 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.

B *Protection Limited to Vested Rights*

Insofar as Crawford's justification for the principle of legality is rooted in the development of devices to determine common law disputes, that would only appear to justify the principle's protection of rights positively vested by the common law, rather than abstract values or principles to which the common law might give effect in varying ways and to differing degrees.[109] That is because the authority entrusted to courts by the *Constitution* is to make laws for the resolution of disputes, not to espouse high-level abstract principles or values.[110] The articulation of those values is incidental to the creation of common law, but it is only the positive doctrines of the common law that comprise 'the law' upon which Crawford rests her justification.[111] This is a further limitation of Crawford's account, because the orthodox understanding of the principle of legality extends its operation beyond vested common law rights. As was explained by Gageler and Keane JJ (with Crennan J agreeing) in *Lee v New South Wales Crime Commission*,

> [a]pplication of the principle … *is not confined to the protection of rights, freedoms or immunities that are hard-edged*, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and *systemic values*.[112]

[108] See generally Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1) *Cambridge Law Journal* 86; Mark Elliott, 'The Fundamentality of Rights at Common Law' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing, 2020) 195.

[109] For an illuminating discussion of the difference between 'directly actionable' rights and 'residual' liberties, see, eg, Dan Meagher, 'Is There a Common Law "Right" to Freedom of Speech?' (2019) 43(1) *Melbourne University Law Review* 269, 271–5.

[110] *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ). See also Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 472.

[111] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 526, 535, 548.

[112] *Lee* (n 84) 310 [313] (Gageler and Keane JJ, Crennan J agreeing at 249–50 [126]) (emphasis added). See also *North Australian Aboriginal Justice Agency* (n 82) 606 [81] (Gageler J), quoting *Lee* (n 84) 310 [313]–[314] (Gageler and Keane JJ, Crennan J agreeing at 249–50 [126]).

Elsewhere, Gageler J has described the application of common law principles of interpretation to 'stable and enduring structural principles or systemic values'.[113] Thus, for example, procedural fairness is not a freestanding 'right' (indeed, in Australia, its most common iteration is not rooted in the common law, but in an implication from the statute itself).[114] Rather, procedural fairness is a variable standard which may in some cases be reduced by circumstances into 'nothingness'.[115] Yet, procedural fairness is undeniably a fundamental principle of the common law and thus it is afforded protection by the principle of legality.[116] So too is the common law's presently ambivalent treatment of the 'right to privacy'[117] very different to its protection of property rights (which is especially visible in tort law), yet the principle of legality protects both largely equally.[118] Jason Varuhas has made this point forcefully, noting that 'whereas the [principle of legality] is "parasitic" on the existence of freestanding *private rights*', there are other rights that 'do not exist independently of their role as trigger norms for the [principle]'.[119] Further, as Varuhas again points out, to the extent that 'principles' or 'values' can enliven the principle of legality,

[113] *Probuild* (n 105) 22 [58]. See also *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398, 422 [81] (Gordon J) ('*Nathanson*'). Justice Edelman also makes a reference to 'values': at 425 [93].

[114] The exception to this would be where procedural fairness poses a limit on non-statutory executive power, in which case it could either be said that the limit inheres in s 61 of the *Constitution* or in the common law: see Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020) 144–8.

[115] *Kioa v West* (1985) 159 CLR 550, 616 (Brennan J).

[116] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), quoting *Coco* (n 82) 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Nathanson* (n 113) 423–4 [88] (Edelman J). See also the interpretative approach floated in *SDCV v Director-General of Security* (2022) 405 ALR 209, 243 [138] (Gageler J).

[117] See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 225–6 [41], 226 [42] (Gleeson CJ), 248 [107], 258 [132] (Gummow and Hayne JJ), 279 [190]–[191] (Kirby J); *Farm Transparency International Ltd v New South Wales* (2022) 403 ALR 1, 11 [39] (Kiefel CJ and Keane J), 22–3 [90] (Gageler J), 37–8 [159] (Gordon J), 55–6 [233]–[238] (Edelman J) ('*Farm Transparency*'). See also *Giller v Procopets* [2004] VSC 113, [187]–[189] (Gillard J). Cf *Grosse v Purvis* (2003) Aust Torts Reports ¶81–706, 64187 [442] (Skoien J); *Doe v Australian Broadcasting Corporation* [2007] VCC 281, [110]–[111] (Hampel J). On the interrelation of privacy and property rights, see *Farm Transparency* (n 117) 10 [31] (Kiefel CJ and Keane J), 18 [70] (Gageler J).

[118] See *LPSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1563, [12] (Bromberg J); *Coco* (n 82) 435–6 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446–7 (Deane and Dawson JJ), 453 (Toohey J).

[119] Varuhas (n 60) 582.

> values are elevated from the substrata that underpins legal norms to the surface level of the law, themselves now having the status of legal norms and, where engaged, having direct legal consequences.[120]

Whether or not one agrees with Varuhas that this is a problem (I do not), the principle of legality's protection of structural principles and systemic values[121] is very different to its protection of vested common law rights. Values do not form part of 'the law' per se. They animate its norms — as Goldsworthy says, '[t]he function or purpose of a legal norm is to achieve something valued'[122] — and inform its development.[123]

While Crawford acknowledges the principle of legality's reach beyond vested rights,[124] and treats as equally salient 'norms', 'principles' and 'values' from the common law,[125] her account is incapable of justifying this application of the principle of legality. That is because Crawford's justification is rooted in the institutional role of the judge to ascertain 'the law' (a 'mix of statutory and common law norms') 'so as to resolve disputes about the law that are brought before the courts'.[126] Values animating the common law are not part of 'the law' and thus the judiciary's protection of them through the principle of legality is not justified on Crawford's account. (In passing I note that, while not part of 'the law', systemic values do inform judicial reasoning in all areas of law, whether common law, equity,[127] constitutional law or statutory interpretation. The judiciary's institutional facility for appropriately constrained and incremental values-based reasoning is a consideration to which I return in Part V.)

120 Ibid.

121 *Probuild* (n 105) 22 [58] (Gageler J).

122 Jeffrey Goldsworthy, 'Functions, Purposes and Values in Constitutional Interpretation' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 43, 44 ('Functions, Purposes and Values').

123 As to the influence of 'enduring values' on common law (and statute), see Justice Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65(1) *Australian Law Journal* 32, 40.

124 Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 520.

125 Ibid 540.

126 Ibid 526.

127 Without seeking to intervene in debate about the fusion of equity and common law, for the purposes of this article I will treat equity as 'a separate and coherent body of principles': *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 231 [173] (Kirby J) (citations omitted). As to the benefits of considering equity's interaction with statutes separately to that of the common law, see generally Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9(2) *Journal of Equity* 108.

C *No Protection of Statutory Rights and Statutory Features of the General System of Law*

A final aspect of the principle of legality that is left unjustified (and thus which apparently needs to be abandoned) on Crawford's account is the presumptive protection of fundamental *statutory* rights and statutory features of the general system of law, albeit that the 'statutorification' of many common law rights is acknowledged.[128] The principle of legality is relatively settled in its application to *statutory* rights that have supplanted fundamental *common law* rights. It has been applied to protect statutory rights to be tried by a jury (in state criminal trials),[129] to native title[130] and to judicial review,[131] as well as statutory instantiations of common law privileges, such as legal professional privilege[132] and the privilege against self-incrimination.[133]

The principle of legality has also been applied to protect statutory rights that were not previously fundamental at common law. One example is the 'significant, albeit statutory, right of an employee' to seek compensation for a workplace injury, which engaged the principle of legality in 1996 in *Buck v Comcare* ('*Buck*').[134] In that case, one of Australia's foremost scholars[135] of the interaction between statute and common law wrote in his judicial capacity:

> To confine our interpretative safeguards to the protection of 'fundamental common law rights' is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.[136]

[128] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 520.

[129] *Tassell v Hayes* (1987) 163 CLR 34, 41 (Mason, Wilson and Dawson JJ).

[130] *Queensland v Congoo* (2015) 256 CLR 239, 301 [159] (Gageler J).

[131] See *Probuild* (n 105) 22 [56]–[57] (Gageler J), discussing the 'statutory perpetuation' of a common law grant of jurisdiction to the Supreme Court of New South Wales.

[132] *R v P* (2001) 53 NSWLR 664, 679 [43] (Hodgson JA, Mason P agreeing at 666 [1], Ipp AJA agreeing at 684 [70]). See also *Meteyard v Love* (2005) 65 NSWLR 36, 53–5 [62]–[68] (Basten JA, Beazley JA agreeing at 39 [1], Santow JA agreeing at 39 [2]).

[133] *Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq)* (2014) 46 VR 583, 595 [43], 595–600 [46]–[73] (Ashley JA, Neave JA agreeing at 607 [115]–[116], Almond AJA agreeing at 608 [118]).

[134] (1996) 66 FCR 359, 364–5 (Finn J) ('*Buck*').

[135] See, eg, Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7; Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52; Paul Finn, 'Common Law Divergences' (2013) 37(2) *Melbourne University Law Review* 509, 534–5.

[136] *Buck* (n 134) 364–5 (Finn J).

Those observations were reiterated in 2013 by a Full Court of the Federal Court in another case concerning a statutory right to compensation,[137] and again in 2015 in relation to a right to accrue annual leave while absent from work and receiving compensation.[138] Other applications of the principle of legality have protected a statutory right to superannuation[139] and a statutory patent right.[140] James Spigelman has also suggested extra-curially that statutory protections against discrimination might be protected from erosion by the principle of legality,[141] an idea with which Lim appears to agree.[142]

Admittedly, there is some controversy around the principle of legality's protection of statutory rights that does not derive from fundamental common law rights. In *Brett v Director General, Department of Education*, the Industrial Appeal Court of Western Australia emphasised that a right to bring a claim for unfair dismissal 'is a statutory right not a common law right'.[143] Despite referring to *Buck*, the Court was not prepared to accept 'that the court should apply the same approach to limitations on statutory rights as to limitations on common law rights' and did not conclude whether a right to bring a claim for unfair dismissal 'is a right which attracts the legality principle'.[144] Some courts have applied the principle of legality with less force to statutory rights as compared to common law rights.[145] Other courts have considered the proposition that 'the presumption can apply to statutory rights, as it does to common law rights'.[146]

Some of the rights protected by the principle of legality have now existed in statute for over half a century and their content has been elaborated by judicial

[137] *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449, 458 [33]–[34] (Cowdroy, Buchanan and Katzmann JJ), quoting ibid 64–5 (Finn J).

[138] *Anglican Care v NSW Nurses and Midwives' Association* (2015) 231 FCR 316, 327 [59]–[60] (Bromberg and Katzmann JJ), quoting *Buck* (n 134) 364 (Finn J).

[139] *Greville v Williams* (1906) 4 CLR 694, 703 (Griffith CJ).

[140] *University of Western Australia v Gray [No 20]* (2008) 246 ALR 603, 634 [88]–[89] (French J) ('*Gray*').

[141] James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 29.

[142] Lim, 'The Normativity of the Principle of Legality' (n 89) 411. Cf Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 475–7 ('The Age of Rights').

[143] [2015] WASCA 66, [18] (Buss, Le Miere and Murphy JJ).

[144] Ibid [18], [20].

[145] *Young v Owners — Strata Plan No 3529* (2001) 54 NSWLR 60, 65 [20] (Santow J). See also *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013] WASC 219, [151]–[152] (Pritchard J).

[146] See, eg, *Vikpro Pty Ltd v Wyuna Court Pty Ltd* (2016) 103 ATR 787, 796–7 [29] (Holmes CJ, P McMurdo JA agreeing at 798 [37]).

exposition of the statute (or sometimes a series of subsequent statutes).[147] In those circumstances, the judicial protection of the resulting right cannot accurately be characterised as protective of the common law and thus cannot be justified on Crawford's account.[148]

Similarly, many features of the 'general system of law' that are protected by the principle of legality are now maintained by statute.[149] One example is 'the accusatorial nature of the criminal justice system', which was described by Hayne and Bell JJ as 'a defining characteristic of the criminal justice system' warranting the protection of the principle of legality in *X7 v Australian Crime Commission*.[150] While it was not elaborated upon in that case, it should be noted that, at the federal level, almost all accusatorial aspects of the criminal justice system are statutory. When an accused is tried in the Federal Court, the *Evidence Act 1995* (Cth) applies, including as to both the nature of questioning[151] and the special protections against self-incrimination.[152] Further aspects of the accusatorial process are inscribed in the *Federal Court (Criminal Proceedings) Rules 2016* (Cth).[153] When federal crimes are tried in state courts, the state laws giving effect to the accusatorial process (including 'the laws relating to procedure, evidence, and the competency of witnesses') are applied by s 79 of the *Judiciary Act 1903* (Cth). Again, Crawford's account is unable to justify the principle of legality's application to protect this or other important statutory features of the general system of law.

D *A Principle with Little or No Force*

Quite apart from the above limitations to the scope of the principle of legality necessitated by Crawford's justification, the most significant change required would be to greatly reduce the force of the principle. In the final analysis, Crawford admits that the version of the principle justified on her account 'is a far less robust presumption' than has been traditionally understood, and may

[147] See, eg, *Gray* (n 140) 634 [89] (French J), considering *Patents Act 1952* (Cth) s 152(1), *Patents Act 1990* (Cth) s 13(2).

[148] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 531–4. Cf Lim, 'The Normativity of the Principle of Legality' (n 89) 409–12.

[149] For a critique of the principle of legality's protection of the 'general system of law', see generally McLeish and Ciolek (n 93).

[150] (2013) 248 CLR 92, 132 [87] ('*X7*').

[151] *Evidence Act 1995* (Cth) pt 2.1 divs 3–5.

[152] Ibid s 128.

[153] See, eg, *Federal Court (Criminal Proceedings) Rules 2016* (Cth) div 3.4.

not even be a presumption, or a standalone principle of interpretation, at all.[154] Crawford explains that what is left 'simply forms part and parcel of the modern approach to statutory interpretation', which permits consideration of statutory context.[155] Further, to the limited extent that Crawford's principle of legality weighs in favour of statutory 'consistency' with common law, 'consistency is used … in a minimal sense, to mean that the two sources of law are capable of logically coexisting'.[156] So understood, the principle of legality would become anomalously weaker than the interpretative approach favouring consonancy[157] between statute and common law (because consonancy is a thicker, or more demanding, concept than consistency when the latter is used in Crawford's 'minimal sense').[158] Just as significantly, Crawford's principle of legality would only fall for application 'all things being equal'.[159] Such an iteration of the principle of legality would have the same effect as that for which McHugh J (in dissent on this point) advocated two decades ago, namely, a 'weak' principle of legality that only assumes significance 'when all other factors are evenly balanced'.[160] (Justice McHugh's suggested attenuation of the principle has been decisively rejected in the last two decades of case law.)[161] Finally, Crawford's account subtly reframes the principle as discretionary rather than mandatory. That is, courts '*may* read statutes in light of the common law' and the revised principle '*permits* the courts to treat the common law as a "weight on the scale"'.[162] By contrast, the current iteration of the principle of legality is not merely permissive: where it is engaged it must be applied.[163] Appeal courts can and do correct lower courts who err by failing to apply the principle of legality.[164]

[154] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 513, 534.

[155] Ibid 513. See also at 534.

[156] Ibid 536.

[157] *Bishop of Salisbury* (n 90) 577 (Wills J); *Signorotto* (n 91) 417 (Fullagar J); *Balog* (n 90) 635–6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

[158] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 536.

[159] Ibid 513. See also at 535.

[160] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36].

[161] See, eg, *Plaintiff S157* (n 96) 492 [30] (Gleeson CJ); *Momcilovic* (n 12) 46 [43] (French CJ); *Lee* (n 84) 307–8 [307]–[308] (Gageler and Keane JJ); *X7* (n 150) 132 [87] (Hayne and Bell JJ); *North Australian Aboriginal Justice Agency* (n 82) 581 [11] (French CJ, Kiefel and Bell JJ).

[162] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 526 (emphasis added). See also at 548.

[163] Dan Meagher, 'The Common Law Principle of Legality' (2013) 38(4) *Alternative Law Journal* 209, 210.

[164] See, eg, *Coco* (n 82) 438–9 (Mason CJ, Brennan, Gaudron and McHugh JJ, Deane and Dawson JJ agreeing at 446), 453 (Toohey J).

By narrowing the principle of legality almost beyond recognition in the course of elaborating her justification, Crawford's analysis fails to fulfil the promise made elsewhere in the article that the *institutional* role of the courts — 'the dual constitutional role of courts as law-interpreters and lawmakers' — could justify the principle of legality and its requirement that Parliament 'clearly manifests an intention to override' fundamental rights.[165] That presented as a promise to justify what sounds like the 'clear statement rule'[166] version of the principle of legality as it exists today. But what is ultimately justified on Crawford's account is something very different. That is somewhat surprising, because one of the identified components of Crawford's justification was the powerful claim that courts, as the dual law-interpreters and lawmakers, have a legitimate institutional commitment to the idea of the common law as enshrining 'valuable and correct' norms for the resolution of disputes.[167] Crawford saw this as having a 'more normative dimension'[168] and one might have expected that it could justify stronger interpretative practices than merely taking the common law into account as context. Yet that possibility is never cashed out. The reader is left with the previously uncontroversial contention that 'courts are permitted to treat the common law as a relevant part of the context that informs statutory meaning'.[169] In Part V, I hope to build upon these aspects of Crawford's analysis and offer a more robust institutional justification for the current iteration of the principle of legality. Before doing so, however, I will point out two further issues with Crawford's account.

IV Other Issues

The issues identified in this part are not as significant as those identified above. Nevertheless, it is worth rehearsing them as they inform my attempt at an improved institutional justification in Part V.

A *Problems of Fit and Coherence*

Crawford presents her institutional justification for the principle of legality as superior to the intentionalist and democracy-enhancing rationales. Yet those rationales each have a quality that Crawford's account lacks — they fit or cohere

[165] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 533.

[166] See Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 428–9.

[167] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 533.

[168] Ibid.

[169] Ibid 511.

with the way in which other principles of statutory interpretation have traditionally been understood. On the intentionalist account of the principle of legality, it operates in the same way as other presumptions of interpretation to give effect to legislative intent.[170] Thus, insofar as it can survive its other criticisms (and whether it can is not the subject of this article), legislative intent provides a unifying and constraining concept that justifies not just the principle of legality, but other interpretative principles and the practice of statutory interpretation more generally.[171]

The fit and coherence of the democracy-enhancing account is less obvious, but can be exposed with a little excavation. It is to be recalled that the democracy-enhancing account rationalises the principle of legality as a means of facilitating the well-functioning of the constitutional order, and in particular the process of parliamentary deliberation and electoral accountability. As Gageler and Keane JJ have explained it, the principle of legality 'respects the distinct contemporary functions [and] *enhances* the distinct contemporary processes'.[172] Similar institutional concerns can be seen to undergird other principles of interpretation, such as the judicially-created[173] presumption that ambiguous[174] statutes neither violate international law nor authorise the executive to violate international law.[175]

This presumption is occasionally discussed in tandem with the principle of legality.[176] In *Momcilovic*, French CJ acknowledged the suggestion that the principle of legality 'may be linked to a presumption of consistency between

170 Guy Aitken, 'Division of Constitutional Power and Responsibilities and Coherence in the Interpretation of Statutes' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 22, 26.

171 Ibid.

172 *Lee* (n 84) 310 [312] (emphasis added).

173 This presumption is also reflected in statute: see *Legislation Act 2001* (ACT) ss 141–2; *Interpretation Act 1987* (NSW) s 34; *Interpretation Act 1978* (NT) s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1984* (WA) s 19.

174 The ambiguity threshold is low in this context: *Teoh* (n 94) 287 (Mason CJ and Deane J); JJ Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22(1) *Sydney Law Review* 141, 149, contending that the presumption is engaged by 'any case of doubt'.

175 *Lim* (n 94) 38 (Brennan, Deane and Dawson JJ); *Teoh* (n 94) 286–7 (Mason CJ and Deane J). See also *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J) ('*Jumbunna*').

176 See also Meagher, 'The Age of Rights' (n 142) 464–8. See generally Wendy Lacey, 'Confluence or Divergence? The Principle of Legality and the Presumption of Consistency with International Law' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 237.

statute law and international law and obligations'.[177] Further, in *Director of Public Prosecutions (Cth) v Logan Park Investments Pty Ltd*, Kirby ACJ opined that the *Universal Declaration of Human Rights*[178] reflected fundamental rights which warranted protection under the principle of legality if not the presumption of consistency with international law.[179] The connection between the two principles has, however, rarely been explained. It is thus helpful to turn to comparative jurisdictions, and in particular the US, where the discussion of this issue is more developed. There, courts and scholars have justified the presumption — labelled the *Charming Betsy* canon after a case of the same name[180] — with reference to the relative institutional competencies of the courts and the other branches of government, and in particular the executive's expertise and constitutional responsibility in international law.[181] It is said that the inherently sensitive and significant nature of breaching international law means that if there is any statutory ambiguity, the courts ought not resolve it to breach international law but rather ought exercise a cautious approach and leave it to Congress to correct any overly prudent interpretation.[182] The point has even more salience in Australia, where the executive also has the constitutional responsibility for international treaty-making[183] but where such treaties do not become law until implemented by Parliament.[184]

[177] *Momcilovic* (n 12) 47 [43], citing Wendy Lacey, 'The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 82, 84–5.

[178] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

[179] *DPP (Cth) v Logan Park Investments Pty Ltd* (1995) 37 NSWLR 118, 125.

[180] *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (Marshall CJ for the Court) (1804).

[181] Curtis A Bradley, 'The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law' (1997) 86(3) *Georgetown Law Journal* 479, 527–9; *Re an Application To Enforce an Administrative Subpoena of the Commodity Futures Trading Commission v Nahas*, 738 F 2d 487, 493 n 13 (Tamm J for the Court) (DC Cir, 1984) ('*Nahas*').

[182] Bradley (n 181) 527; *Nahas* (n 181) 493 n 13 (Tamm J for the Court). Cf Note, 'The *Charming Betsy* Canon, Separation of Powers, and Customary International Law' (2008) 121(4) *Harvard Law Review* 1215, 1220.

[183] *Teoh* (n 94) 287 (Mason CJ and Deane J).

[184] Ibid 286–7.

Similar institutional concerns can be seen to underlie the judicially-created[185] presumption against the extraterritorial application of federal law.[186] Aside from legislative intention, this presumption is commonly justified as preserving the 'comity of nations'.[187] Courts have considered it essential to the preservation of international comity that legislatures do not 'deal with persons or matters over which … the jurisdiction properly belongs to some other sovereign or state'.[188] For states to legislate with extraterritorial application has been considered as interfering with 'the general law of nations' [189] or 'international law'.[190] Put another way, 'international comity … requires the courts of each state to respect the sovereignty of others'.[191] The international comity rationale for the presumption is thus independent of, or supplemental to, the intentionalist rationale. It requires courts interpreting statutes to do so while mindful of Australia's place in the international legal order, even if Parliament has not explicitly been so mindful.

Other interpretative presumptions can be understood to cohere with the institutionally-protective nature of the democracy-enhancing rationale for the principle of legality. In particular, the administrative law presumptions of

[185] See also *Acts Interpretation Act 1901* (Cth) s 21(1)(b); *Legislation Act 2001* (ACT) s 122(1)(b); *Interpretation Act 1987* (NSW) s 12(1)(b); *Interpretation Act 1978* (NT) s 38(1)(b); *Acts Interpretation Act 1954* (Qld) s 35(1)(b); *Acts Interpretation Act 1931* (Tas) s 27(b); *Interpretation of Legislation Act 1984* (Vic) s 48(b). The exact effect of the statutory statements is the subject of some dispute; however, it might be accepted that they operate very similarly to the common law presumption: see *Morgan v Goodall* (1985) 2 NSWLR 655, 659 (McHugh JA).

[186] *Jumbunna* (n 175) 363 (O'Connor J); *Morgan v White* (1912) 15 CLR 1, 4 (Barton J), 13 (Isaacs J) ('*Morgan v White*'); *Mynott v Barnard* (1939) 62 CLR 68, 75–6 (Latham CJ); *Meyer Heine Pty Ltd v The China Navigation Co Ltd* (1966) 115 CLR 10, 23 (Kitto J, McTiernan J agreeing at 20), 30–1 (Taylor J), 38 (Menzies J), 43 (Windeyer J) ('*Meyer Heine*'); *Walker v New South Wales* (1994) 182 CLR 45, 49 (Mason CJ). See also *Solomons v District Court (NSW)* (2002) 211 CLR 119, 130 [9] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

[187] *Jumbunna* (n 175) 363 (O'Connor J), citing Sir Peter Benson Maxwell, *On the Interpretation of Statutes*, ed AB Kempe (Sweet & Maxwell, 3rd ed, 1896) 200 ('*On Statutes*'); *Morgan v White* (n 186) 5 (Barton J); *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 410 (Starke J) ('*Barcelo*'); *Meyer Heine* (n 186) 31 (Taylor J); *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, 241–2 (Malcolm CJ, Walsh J agreeing at 279, Anderson J agreeing at 280).

[188] *Niboyet v Niboyet* (1878) 4 PD 1, 7 (James LJ), quoted with approval in *Barcelo* (n 187) 424 (Dixon J).

[189] *Cope v Doherty* (1858) 4 K & J 367; 70 ER 154, 161 (Wood V-C), quoted with approval in *Barcelo* (n 187) 425 (Dixon J).

[190] *Jumbunna* (n 175) 363 (O'Connor J), citing Maxwell, *On Statutes* (n 187) 200; *Morgan v White* (n 186) 5 (Barton J); *Barcelo* (n 187) 410 (Starke J), 424 (Dixon J). See also *Forster v Forster* [1907] VLR 159, 164 (Cussen J for the Court) (seeking to produce 'no conflict with the rules of international law'), quoted with approval in *Barcelo* (n 187) 424 (Dixon J).

[191] *Thompson v The Queen* (1989) 169 CLR 1, 24 (Brennan J).

reasonableness and procedural fairness are increasingly understood to enhance executive decision-making. As much was explained by Gageler J in *Nathanson v Minister for Home Affairs*, where his Honour wrote that 'one of the main justifications' for the procedural fairness presumption is the 'reduction of the risk of the decision-maker reaching an unsound conclusion and thereby reduction of the associated risks of injustice and inefficiency'.[192] These examples could be multiplied, and while their enhancement of institutional functioning is imperfect and may be partially aspirational (as Crawford's criticisms of the democracy-enhancing account show),[193] they have the same advantage of intentionalism: namely, they offer an internally coherent justification for what have traditionally been understood to be closely related principles of statutory interpretation. By contrast, Crawford's justification for the principle of legality is sui generis, and does not explain the principle of legality's resemblance to other principles of interpretation.

B *Comparative Stress-Testing*

As Crawford notes,[194] some of the institutional considerations she discusses have been thoroughly explored in the different constitutional setting of the US. This appears to have been in part because the *United States Constitution* does not permit of (much) federal common law and it has thus been necessary to search for another plausible source for the elaborate array of judge-made principles governing federal statutory interpretation.[195] Abbe Gluck has written most extensively on the topic.[196] Gluck ultimately concludes that at least some interpretative presumptions 'might be understood as a special kind of law that

[192] *Nathanson* (n 113) 414–15 [51].

[193] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 519–26.

[194] Ibid 534.

[195] See *Erie Railway Co v Tompkins*, 304 US 64, 78 (Brandeis J for the Court) (1938); Abbe R Gluck, 'The Federal Common Law of Statutory Interpretation: *Erie* for the Age of Statutes' (2013) 54(3) *William and Mary Law Review* 753, 811 ('*Erie* for the Age of Statutes').

[196] See, eg, Abbe R Gluck, 'Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine' (2011) 120(8) *Yale Law Journal* 1898 ('Intersystemic Statutory Interpretation'); Abbe R Gluck, 'Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lessons for the Nation' (2011) 47(4) *Willamette Law Review* 539; Gluck, '*Erie* for the Age of Statutes' (n 195).

enforces constitutional norms or implements the [*United States*] *Constitution*'.[197] Hers is not a new or unique view.[198]

As early as 1958, Henry Hart and Albert Sacks suggested that the principles of statutory interpretation 'constitute conditions on the effectual exercise of legislative power' and thus should be considered 'constitutionally imposed'.[199] More recently, John Manning has recognised the Supreme Court drawing connections between the interpretative principles and the *United States Constitution* (without necessarily agreeing with that approach).[200] A number of scholars have sought to comprehensively list or categorise interpretative principles derived from the *United States Constitution*. Before her appointment to the Supreme Court, Amy Coney Barrett identified a number of 'substantive canons' rooted in the *United States Constitution*.[201] Nicholas Quinn Rosenkranz identified four types of constitutionally-grounded canon: a '[m]andatory [s]ubstantive rule', a 'default rule', a 'starting-point rule' and a rule falling within 'immutable parameters'.[202] Ernest Young has described the principles of statutory interpretation as constitutional 'resistance norms'.[203] In their exhaustive list of canons, William Eskridge Jr, Philip Frickey and Elizabeth Garrett purport to identify no fewer than 39 '[c]onstitution-[b]ased [c]anons'.[204] Elsewhere, Eskridge Jr and Frickey have discussed some of these

[197] Gluck, '*Erie* for the Age of Statutes' (n 195) 757. See also Gluck, 'Intersystemic Statutory Interpretation' (n 196) 1917–18.

[198] For a summary of scholarship identifying constitutional bases for the canons, see Glen Staszewski, 'The Dumbing Down of Statutory Interpretation' (2015) 95(1) *Boston University Law Review* 209, 251–2.

[199] Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed William N Eskridge Jr and Philip P Frickey (Foundation Press, 1994) 1376. See also Alexander M Bickel and Harry H Wellington, 'Legislative Purpose and the Judicial Process: The Lincoln Mills Case' (1957) 71(1) *Harvard Law Review* 1, 27–8, arguing that, with respect to penumbral constitutional values, 'it is for the Court to bring them to the fore so that they may receive their due weight in Congress'.

[200] John F Manning, 'Clear Statement Rules and the Constitution' (2010) 110(2) *Columbia Law Review* 399, 401–3. See also John F Manning, 'Legal Realism & the Canons' Revival' (2002) 5(3) *Green Bag* 283, 292 n 42; John F Manning, 'Deriving Rules of Statutory Interpretation from the Constitution' (2001) 101(7) *Columbia Law Review* 1648, 1655.

[201] Amy Coney Barrett, 'Substantive Canons and Faithful Agency' (2010) 90(1) *Boston University Law Review* 109, 163–4.

[202] Nicholas Quinn Rosenkranz, 'Federal Rules of Statutory Interpretation' (2002) 115(8) *Harvard Law Review* 2085, 2094, 2096–7, 2099 (emphasis omitted).

[203] Ernest A Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (2000) 78(7) *Texas Law Review* 1549, 1552.

[204] William N Eskridge Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (Foundation Press, 2000) 378–81.

canons as 'directly *inspired* by the [*United States*] *Constitution*'.[205] They summarise these interpretative principles as follows:

> The canons … can protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly. Protecting underenforced constitutional norms through super-strong clear statement rules makes sense: it is not ultimately undemocratic, because Congress can override the norm through a statutory clear statement; such rules still provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and *ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the* [United States] Constitution.[206]

These are institutional justifications for interpretative principles that look very similar to Australia's principles but do not rely at all on the dual constitutional role of courts in developing common law and interpreting statutes. Accordingly, the modest comparative insight to be drawn from the US — using it as a foil more than anything — suggests that attention to underlying constitutional norms and proper institutional functioning may remain the most plausible route to an institutional justification for the Australian principle of legality. In the final part of this article, I return to these ideas — which appear to have provided Crawford's starting point[207] — to seek to better institutionally justify the principle of legality.

V An Alternative Institutional Account

In the space remaining, I outline the beginnings of a different institutional account to that offered by Crawford. This account bears some similarities with the democracy-enhancing account, albeit that the attention to the *institutional* (rather than pragmatic) dimension of that account increases its defensibility. On my account, when the courts are faced with reasonably open constructional

[205] William N Eskridge Jr and Philip P Frickey, 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' (1992) 45(3) *Vanderbilt Law Review* 593, 598 (emphasis added). Note, however, that Eskridge Jr and Frickey do not necessarily wholeheartedly endorse the idea of developing canons by inspiration from the [*United States*] *Constitution*: at 632–45.

[206] Eskridge Jr and Frickey (n 205) 631 (emphasis added). Note, however, that Eskridge Jr and Frickey do not necessarily endorse this account of the canons: at 632–45.

[207] See especially Crawford's statement that 'statutory interpretation is informed by the constitutional norms and principles that determine the natures and functions of Parliament and the courts' and that 'the principles and process of statutory interpretation are informed by constitutional norms and the constitutional distribution of powers': Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 526–7.

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. What follows is only a sketch of my account. Further explication or revision will likely be required as the courts further elucidate the institutional (and constitutional) dimensions to statutory interpretation.

A *Judicial Protection of Structural Principles and Systemic Values*

On my account, it is the proper role of the judiciary to advance structural principles and systemic values of the legal system by requiring clear (or clearer) statements before they are eroded. Unlike Crawford,[208] I see the principle of legality as capable of protecting principles and values derived from the entire 'fabric of the legal system',[209] whether common law, equity, statute, the *Constitution*, or a combination thereof. Justices Gageler and Edelman each appear to share this view, although they use slightly different terminology. Justice Gageler has described the principle of legality as 'protective of … enduring structural principles or systemic values' with no specific limiting of those principles and values to the common law.[210] (Chief Justice Gleeson seems to have been getting at something similar when his Honour described the principle of legality as 'an expression of a legal value'.)[211] Justice James Edelman has written of the administrative law norms as giving effect to 'structural and superstructural principles and conceptions of the legal system'.[212] On Edelman's account, these principles must be 'fundamental',[213] but there is no suggestion they can only be derived from the common law. My claim that it is appropriate for the judiciary to protect these principles and values through statutory interpretation derives primarily from two institutional characteristics of the judiciary.

The first is the judiciary's institutional competence in extracting and identifying principles and values from the broader body of 'law', and its

[208] See ibid 534.

[209] Justice Edelman used this language in describing the rationale for the variability of the principle of legality: *Tomaras* (n 103) 467 [101].

[210] *Probuild* (n 105) 22 [58].

[211] *Al-Kateb* (n 87) 577 [20].

[212] Justice James Edelman, 'Foreword' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) v, vi.

[213] Ibid.

competence in appropriately protecting those principles and values through the development and calibration of legal rules (including tailoring those rules so that they do not extend beyond their animating rationale). Crawford also identifies this as being a competency of the judiciary,[214] although she focuses only on the development of the *common law*. But the judiciary also engages in this process of reasoning from structural principles and systemic values in other areas of law. For example, in *constitutional law*, Stephen Gageler has explained (writing extra-curially with Will Bateman) that the courts engage in a process of reasoning analogous to that involved in the development of common law principles.[215] Many others have recognised the role of values in constitutional reasoning.[216] So too in *equity* are the courts expert in developing doctrine by reference to underlying norms.[217] Indeed, this is perhaps the most obvious forum in which courts proceed 'by reference to principles born of values derived from human experience'.[218] Finally, in the application of *statute law*, even when interpretative presumptions are not being applied, courts must still engage in a process of what James Allsop has described extra-curially as 'interpreting the words of generality *by reference to the values* that the statute requires'[219] and 'articulating, on a case by case basis, why the general words are

[214] Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 533.

[215] Stephen Gageler and Will Bateman, 'Comparative Constitutional Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 261, 267.

[216] See generally Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3; Jonathan Crowe, 'Functions, Context and Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 61; Goldsworthy, 'Functions, Purposes and Values' (n 122); James Stellios, 'Constitutional Characterisation: Embedding Value Judgements about the Relationship between the Legislature and the Judiciary' (2021) 45(1) *Melbourne University Law Review* 277.

[217] See, eg, *Muschinski v Dodds* (1985) 160 CLR 583, 615–16 (Deane J).

[218] James Allsop, 'Statutes and Equity' (Kenneth Sutton Lecture, Sydney, 12 November 2019) 5 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20191112>, archived at <https://perma.cc/8ATQ-W7G6>. As to differences between common law and equitable reasoning, see *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 268 [271] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]) ('*Paciocco*'), quoting *The Juliana* (1822) 2 Dods 504; 165 ER 1560, 1567 (Lord Stowell). *Paciocco* (n 218) was affirmed in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 536 [2] (French CJ), 557 [69]–[70] (Kiefel J), 590 [203] (Gageler J), 622 [305] (Keane J). See also at 643 [376] (Nettle J).

[219] Allsop (n 218) 4 (emphasis added). Allsop's reference to the 'values that the statute requires' is important, as it distinguishes the modern approach to purposive interpretation from earlier approaches rooted in the so-called 'equity of the statute': at 6. See James Edelman, 'The Equity of the Statute' in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical*

engaged, or not'.[220] Thus, in each of its areas of day-to-day adjudication, the judiciary is involved in the identification of, and (appropriately constrained) protection of, structural principles and systemic values, and has been since Federation. This fact of the courts' institutional experience, and thus competence, in identifying and protecting structural principles and systemic values (in various contexts) is the first institutional reason justifying the robust principle of legality.

A second, and related, institutional characteristic of the judiciary that makes it well suited to interpretative practices aimed at protecting structural principles and systemic values is the judiciary's independence. By reason of security of tenure and other implied constitutional protections against political interference,[221] courts are quarantined from most of the pressures of day-to-day politics. By contrast, the exertion of these pressures on Parliament can create incentives for Parliament to erode structural principles and systemic values without expressly saying so (to avoid adverse media coverage, protracted parliamentary debate, problems with donors,[222] international censure and the like). Courts are institutionally insulated from these pressures and thus are ideally situated to push, but not force, legislative deliberation to be more sensitive to the benefits of structural principles and systemic values — especially because the courts are particularly well versed in, and can articulate, those principles and values (and their potential benefits).

The idea just expressed builds upon the democracy-enhancing account of the principle of legality, which is designed to enhance parliamentary deliberation on rights, in two respects. First, my justification is process rather than outcome oriented. Thus, the arguments made by Crawford[223] that judicial interpretative presumptions may have little (measurable) effect in enhancing the well-functioning of constitutional institutions do not refute my account. This is because, like other tenets of the legal system that rely upon occasionally disprovable theoretical commitments — the reliance on general deterrence in the law of criminal sentencing is a good example — the judiciary can have a

Foundations of the Law of Equity (Oxford University Press, 2020) 352, 353; WMC Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) 18–22.

220 Allsop (n 218) 4. See generally Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1.

221 See, eg, *Constitution* s 72.

222 In relation to donors and lobbyists, it must be acknowledged that (historically at least) these pressure groups have not been a significant problem in Australian politics: Keith Abbott, *Pressure Groups and the Australian Federal Parliament* (Australian Government Publishing Service, 1996) 64–73.

223 Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 523–6.

duty to assume the effectiveness of law and legal processes, even in the face of contrary evidence (or in the absence of evidence).[224] The threads of this idea can be seen in the High Court's move from authentic legislative intention to objectively ascertainable intention (which is premised on the idea that, whatever Parliament may have *in fact* intended, the courts have a duty[225] to attribute to it the intention that would be discerned by a reasonable reader of the law armed with publicly available statutory context), and in earlier ideas that the ordinary meaning rule imposed a 'duty' on judges to 'obey' the ordinary meaning, however 'inconvenient or impolitic or improbable'.[226] Occasional expressions of this idea can also be seen in the expression of particular interpretative presumptions. For example, of the presumption of extraterritoriality it has been said that 'it has always appeared to me to be the *duty of the Court to assume* that Parliament will not lightly attempt to exceed its territorial limits'.[227] Relatedly, in the US, Marshall CJ referred to the courts of that country having a 'duty' to believe that statutes do not violate international law.[228]

The second way in which my account differs (at least in emphasis) from the democracy-enhancing rationale is that explanations of the democracy-enhancing rationale too often focus on the institutional characteristic of *Parliament* (namely, its majoritarianism) that can dull its sensitivities to structural principles and systemic values — particularly when those principles and values protect individuals or minorities with little political voice (such as non-citizens affected by migration laws).[229] That is 'a very powerful consideration' supporting the principle of legality.[230] But equally important is the corresponding recognition that the *courts* do not suffer those majoritarian pressures, and in fact are protected from what Philip Sales has called extra-

224 *R v Wong* (1999) 48 NSWLR 340, 363 [127] (Spigelman CJ). See also *Walden v Hensler* (1987) 163 CLR 561, 569 (Brennan J).

225 See the reference to the Court's 'duty' to apply the rules of statutory construction in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322 (Brennan J), citing *Re Jordison; Raine v Jordison* [1922] 1 Ch 440, 465 (Younger LJ), *Sorby v Commonwealth* (1983) 152 CLR 281, 322 (Brennan J).

226 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 162 (Higgins J). See also *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 398–9 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).

227 *R v Call; Ex parte Murphy* (1881) 7 VLR (L) 113, 119 (Stawell CJ) (emphasis added).

228 *Talbot v Seeman*, 5 US (1 Cranch) 1, 43–4 (Marshall CJ for the Court) (1801).

229 Lim, 'The Normativity of the Principle of Legality' (n 89) 399–402.

230 Heydon (n 48) 343.

curially 'the short-wave excitability of ordinary democratic politics'.[231] In a different context, Stephen Gageler has recognised these institutional differences as making 'judicial vigilance … appropriate where political accountability is either inherently weak or endangered'.[232]

Of course, the fact that the judiciary is insulated from democratic politics also points to an important institutional characteristic — the lack of democratic accountability — that constrains the extent to which courts can impose interpretative pressures on Parliament. It is difficult to identify in the abstract where the line between permissible institutionally-protective interpretation and impermissible legislative frustration will lie, but the difficulty in identifying the line ought to counsel caution, not pessimism. Ultimately, the constitutional limits on the courts' interpretative power will be governed by the limits of ch III judicial power, to which I will now turn.

B *The Interpretative Aspect of ch III Judicial Power*

The above account is not just descriptively accurate of the way courts deploy the principle of legality, but is also constitutionally justifiable — and thus may assist in defending the principle of legality against claims that it is a 'sheer judicial power-grab'.[233] The constitutional justification depends on an appreciation of the interpretative dimension to ch III judicial power. As Justice John Basten has recognised extra-curially, the judiciary's power to develop principles of statutory interpretation derives from its constitutional duty 'to say what the law is' and that 'the function of the courts, according to reasonably well defined principles, to determine the meaning of legislation … is not a common law function'.[234] Jeffrey Goldsworthy has written of the principles of statutory interpretation as aspects of judicial power, albeit while accepting that the constitutional concept of judicial power was informed by pre-Federation

[231] Philip Sales, 'In Defence of Legislative Intention' (2019) 48(1) *Australian Bar Review* 6, 20 ('In Defence of Legislative Intention').

[232] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' [2009] (Winter) *Bar News: The Journal of the NSW Bar Association* 30, 37. Rosalind Dixon has written helpfully of 'blind spots' and 'burdens of inertia' in the legislative process: Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38(6) *Cardozo Law Review* 2193, 2208–12.

[233] See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 29.

[234] Basten, 'Constitutional Dimensions of Statutory Interpretation' (n 13) 3, 9, quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (Marshall CJ for the Court) (1834).

(common law) interpretative practices of British courts.[235] Crawford has also previously acknowledged that 'the power to interpret statutes is a constitutional one, conferred and constrained by Chapter III of the *Constitution*'.[236] Thus, to use a Hartian scheme that Edelman J appears to endorse,[237] it is reasonable to think that ch III judicial power encompasses the authority to develop 'second order' interpretative principles to assist in identifying the exact content of the 'first order' rules of conduct.

This account accords with historical understandings of judicial power. At the time of Federation, the judiciaries of the colonies, the United Kingdom ('UK') and the US had long been enforcing systemic values through statutory interpretation.[238] As Dicey acknowledged, this at times resulted in judges construing

> statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.[239]

Absent any historical evidence that the framers of the *Australian Constitution* intended ch III to eradicate that practice (and there is none), it can be assumed that the constitutional concept of 'judicial power' was intended to or assumed to permit such practices to continue so long as they did not offend the separation of judicial and legislative power.

C *Coherence and Comparative Confirmation*

Given my earlier criticism of Crawford's justification as being in tension with both the way we understand other interpretative principles and comparative experience, it is appropriate that I explain how my account is not vulnerable to the same critiques. As to the former, I have already explained above in

[235] Goldsworthy, 'The Constitution and Its Common Law Background' (n 23) 271, citing *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J).

[236] Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 168.

[237] *Brown v Tasmania* (2017) 261 CLR 328, 496–7 [542] (Edelman J). See also Sir Rupert Cross, John Bell and Sir George Engle, *Statutory Interpretation* (Butterworths, 3rd ed, 1995) 42, writing that '[t]he rules of statutory interpretation provide criteria for identifying legal rules, and belong to the category of "secondary rules" of the legal system'.

[238] William N Eskridge Jr, 'All about Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806' (2001) 101(5) *Columbia Law Review* 990, 1012; AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 6th ed, 1902) 357. See also at 354.

[239] Dicey (n 238) 357.

Part IV(A) how a number of canons — and in particular, the presumption against extraterritoriality and the presumption of non-violation of international law — can be seen to have institutional considerations underlying them. My institutional justification of the principle of legality thus coheres with this area of the law.

Looking abroad, it is notable that in both the UK and the US, principles of statutory interpretation have been understood to protect structural principles or systemic values (although the labels used have sometimes differed). In the UK, Dawn Oliver writes that 'presumptions enable the courts to uphold what they see as certain fundamental constitutional principles'.[240] John McGarry and Samantha Spence seem to take a similar view when they describe 'constitutional fundamentals'[241] and write: 'The courts have developed the principle that such fundamentals will only be taken to be displaced by clear statutory language.'[242] As Rupert Cross explains:

> [Statutes] are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules … *Long-standing principles of constitutional and administrative law are likewise taken for granted*, or assumed by the courts to have been taken for granted, by Parliament. … These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. *They operate here as constitutional principles which are not easily displaced by a statutory text.*[243]

Philip Sales has endorsed this passage in extra-curial writing,[244] where he has further explained:

[240] Dawn Oliver, '*Pepper* v *Hart*: A Suitable Case for Reference to *Hansard*?' [1993] (Spring) *Public Law* 5, 12–13.

[241] John McGarry and Samantha Spence, 'Constitutional Statutes: Roots and Recognition' (2020) 41(3) *Statute Law Review* 378, 383:

> We employ the phrase 'constitutional fundamentals' here, rather than 'fundamental rights' or 'human rights'. This is because it is possible to have a fundamental principle which is not a right in the commonly used constitutional sense of the word …

[242] Ibid.

[243] Cross, Bell and Engle (n 237) 165–6 (emphasis added).

[244] Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 (October) *Law Quarterly Review* 598, 600 ('The Principle of Legality and Section 3'), quoting ibid 165. Elsewhere, Sales has acknowledged that parliamentary debate, and thus legislation, must inevitably be read in light of a whole host of background assumptions: Philip Sales, '*Pepper v Hart*: A Footnote to Professor Vogenauer's Reply to Lord Steyn' (2006) 26(3) *Oxford Journal of Legal Studies* 585, 588.

> It has … long been the case that an important dimension of English constitutional law has existed in the interstices of statutory interpretation. Where constitutional principles or understandings can be established, or constitutional rights have been recognised, statutory interpretation will be moulded around them. They exist as a form of *presumptive constitutional order*, albeit one capable of being overridden by Parliament by clear language used in a statute.[245]

Acknowledging, as Cross and Sales do, that legislation is enacted within 'the complex set of legal propositions and principles that forms the law', Richard Ekins accepted that 'legal principles that form part of the constitutional order … may be taken for granted' unless they 'loom[ed] large' in legislative deliberation.[246] In the US, Amy Coney Barrett has advanced the view that the judiciary's constitutional duty of serving as the faithful agent of Congress is modified by the judicial 'power to push — though not force — statutory language in directions that better accommodate constitutional values',[247] so long as such values are 'an identifiable, closed set of [constitutional] norms'.[248]

On neither the UK nor the US accounts do the constitutional norms informing the presumptions justify ignoring authentic legislative intent or the intent that may be constructed from statutory text, context and purpose. While 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',[249] that role is ultimately subject to the overriding authority of Parliament. On this account, the institutional role of the judiciary justifies the supplemental use of interpretative inputs other than authentic legislative intention, even if legislative intention remains the primary touchstone (and the decisive one in the overwhelming number of cases). As much was explained in *Coco v The Queen*, where legislative intention and the enhancement of parliamentary processes were put as 'cumulative justifications' for the principle of legality.[250] In the UK, intentionalists like Philip Sales appear

245 Sales, 'The Principle of Legality and Section 3' (n 244) 601 (emphasis added).

246 Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 259.

247 Barrett (n 201) 112.

248 Ibid 111.

249 Sales, 'In Defence of Legislative Intention' (n 231) 20. See also the more extreme statement that the ascertainment of legislative intent will be subject to presumptions that 'promote objectives of the legal system which transcend the wishes of any particular session of the legislature': Hart Jr and Sacks (n 199) 1376.

250 *Coco* (n 82) 436–8 (Mason CJ, Brennan, Gaudron and McHugh JJ), cited in Crawford, 'An Institutional Justification for the Principle of Legality' (n 1) 516–17. Note that Crawford thinks the justifications 'are better understood as alternatives': at 517.

to accept this composite justification.[251] Similarly, in the US, a recent justification of one interpretative presumption grounded that presumption in '*both* separation of powers principles and a practical understanding of legislative intent'.[252] Thus, the institutional justification for the principle of legality developed here cannot be doubted for stark divergence from the experience in comparable jurisdictions.

VI Conclusion

Crawford set out to provide an institutional justification for the principle of legality. The principle that survives on that justification, however, bears little resemblance to the principle of legality as it currently exists in Australian law. Of course, if that attenuated version of the principle was indeed all that could be justified, Crawford would nevertheless have done a significant service to the transparency and integrity in the law by drawing that uncomfortable fact to our attention. However, we ought not be too quick to accept that this unrecognisable principle is all that can be justified. That the forceful version of the principle of legality has been applied in this country for over a century (albeit with more regularity in recent years) ought to cause us to pause before discarding it. When we do, it can be seen that Crawford's initial intuition as to an institutional justification for the principle of legality was not misplaced. To the contrary, attendance to some of the same institutional characteristics that Crawford identified (and others) shows that the peculiar and historic function of the judiciary in our constitutional order justifies its use of interpretative presumptions to protect the structural principles and systemic values of our legal system.

[251] Sales, 'In Defence of Legislative Intention' (n 231) 20.

[252] *West Virginia v Environmental Protection Agency*, 142 S Ct 2587, 2609 (Roberts CJ for the Court) (emphasis added) (2022).